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CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND DISTRICT COURTS
OF THE UNITED STATES AND THE COURT
OF APPEALS OF THE DISTRICT
OF COLUMBIA

WITH TABLE OF CASES IN WHICH REHEARINGS HAVE BEEN
GRANTED OR DENIED

NOVEMBER — DECEMBER, 1920

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RULES OF PRACTICE

FOR THE COURTS OF THE UNITED STATES IN ADMIR-
ALTY AND MARITIME JURISDICTION

To take effect March 7, 1921

Promulgated by the Supreme Court of the United States, December 6, 1920

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SUPREME COURT OF THE UNITED STATES.

October Term, 1920.

ORDER.

It is now here ordered by the court that the rules of practice for the courts of admiralty of the United States this day adopted and established by the court be, and the same are hereby, promulgated as such to be in force on and after March 7, 1921.

December 6, 1920.

ADMIRALTY RULES OF PRACTICE.

1.

PROCESS ON FILING LIBEL.

No mesne process shall issue from the District Court in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall have been filed in the clerk's office from which such process is to issue. All process shall be served by the marshal or by his deputy, or, where he or they are interested, by some discreet and disinterested person appointed by the court.

2.

SUITS IN PERSONAM—PROCESS IN—ARREST IN SAME.

In suits in personam the mesne process shall be by a simple monition in the nature of a summons to appear and answer to the suit, or by a simple warrant of arrest of the person of the respondent in the nature of a *capias*, as the libellant may, in his libel or information pray for or elect; in either case with a clause therein to attach his goods and chattels, or credits and effects in the hands of the garnishees named in the libel to the amount sued for, if said respondent shall not be found within the district. But no warrant of arrest of the person of the respondent shall issue unless by special order of the court, on proof of the propriety thereof by affidavit or otherwise.

3.

BAIL—IMPRISONMENT FOR DEBT.

In all suits in personam, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the state where an arrest is made on similar or analogous process issuing from the state court.

And imprisonment for debt, on process issuing out of the admiralty court, is abolished, in all cases where, by the laws of the state in which

the court is held, imprisonment for debt has been, or shall be hereafter, abolished, on similar or analogous process issuing from a state court.

4.

BAIL IN SUITS IN PERSONAM.

The marshal shall take from the party arrested, as bail, either sufficient cash or a bond or stipulation in a sufficient sum, with sufficient sureties or an approved corporate surety, to be held by him to secure the appearance of the party so arrested in the suit. And upon such bond or stipulation summary process of execution shall be issued against the principal and sureties or corporate surety by the court to which the process is returnable.

5.

BOND IN ATTACHMENT SUITS IN PERSONAM.

In all suits in personam, where goods and chattels, or credits and effects, are attached under a process authorizing the same, the attachment shall be dissolved by order of the court to which the process is returnable, on the giving of a bond or stipulation, with sufficient sureties, or an approved corporate surety, by the respondent whose property is so attached, or by someone on his behalf, conditioned to abide by all orders, interlocutory or final, of the court, and to pay the amount awarded by the final decree of the court to which the process is returnable, or in any appellate court, not exceeding, however, the value of the goods so attached with interest at six per centum per annum and costs; and upon such bond or stipulation, summary process of execution shall be issued against the principal and sureties or surety by the court to which the process is returnable, to enforce the final decree so rendered or on appeal by any appellate court.

6.

BONDS—STIPULATION—HOW GIVEN.

All bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before the clerk or a deputy clerk or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or before any commissioner of the United States authorized by law to take bail and affidavits in civil cases, or otherwise by written agreement of the parties or their proctors of record.

7.

BONDS—PREMIUMS—TAXABLE AS COSTS.

If costs shall be awarded by the court to either or any party then the reasonable premiums or expense paid on all bonds or stipulations or other security given by that party in that suit shall be taxed as part of the costs of that party.

8.

REDUCTION OF BAIL, BOND OR STIPULATION—NEW SURETIES.

In all suits either in rem or in personam, where bail is given or a bond or stipulation is taken, the court may, on motion, for due cause shown, reduce the amount of such bail or may reduce the amount of security given by either bond or stipulation; and in all cases, either in rem or in personam, where a bond or stipulation is given, if either of the sureties or the corporate surety shall be or become insufficient or the security for costs shall for any reason be insufficient pending the suit, new or additional security may be required by order of the court on motion.

9.

MONITION TO THIRD PARTIES IN SUITS IN REM.

In all suits in rem against a ship, and/or her appurtenances if her appurtenances or any of them are in the possession or custody of any third person, the court shall, on due notice to such third person and after hearing, decree that the same be delivered into the custody of the marshal or other proper officer, if on hearing it appears that the same is required by law and justice.

10.

PROCESS IN SUITS IN REM.

In all cases of seizure, and in other suits and proceedings in rem, the process, if issued and unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

11.

PERISHABLE GOODS—HOW DISPOSED OF.

In all cases where any goods or other things are arrested, if the expense of keeping the same is excessive or disproportionate, or if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, on the application of either party, order the same or any portion thereof to be sold; and the proceeds, or so much thereof as shall be full security to satisfy any decree, to be brought into court to abide the event of the suit; or the court may, on the application of the claimant, order a delivery thereof to him, either on the filing of a written agreement of the parties or their proctors of record to that effect, or on a due appraisal, to be had under its direction, unless the value has been agreed to in writing by the parties or their proctors of record, on the claimant's

depositing in court so much money as the court shall order, or on his giving a stipulation, with sufficient sureties or an approved corporate surety, in such sum as the court shall direct or as shall be agreed upon in writing by the parties or their proctors of record, conditioned to abide by and pay the money awarded by the final decree rendered by the court, or any appellate court, if any appeal intervenes, not to exceed however in any event such agreed or appraised value with interest at six per cent. per annum and costs, as the one or the other course shall be ordered by the court.

12.

SHIP—HOW APPRAISED, SOLD OR BONDED.

Where any ship shall be arrested, the same shall, on the application of the claimant, be delivered to him either on a due appraisalment, to be had under the direction of the court, or on his filing an agreement in writing to that effect signed by the parties or their proctors of record, and on the claimant's depositing in court so much money as the court shall order, or on his giving a stipulation for like amount, with sufficient sureties, or an approved corporate surety, conditioned as provided in the foregoing rule; and if the claimant shall unreasonably neglect to make any such application, then the court may, on the application of either party, on due cause shown, order a sale of such ship, and require the proceeds thereof to be brought into court or otherwise disposed of.

13.

SEAMEN'S WAGES—MATERIALMEN—REMEDIES.

In all suits for mariners' wages or by materialmen for supplies or repairs or other necessities, the libellant may proceed in rem against the ship and freight and/or in personam against any party liable.

14.

PILOTAGE—COLLISION—REMEDIES.

In all suits for pilotage or damage by collision, the libellant may proceed in rem against the ship and/or in personam against the master and/or the owner.

15.

ASSAULT OR BEATING—REMEDIES.

In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only.

16.

MARITIME HYPOTHECATION—REMEDIES.

In all suits founded upon a mere maritime hypothecation of ship or freight, either express or implied, by the master for moneys taken up in a foreign port for supplies or repairs or other necessities for the voyage, without any claim of maritime interest, the libellant may proceed in rem and/or in personam against the master and/or the owners.

17.

BOTTOMRY BONDS—REMEDIES.

In all suits on bottomry bonds, properly so called, the suit shall be in rem only against the property hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by its own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be in personam against the wrongdoer.

18.

SALVAGE—REMEDIES.

In all suits for salvage, the suit may be in rem against the property saved, or the proceeds thereof, and/or in personam against any party liable for the salvage service.

19.

PETITORY OR POSSESSORY SUITS.

In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship or the majority thereof, against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage, on giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

20.

EXECUTION ON DECREES.

In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the respondent, claimant, or stipulators. And any other remedies shall be available that may exist under the state or federal law for the enforcement of judgments or decrees.

21.

REQUISITES OF LIBEL OF INFORMATION.

All informations and libels of information upon seizures for any breach of the revenue, or navigation or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary

to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return-day of the process why the forfeiture should not be decreed.

22.

REQUISITES OF LIBEL IN INSTANCE CAUSES.

All libels in instance causes, civil or maritime, shall be on oath or solemn affirmation and shall state the nature of the cause, as, for example, that it is a cause, civil and maritime, of contract, or a tort or damage, or of salvage, or of possession, or otherwise, as the same may be; and, if the libel be in rem, that the property is within the district; and, if in personam, the names and places of residence of the parties so far as known. The libel shall also propound and allege in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the respondent or claimant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer for due process to enforce his rights in rem, or in personam, as the case may be, and for such relief and redress as the court is competent to give in the premises.

23.

AMENDMENTS TO LIBELS.

In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, on motion, at any time before the final decree, on such terms as the court shall impose. And where any defect of form is set down by the respondent or claimant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms on the libellant.

24.

STIPULATIONS FOR COSTS.

In all cases the court may, on the filing of a libel or on the appearance of any respondent, or claimant, or at any other time, require the libellant, respondent or claimant, or either of them to give a stipulation or an additional stipulation with sufficient sureties, or an approved corporate surety, in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him, it, or them, by the final decree of the court, or by any interlocutory order in the progress of the suit, or an appeal by any appellate court.

25.

CLAIM—HOW VERIFIED—CLAIMANT'S BONDS.

In suits in rem the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or

on whose behalf the claim is made is the true and bona fide owner. And where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or, if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And, on putting in such claim, the claimant shall file a bond or stipulation for costs as above provided.

26.**ANSWERS—REQUISITES OF.**

In all libels in causes of civil and maritime jurisdiction, whether in rem or in personam, the answers of or on behalf of the respondent or claimant to the libels and interrogatories shall be on oath or solemn affirmation; and all answers shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner or except to each interrogatory propounded by the libellant. But this rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the District Court shall be of opinion that the proceedings prescribed herein are necessary for the purposes of justice in the case before the court.

27.**PLEADINGS—INTERROGATORIES—EXCEPTIONS TO.**

Either party may except to the sufficiency, fullness, distinctness, relevancy or competency of any of the pleadings or interrogatories filed by the other party; and if the court shall so adjudge on a hearing on the exceptions, and shall order further pleadings or answers to be filed by either party, such pleadings or answers shall be filed within such time and on such terms as the court may direct.

28.**DEFAULT ON FAILURE TO ANSWER.**

If the respondent or claimant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court may pronounce him to be in contumacy and default and thereupon shall proceed to hear the cause ex parte, and adjudge therein as to law and justice shall appertain. But the court may set aside the default and upon the application of the respondent or claimant admit him to make answer to the libel on such terms as the court may direct.

29.**EFFECT OF FAILURE TO ANSWER FULLY.**

In all cases where the respondent or claimant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and

the exception is allowed, the court may, by attachment or otherwise, compel the respondent or claimant to make further answer thereto; or may make such other order in the cause as it shall deem most fit to promote justice.

30.

WHAT EITHER PARTY MAY OBJECT TO ANSWERING.

Either party may object by proper pleadings to answering any allegation contained in any pleading or interrogatory filed by the other party, which will tend to expose him, it, or them, to any prosecution or punishment for crime, or for any penalty or any forfeiture of his, its or their property for any penal offense.

31.

INTERROGATORIES MAY BE REQUIRED TO BE ANSWERED UNDER OATH.

Either party shall have the right to require the personal answer of the other party or of its proper officer on oath or solemn affirmation to all interrogatories propounded by him, it, or them, in the libel, answer or otherwise as may be ordered by the court on cause shown and required to be answered. In default of due answer by either party to such interrogatories, the court may adjudge such party to be in default and enter such order in the cause as it shall deem most fit to promote justice.

32.

DISCOVERY OF DOCUMENTS BEFORE TRIAL.

After joinder of issue, and before trial, any party may apply to the court for an order directing any other party, his agent or representative, to make discovery, on oath, of any documents which are, or have been, in his possession or power, relating to any matter or question in issue. And the court may order the production, by any party, his agent or representative, on oath, of such of the documents in his possession or power relating to any matter in question in the cause as the court shall think right, and the court may deal with such documents, when produced, in such manner as shall appear just.

33.

HOW VERIFICATION OF ANSWER TO INTERROGATORY OBIATED.

Where either the libellant or the respondent or claimant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the respondent or claimant when and as soon as it may be practicable or may receive a verification by agent or attorney with like force and effect as if made by the party.

34.

HOW THIRD PARTY MAY INTERVENE.

If any third person shall intervene in any cause of admiralty and maritime jurisdiction in rem for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, on filing his allegations, to give a stipulation with sufficient sureties or an approved corporate surety to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded against him by the court on the final decree, whether it is rendered in the original or appellate court, not to exceed however in any event the agreed or appraised value of the property so claimed by him, it, or them, with interest at six per cent. per annum and costs.

35.

EXCEPTIONS TO PLEADINGS FOR SURPLUSAGE OR SCANDAL.

Exceptions may be taken to any libel, allegation, answer or other pleading for surplusage, impertinence or scandal; and if on hearing the matter excepted to shall be held to be so objectionable it shall be expunged on such terms as the court may direct.

36.

PROCEDURE AGAINST GARNISHEE.

In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation as to the debts, credits, or effects of the respondent or claimant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process in personam against him. If he admits any debts, credits or effects, the same shall be held in his hands, or paid into the registry of the court and shall be held in either case subject to the further order of the court.

37.

BRINGING FUNDS INTO COURT.

In cases of mariners' wages, or bottomry, or salvage, or other proceeding in rem, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, on due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit, and if no cause be shown, the court may order the same to be brought into court to answer the

exigency of the suit, and on failure of the party to comply with the order, may award an attachment, or other compulsory process to compel obedience thereto.

38.

DISMISSAL FOR FAILURE TO PROSECUTE.

If, in any admiralty suit, the libellant shall not appear and prosecute his suit, and comply with the orders of the court, he shall be deemed in default and contumacy; and the court may, on the application of the respondent or claimant, pronounce the suit to be deserted, and the same may be dismissed with costs.

39.

REOPENING DEFAULT DECREES.

The court may, in its discretion, on motion of the respondent or claimant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within sixty days after the decree has been entered, the respondent or claimant submitting to such further orders and terms in the premises as the court may direct; and the term of the court shall be deemed extended for this purpose until the expiration of such period of sixty days.

40.

SALES IN ADMIRALTY.

All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

41.

FUNDS IN COURT REGISTRY.

All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out, except by a check or checks signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all of the checks so drawn and the date thereof.

42.

CLAIMS AGAINST PROCEEDS IN REGISTRY.

Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceedings, to in-

tervene pro interesse suo for delivery thereof to him, and on due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or on a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

43.**REFERENCE TO COMMISSIONERS.**

In cases where the court shall deem it expedient or necessary for the purposes of justice, it may refer any matters arising in the progress of the suit to one or two commissioners or assessors, to be appointed by the court, to hear the parties and make a report therein. And such commissioners or assessors shall have and possess all the powers in the premises which are usually given to or exercised by matters in chancery in references to them, including the power to administer oaths to and examine the parties and witnesses touching the premises.

44.**RIGHT OF TRIAL COURTS TO MAKE RULES OF PRACTICE.**

In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules.

45.**FURTHER PROOF ON APPEAL.**

Further proof taken by leave of a Circuit Court of Appeals or the Supreme Court on an appeal in admiralty shall be taken in such manner as may be prescribed by statute or by said court.

46.**EVIDENCE—HOW TAKEN.**

In all trials in admiralty the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute, or agreement of parties. When deemed necessary by the court or the officer taking the testimony or by the parties, a stenographer may be employed who shall take down the testimony in shorthand or otherwise and, if requested by the court or either party, transcribe the same. The fees may be fixed by the court and taxed as costs.

47.**COSTS—TRAVEL OF WITNESSES.**

Traveling expenses of any witness for more than one hundred miles to and from the court or place of taking the testimony shall not be taxed as costs.

48.

ISSUE ON NEW FACTS IN ANSWER.

When the respondent or claimant in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication or reply, general or special, shall be filed, unless ordered by the court on proper cause shown. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libellant may amend his libel so as to confess and avoid, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the respondent or claimant shall answer such amendments.

49.

RECORD ON APPEAL.

The clerks of the District Courts shall make up the records to be transmitted to the Circuit Court of Appeals.

I. They shall contain the following:

A. The style of the court.

B. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.

C. If bail was taken, or property was attached or arrested, the process of the arrest or attachment and the service thereof, all bail and stipulations, and, if any sale has been made, the orders, warrants, and reports relating thereto.

D. The libel, with exhibits annexed thereto.

E. The pleadings of the respondent or claimant with the exhibits annexed thereto.

F. The testimony as taken on the part of the libellant, and any exhibits not annexed to the libel.

G. The testimony as taken on the part of the respondent or claimant and any exhibits not annexed to his pleadings.

H. Any orders and opinions of the court.

I. Any report of a commissioner or assessor, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the commissioner or assessor are to be stated.

J. The final decree.

K. The notice of or prayer for an appeal, and the assignment of errors.

II. The following shall be omitted:

A. The continuances.

B. All motions, rules, and orders which are merely preparatory for trial and to which no exception was taken or error assigned.

C. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the District Court was founded on some one or more

of these; in which case so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness, and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

III. The clerk of the District Court shall page the copy of the record thus made up, and shall make an index thereto, and he shall certify the entire document at the end thereof under the seal of the court, to be a transcript of the record of the District Court in the cause named at the beginning of the copy made up pursuant to this rule.

IV. In making up the record to be transmitted to the Circuit Court of Appeals, the clerk of the District Court shall omit therefrom any of the pleadings, testimony or exhibits which the parties, by their proctors, shall, by written stipulation, agree may be omitted; and shall receive and include in the record any statement of the case which may be signed by the proctors showing how the questions arose and were decided in the District Court and setting forth so much only of the facts alleged and proved, or sought to be proved, or of the evidence thereof, as is essential to a decision of such question by the appellate court, and such stipulation and statement shall be filed and certified up with the record.

50.

SECURITY ON CROSS-LIBEL.

Whenever a cross-libel is filed upon any counterclaim arising out of the same contract or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs.

51.

LIMITATION OF LIABILITY—HOW CLAIMED.

When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled "An act to limit the liability of ship-owners and for other purposes" now embodied in sections 4283 to 4285 of the Revised Statutes, as now or hereafter amended or sup-

plemented, the said owner or owners shall and may file a libel or petition in the proper District Court of the United States, as hereinafter specified, setting forth the facts and circumstances on which said limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation with sufficient sureties or an approved corporate surety for the payment thereof into court with interest at the rate of six per cent. per annum from the date of said stipulation and costs, whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement make an order for the transfer by him or them of his or their interest in such vessel and freight to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage or injury, citing them to appear before the said court and file their respective claims at or before a certain time to be named in said writ, not less than 30 days from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the post office, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect to any such claim or claims.

52.

PROOF OF CLAIMS IN LIMITED LIABILITY PROCEDURE.

Proof of all claims which shall be filed in pursuance of said monition shall thereafter be made before a commissioner to be designated by the court, or before the court as the court may determine, subject to the right of any person interested to question or controvert the same; and on the completion of said proofs, the commissioner shall make report, or the court its finding on the claims so proven, and on confirmation of said commissioner's report, after hearing any exceptions thereto, or on such finding by the court, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expense) shall be divided pro rata amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

53.

DEFENSE TO CLAIMS IN LIMITED LIABILITY PROCEDURE.

In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage or injury

(independently of the limitation of liability claimed under said act), provided he, it or they shall have complied with the requirements of Rule fifty-one and shall also have given a bond for costs and provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have filed his or their claim under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both, provided such answer shall in suitable allegations state the facts and circumstances by reason of which liability is claimed or right to limitation of liability should be denied.

54.

COURTS HAVING COGNIZANCE OF LIMITED LIABILITY PROCEDURE.

The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage or injury; or, if the said ship or vessel be not libeled, then in the District Court for any district in which the said owner or owners may be sued in that behalf; when the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the District Court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship shall have already been libeled or sold, the proceeds shall represent the same for the purposes of these rules.

55.

APPEALS IN LIMITED LIABILITY CASES.

All the preceding rules and regulations for proceeding in causes where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the Circuit Courts of Appeals of the United States where such cases are or shall be pending in said courts on appeal from the District Courts.

56.

RIGHT TO BRING IN PARTY JOINTLY LIABLE.

In any suit, whether in rem or in personam, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the

progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the particulars thereof, and that such other vessel, or person ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, or an approved corporate surety, to pay the libellant and to any claimant or any new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court on the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in the like cases from parties brought in under process issued on the prayer of a libellant.

57.

PROPERTY IN CUSTODY OF MARSHAL.

No property in the custody of the marshal or other officer of the court shall be delivered up without an order of the court but, except in possessory actions, such order may be entered, as of course, by the clerk, on the filing of either a written consent thereto by the proctor on whose behalf it is detained, or an approved stipulation or bond given as provided by law and these rules; or upon the dismissal or discontinuance of the libel; except that in proceedings under section 941 of the Revised Statutes the marshal shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid into the court by the party receiving such property subject to the decision of the court with respect to the amount of costs due such officers.

JUDGES

OF THE UNITED STATES CIRCUIT COURTS OF APPEALS AND DISTRICT COURTS AND COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice..... Washington, D. C.
Hon. GEORGE H. BINGHAM, Circuit Judge.....Manchester, N. H.
Hon. CHARLES F. JOHNSON, Circuit Judge.....Portland, Me.
Hon. GEORGE W. ANDERSON, Circuit Judge.....Boston, Mass.
Hon. CLARENCE HALE, District Judge, Maine.....Portland, Me.
Hon. JAMES M. MORTON, Jr., District Judge, Massachusetts.....Boston, Mass.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

SECOND CIRCUIT

Hon. LOUIS D. BRANDEIS, Circuit Justice.....Washington, D. C.
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Hon. HENRY WADE ROGERS, Circuit Judge.....New Haven, Conn.
Hon. CHARLES M. HOUGH, Circuit Judge.....New York, N. Y.
Hon. MARTIN T. MANTON, Circuit Judge.....New York, N. Y.
Hon. EDWIN S. THOMAS, District Judge, Connecticut.....New Haven, Conn.
Hon. THOMAS I. CHATFIELD, District Judge, E. D. New York.....Brooklyn, N. Y.
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Hon. GEORGE W. RAY, District Judge, N. D. New York.....Norwich, N. Y.
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Hon. LEARNED HAND, District Judge, S. D. New York.....New York, N. Y.
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Hon. AUGUSTUS N. HAND, District Judge, S. D. New York.....New York, N. Y.
Hon. JOHN CLARK KNOX, District Judge, S. D. New York.....New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York.....Buffalo, N. Y.
Hon. HARLAND B. HOWE, District Judge, Vermont.....Burlington, Vt.

THIRD CIRCUIT

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Hon. VICTOR B. WOOLLEY, Circuit Judge.....Wilmington, Del.
Hon. J. WARREN DAVIS, Circuit Judge.....Trenton, N. J.
Hon. HUGH M. MORRIS, District Judge, Delaware.....Wilmington, Del.
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Hon. CHARLES F. LYNCH, District Judge, New Jersey.....Newark, N. J.
Hon. JOSEPH L. BODINE, District Judge, New Jersey.....Trenton, N. J.
Hon. J. WHITAKER THOMPSON, District Judge, E. D. Pennsylvania...Philadelphia, Pa.
Hon. OLIVER B. DICKINSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. CHARLES B. WITMER, District Judge, M. D. Pennsylvania.....Sunbury, Pa.
Hon. CHARLES P. ORR, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.
Hon. W. H. SEWARD THOMSON, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.

FOURTH CIRCUIT

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Hon. ALEXANDER C. KING, Circuit Judge.....	Atlanta, Ga.
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Hon. ROBERT T. ERVIN, District Judge, S. D. Alabama	Mobile, Ala.
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Hon. JAMES CLIFTON WILSON, District Judge, N. D. Texas	Ft. Worth, Tex.
Hon. DUVAL WEST, District Judge, W. D. Texas	San Antonio, Tex.
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Hon. WILLIAM R. SMITH, District Judge, W. D. Texas.....	El Paso, Tex.

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Hon. ARTHUR C. DENISON, Circuit Judge.....	Grand Rapids, Mich.
Hon. MAURICE H. DONAHUE, Circuit Judge.....	Columbus, Ohio.
Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....	Maysville, Ky.
Hon. WALTER EVANS, District Judge, W. D. Kentucky.....	Louisville, Ky.
Hon. ARTHUR J. TUTTLE, District Judge, E. D. Michigan.....	Detroit, Mich.
Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan.....	Grand Rapids, Mich.
Hon. JOHN M. KILLITS, District Judge, N. D. Ohio.....	Toledo, Ohio.
Hon. D. C. WESTENHAVER, District Judge, N. D. Ohio	Cleveland, Ohio.
Hon. JOHN E. SATER, District Judge, S. D. Ohio.....	Columbus, Ohio.
Hon. JOHN W. PECK, District Judge, S. D. Ohio.....	Cincinnati, Ohio.
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Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois.....	Chicago, Ill.

JUDGES OF THE COURTS

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Hon. LOUIS FITZHENRY, District Judge, S. D. Illinois.....Peoria, Ill.
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 Hon. ALBERT B. ANDERSON, District Judge, Indiana.....Indianapolis, Ind.
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 Hon. JOHN H. COTTERAL, District Judge, W. D. Oklahoma.....Guthrie, Okl.
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 Hon. EDWARD E. CUSHMAN, District Judge, W. D. Washington.....Tacoma, Wash.
 Hon. JEREMIAH NETERER, District Judge, W. D. Washington.....Seattle, Wash.

COURT OF APPEALS OF DISTRICT OF COLUMBIA

Hon. CONSTANTINE J. SMYTH, Chief Justice.....Washington, D. C.
 Hon. CHARLES H. ROBB, Associate Justice.....Washington, D. C.
 Hon. JOSIAH A. VAN ORSDEL, Associate Justice.....Washington, D. C.

¹ Died October 18, 1920.

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Rehearing denied Dec. 9, 1920.

Wooton Land & Fuel Co. v. Ownbey, 265 F. 91. Rehearing denied
Oct. 25, 1920.

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Lee Wing Wah v. White, 264 F. 961. Rehearing denied Oct. 25, 1920.

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS, THE DISTRICT COURTS, AND THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

COLUMBIA AGRICULTURAL CO. v. SEID PAK SING.

SEID PAK SING v. COLUMBIA AGRICULTURAL CO.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1920. Rehearing Denied October 28, 1920.)

No. 3469.

1. Landlord and tenant ⚡136—Lease held to require lessor to pump water from land.

A lease of agricultural land within a drainage district, which required the lessor to keep the drainage canals open and clean, to reimburse lessee for loss of crops from flooding by break in levees or rise of water table, to pump water from the land at seeding time, and to pay the pumping charges levied against the land, requires the lessee to pump at times other than seeding time the water from the pump into which the drainage canals emptied, which was necessary to enable those canals to perform their function.

2. Appeal and error ⚡1001(1)—Verdict supported by evidence not reviewable.

Issues submitted to the jury under proper instructions, on which there was evidence to support the verdict rendered, are finally determined by the verdict, and the appellate court will not review the testimony.

3. Trial ⚡296(2)—Instruction held not error, in view of another instruction.

An instruction, under a lease of agricultural lands which required the lessor to maintain the drainage of the lands, that the drainage should be maintained so that the lands would be in the ordinary condition of uplands or flat lands not needing drainage, was not error, where the court also instructed as to the lessee's duty to maintain ditches on the land and to cultivate his crops properly, and denied recovery if the jury found negligence by the lessee.

4. Landlord and tenant ⚡129(4)—Lessee, whose performance was prevented, can recover, after rescission, expenditures before breach.

Lessee of a tract of agricultural land, whose performance of the lease was prevented by breach of lessor's contract to erect buildings on the land and deliver possession, can, after rescinding the lease, recover from lessor expenditures by him before the rescission in preparation for the cultivation of the land.

5. Landlord and tenant ⚡49(2)—Lessee, after lessor's breach, can recover expenditures by action for breach of contract.

Where lessee's performance of his contract was prevented by breach of lessor's agreements, lessor can, after rescinding the contract, recover his expenditures in preparation for performance thereof by an action for breach of contract.

6. Landlord and tenant ⚡200(1)—Lessee, using only part, is liable for rent of entire tract.

One who leased a stated number of acres, which were to be set apart to him from a larger tract at a fixed rental per acre, is liable for the rent of the number of acres stated, and which were available for his use, though he actually used only a portion thereof.

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Action by Seid Pak Sing against the Columbia Agricultural Company. Judgment for plaintiff for part of the amount claimed, and both parties bring error. Affirmed.

This was an action for damages for breach of contract, with a verdict in favor of plaintiff below. A judgment was entered upon the verdict. Cross-writs of error were sued out.

On March 2, 1917, the defendant, Agricultural Company, leased to the plaintiff, Sing, a Chinaman, certain lands for agricultural purposes; the lease reciting that the company owned certain diked lands in certain drainage districts in Oregon, which lands "are protected from overflow by levees and a drainage system thereon operated by said districts, sufficient for protection under ordinary circumstances." Tract 1 was described as 400 acres of land in the Midland and Magruder drainage districts, and was leased for the year 1917, commencing with the date of the lease, and ending December 31, 1917, rental to be \$9 per acre, or \$3,600. Tract 2 was 3,000 acres in the Beaver drainage district, the lease to run for four years from January 1, 1918, rental to be \$9 per acre, or \$27,000. It was agreed in the lease that no rent should be called for until the lessee was given actual possession of the land and every part thereof, the land to be "in a condition suitable and ready for the work to be performed thereon by said lessee and suitable for the purposes for which he is leasing said premises."

Lessee covenanted with Sing, among other things, that the lessee (5) "will use and occupy said leased premises for general farming purposes, and will at all times cultivate the same in a first class husbandlike manner," etc.; (7) will at all times during said lease, at his own expense, keep the irrigation ditches on said lands clean and open; lessor to keep main drainage canals open and clean. "Lessor guarantees to said lessee the following: (1) That if during the term of this lease the levee should break and emit water upon the said leased lands, or if the water table should rise by reason thereof, or from seepage, to such an extent as to injure or destroy the crops planted thereon, or on any part of said premises of lessee, lessor will reimburse said lessee for the actual expense of the seeding and cultivating of said lands to said time, not to exceed \$20 per acre, and said lessee shall not be required to pay rental for that portion of the land on which crops may be so injured or destroyed, as aforesaid, during the year in which said land is so flooded or such crops are so injured or destroyed. (2) To pump water off and to drain said lands, so that the same will be at a depth of approximately 4 feet below the surface of the land at seeding time, which depth of water is about one foot above the zero mark of the district, and which is estimated at the proper depth for the best seeding of said land. * * * (10) To construct an additional main drainage canal in the Beaver drainage district so as to afford additional drainage of said lands. (11) To pay the pumping charges, assessments, and taxes which may be levied against said lands."

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The first cause of action was for damages to 40 acres of potatoes destroyed by flood water and for certain moneys paid out by plaintiff to 46 employes hired to harvest the potatoes in the acreage included in tract 1. The basis of the first cause of action is that there was an obligation resting upon the defendant to keep open the main canal and drain the land in the fall and winter of 1917.

In connection with the second cause of action, which pertains to the lease of tract 2, or the 3,000 acres in the Beaver drainage district, the lessor agreed to provide and build buildings upon each 500 acres of land in the district, at places to be thereafter mutually agreed upon by the parties to the lease. In this cause the plaintiff pleaded failure to deliver possession, and sued for expenses incurred in sending men and machinery from San Francisco to Oregon to prepare the lands in the tract for farming, and for the expense of returning the men and machines to San Francisco after defendant refused to deliver possession.

In answer to the first cause of action defendant set up that the lands prior to December 21, 1912, were swampy and unfit for cultivation, and that it had constructed a large levee and dike around the Midland district lands, and had built dams and dikes and tide gates, and had installed a pumping plant and a general system of drainage to reclaim the lands; that thereafter, when the drainage system was constructed, the defendant had sold the lands in the Midland district to one Magruder, and that the deed of sale embraced conditions running as covenants whereby the land should be sold to purchasers, who would agree to associate themselves with other property owners as the Midland drainage district. It is averred that Magruder sold the lands to defendant, and defendant sold tracts whereby the purchasers acquired, subject to the conditions and reservations which had been incorporated in the deed to Magruder; that thereafter the Midland drainage district was organized, trustees were elected, and the trustees, since January 25, 1913, had had exclusive charge of the dikes and drainage system and pumping of the water within the district.

It is alleged that before the lease in question was made the plaintiff herein knew all of the conditions with respect to the covenants referred to, examined the lands, knew their character, and was familiar with climatic conditions, and the condition of the dikes and pumping plant, and the plan of drainage. Defendant pleads that the proximate cause of the damage, if any there was, to the potatoes grown by plaintiff upon the land, was the negligence, omission, and failure of plaintiff to harvest the crop "in due course of husbandry," and that the crop was ready for harvesting weeks before any damage was done by rainfall or surface water. Defendant also pleads that, when the rainy season set in, the rainfall was so heavy that no amount of pumping would have removed sufficient water from the land to render it practicable to dig the potatoes, and that pumping would have been ineffectual.

With relation to tract 2, the 3,000 acres leased, defendant pleaded the plaintiff notified defendant that he could not finance so large a matter during the season of 1918, and that by mutual consent in December, 1917, the parties abandoned and rescinded the lease with respect to the 3,000 acres, and thereafter negotiations were had for a new contract for a smaller number of acres, but that no such contract was ever made, and the things done by plaintiff were with full knowledge that they were not being done under the terms of the contract "so rescinded as aforesaid," but were done with the expectations that he would be able to make a new contract for a smaller number of acres for 1918.

The defendant set up a counterclaim, and alleged that the plaintiff selected 400 acres, tract 1, of the lands, for which he agreed to pay \$9 per acre, or \$3,600, rental by December 31, 1917, but that he had only paid \$2,000, which had been deposited on account of rentals for 1918 for tract 2, which was the 3,000-acre tract, but that in December, 1917, cancellation by mutual consent had been had upon that tract, and that the \$2,000 had been applied and credited by the defendant upon the lands in the Midland district. The court instructed the jury that the defendant was entitled to recover \$1,600 from

the plaintiff, which should be set off against any amount found due plaintiff from defendant. This \$1,600 was the difference between \$3,600, rental of 400 acres in tract 1, and \$2,000 found to have been paid. There was also an item of \$1,558.40, which was admitted to be due by plaintiff to defendant.

The verdict of the jury was for \$2,024.93, which sum would appear to have been reached by verdict in favor of plaintiff on both causes of action in the aggregate sum of \$5,183.33, less items of \$1,600 plus \$1,558.40, which the court charged the jury to deduct as properly to be credited to the defendant.

The Agricultural Company contends that the judgment should be reversed, and that there should be a direction to the District Court to render judgment in its favor for \$3,158.40 and interest; while Sing contends that the judgment in his favor should be affirmed in the sum of \$2,024.93 and interest, but that there should be a reversal of the judgment of the District Court as to the item of \$1,600 rental, and that he should be allowed that additional sum, with interest.

Robert R. Rankin, of Portland, Or., and Sterling Carr, of San Francisco, Cal., for plaintiff.

Russell E. Sewall and Guy C. H. Corliss, both of Portland, Or., for defendant.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The contention of the agricultural company is that the court should have directed a verdict on the ground that plaintiff could not recover either for damages to the potato crop, or for damages on account of expenses incidental to sending men from California to Oregon to work on tract No. 2.

Error is also assigned upon an instruction to the jury to the effect that it was the duty of the defendant to drain the land so that it would be susceptible of cultivation and in such a condition that the potatoes could be harvested; that it was its duty to put the lands in like condition as upland is naturally, or ordinary level land that is drained by natural sources or natural drainage ways; and that the people who were farming in the drainage district—

“ought to be placed in the same condition that people are in who are farming upon upland or the ordinary level lands, or even the flat lands that are not drained by special drainage construction like a district of this kind.”

The court added:

“Now that gives you the idea of what the defendant was required to do for the protection of the plaintiff in this case, in so operating these pumps as to keep the drainage canal open, so that the water would naturally flow from this land into the sump and thereby be carried away from the land.”

[1] Defendant concedes that there was an obligation upon the lessor to pump the water off in the spring, so as to fit the land for seeding, but argues that there was no obligation of any kind to operate the pumps late in the fall and early in the winter, and that to hold that defendant should have taken care of water which the tide gates did not take off would be to interpolate into the lease an additional agreement never made nor intended by the parties. But we cannot agree to such a construction of the contract. On its face the lease referred to the lands as protected from overflow by two means—levees and a drainage

system thereon, of a character sufficient for protection under ordinary circumstances. Again, it was "expressly" agreed that Sing was not to be called on for rent until the lands and every part thereof were in condition suitable and ready for the farming work to be performed—general farming, which plainly included raising of potatoes. Thus far, by plain understanding the lands leased were protected by a drainage system, and were to be turned over in condition fit for raising farm produce and were to be used by the lessee for farming purposes.

When we look at the duties assumed after possession should be had, we have the obligation on the part of Sing to continue "at all times" during the lease to keep the irrigating ditches open, and on the part of the company to keep the "main drainage canals open and clean." Just as it was the duty of Sing to keep the irrigating ditches open and clean, so was it the duty of the company to keep the main drainage canals open and clean. Such duties were continuous, and from each to each. Next came the special provision by way of assurance whereby, in the possible event of a break in the levee, or a rise in the water table by reason of seepage to an extent to injure planted crops, the company was to reimburse Sing for expense, not alone of seeding, but also for the cultivation of the land to the time of injury, and would release him of rental for the acreage on which the crops might have been injured or ruined. Furthermore, as throwing light upon the true construction of the lease, we have the agreement on the part of the company to pump the water off and drain the land, so that there may be the proper depth for the best seeding, and that the company would construct an additional main drainage canal in tract 1, "so as to afford additional drainage" of the land.

The essence of these agreements was that the Agricultural Company would use the means and methods referred to, not only to put the lands in suitable condition for farming purposes at the time that they were turned over to Sing, but that during the time of the lease the company would keep the main drainage canals open and clean, and also construct an additional main drainage canal to afford additional drainage. As the evidence shows the lateral ditches ran into the main drainage canals, obviously it was necessary that such main drainage canals should be kept open and clean, in order that the water might find its way to the sump from which the tide gates emit the water, and from which excess water was pumped over the levee. By keeping in mind the language we have referred to as employed in the lease, and the carefully imposed obligations therein assumed by the parties, and regarding the covenants entered into as pertaining to the leasing of lands to be drained so as to be fit for cultivation and general farming, we are very clear in the opinion that the duty of the company was to keep the main drainage canals so as to remove the surplus water to the end that the land might be used for the purposes for which it was leased.

[2] Whether the plaintiff performed his duty, and kept the smaller ditches open and clean, to the end that the water therein could drain from his lands into the main drainage canal, was one of the questions

tried in the case, as was the larger question whether or not Sing farmed properly and with ordinary skill, and whether he planted and harvested at proper times. These issues were all submitted to the jury under careful instructions of the court, and as there is ample evidence to support the verdict in favor of the plaintiff, the lower court properly submitted the case to the jury, and this court will not review the testimony in support of the verdict.

[3] Referring specially to the instruction complained of, it should be read in connection with the main parts of the charge. When we do so, we find no possible prejudice to the rights of the defendant company. The court instructed that it was the duty of Sing to keep the lateral ditches open, in order that there might be afforded a regular drainage system through the lateral ditches into the main canal; that if Sing were negligent in planting his potatoes, or if he negligently allowed them to mature so late as to prevent the crop being saved, because they would not mature under natural conditions, then he could not recover; that under the lease there was no obligation on the company to furnish any other facilities for draining the rainfall from the land on which the potatoes were growing into the main ditches, except the small drainage ditches which were on the land when the lease was made; and that if Sing were negligent in keeping the laterals open he could not recover, but that the defendant was under an obligation to keep the large canals open, so that the water would flow to the sump and out of the sump to such lower depth that the drainage canal would operate to carry the water constantly to the sump, and thereby the water might be drained into the canals by the lateral ditches. The jury were told that they could consider the manner in which the potatoes were planted and hilled, the location of the small drainage ditches, the volume and frequency of the rainfall, height of water in the main drainage ditch during the time of the rainfall, and up to the time the crop was destroyed by water.

In the second cause of action, which has to do with the 3,000 acres in the Beaver district, plaintiff sued for damages caused by the failure of defendant to deliver possession of the land. As already stated, there was a provision in the lease for the erection by the company of a set of buildings upon each 500 acres of the leased land, the buildings to be erected at such places as might thereafter be mutually agreed upon by the parties to the lease; also a provision that the rental of the Beaver district land should not commence to run until January 1, 1918, although possession was to have been taken on or about the 1st of August, 1917—the lessee agreeing to prepare the ground for the next year's crops. Sing testified that he saw a representative of the defendant company about October 10th, and asked him to put up the buildings in the Beaver district, and that the agent of the company said he was going to put them up pretty soon. Sing also said that he talked again with him in November about the buildings, but no building was started until just before Christmas 1917. In November, 1917, Sing wrote to the defendant that he had been disappointed in promises of people to take up the whole 3,000 acres, and that he believed that he would be able to cultivate only about 1,500 acres during the ensuing

year, and he wanted a directors' meeting called to sanction him in cultivating 1,500 acres during the coming year.

There is evidence to the effect that Sing met an agent of the defendant and agreed that the 3,000 acres should be cut up into 500-acre tracts, that improvements were to be made upon each of such tracts, and that this should be done in order that Sing might take possession and go ahead with the work. Plaintiff's evidence tended to show that the company did not do any work on the land and did not build the buildings, further than to put material upon the ground. There is evidence that the land of the Beaver district was flooded with water late in December and was in no condition for farming, and that on January 5, 1918, Sing notified the company that, in view of the failure to perform the conditions of the lease with respect to building certain buildings and to perform certain other work, he would cancel the lease. In that same letter Sing advised the company that the called-for \$3,600 rental for 1917 was for 400 acres, but that, inasmuch as the company had only turned over to him 200 acres, the rental should not exceed \$1,800, and that, as the company then had in its possession \$2,000 of his money, there was a credit with them in his favor of \$200, which amount he asked the company to return to him. To this letter an agent of the company replied that the directors would meet on the following Friday, when his letter would be submitted, requesting Sing that he write his proposal to rent smaller acreage in the Beaver district and his wishes regarding lands in the Midland camp.

[4] It is contended by the company that there was a voluntary rescission of the lease, whereby Sing escaped all possible liability for any going on with the contract and all risk of carrying out the lease for the next four years. The view taken by the learned judge of the District Court was that, notwithstanding the rescission as to the 3,000-acre tract, Sing was entitled to be put in statu quo, and that in order for him to be so put he should be paid for such expenses as he may have been put to in bringing men to the ground and transporting implements for the purpose of taking possession and working the lands: Provided, the company had broken the agreement it had entered into by not having put the lands in condition for the plaintiff to take possession of them. The court added that Sing could not recover unless there was such breach.

The general principle embodied in the instruction of the court was correct. In *United States v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, it was held that where one has voluntarily and wrongfully put an end to a contract, he cannot be heard to say that the party injured has not been damaged at least to the amount of what he has been induced in good faith to pay out and expend after making allowance for the value of the material on hand; that the one in default cannot say this, unless he can show that the expenses of the party injured have been extravagant and unnecessary for the purpose of carrying out the contract. Justice Bradley, for the court, said:

"The distinction between those claims under a contract which result from a performance of it on the part of the claimant, and those claims under it which result from being prevented by the other party from performing it,

has not always been attended to. The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred."

[5] The Behan Case also disposes of any suggestion that there can be no recovery under the pleading of the second cause of action, because it is based upon the theory of a breach of contract, in that the court held that the particular form of the complaint ought not to preclude claimant from recovering what was fairly shown by the evidence to be damage sustained by him by way of losses for outlay and expenses.

Alabama Oil & Pipe Line Co. v. Sun Co. (Tex. Civ. App.) 90 S. W. 202, turned largely upon the particular facts discussed by the court, which held that there never was any intention on the part of the plaintiff in that case to reserve the right to hold the appellees for damages for precedent breaches of the contract, and that the appellee had a right to assume that whatever results the law attached to an unreserved and unconditional cancellation were in contemplation by the appellant, and that under the facts appellant waived all right to recover damages for the breach of the contract by the appellee.

It may be that the rule in the Behan Case goes farther than that stated in the decisions cited by defendant, but, by the authority of the Behan Case, Sing, having shown himself substantially entitled to relief, should not be denied recovery of the claim for losses sustained by outlay and expenses. United States v. Molloy, 127 Fed. 953, 62 C. C. A. 585.

[6] By writ of error sued out by Sing the question is whether the court erred in instructing the jury to this effect: That the company had pleaded as a set-off that Sing rented 400 acres of land in tract 1 from the defendant, and agreed to pay \$9 per acre, or \$3,600; that \$2,000 had been paid thereon, leaving due the company from Sing \$1,600; that as a matter of law the company was entitled to recover \$1,600 from Sing, and to have that amount set off against any amount that the jury might find was due to Sing from the company.

The lease, as already shown, called for 400 acres, tract 1, for 1917, at \$9 per acre per annum, the land to be selected by Sing, his selection to be made known to the lessor. There were provisions respecting no rental until the possession was given, and an agreement respecting measurement of the tracts. There were also provisions which we do not think it necessary to set forth, as the real point is whether Sing was responsible for the rent for the full 400 acres at \$9 per acre, or only for about 200 acres, the land actually used by him.

The lease, however, was a contract for the letting of 400 acres in the Midland district; and, considering the fact that the company turned over to Sing for selection 400 or more acres of tillable land, it became the duty of Sing to select the particular 400 acres he wished to lease, and then to notify the company. During 1917, if the crops were unsatisfactory, he had a right to cancel the lease of tract 1 upon paying to the lessor the further sum of \$1,600. Sing made no claim in the farming season of 1917 that he had not been given the full 400

acres, or that he intended to pay only for such land as he actually used. He made a payment as required by the lease on August 1, of \$720, or one-fifth of the whole rent, and thus recognized that he was liable for the full \$3,600. He thereafter secured extensions of time for payment of further installments, but made no claim of exemption from liability for \$3,600 rental. Nor did he ever make such a claim when the lease was canceled. Whether Sing used and farmed the 400 acres was not material, so long as they were turned over to him and were available for use by him.

We think the obligation to pay for the 400 acres was incurred and that the court was right in its ruling. As the record shows that neither party has been prejudiced by the judgment rendered, it will be affirmed.

So ordered.

ANSEHL v. WILLIAMS.

(Circuit Court of Appeals, Eighth Circuit. July 15, 1920. Rehearing Denied September 27, 1920.)

No. 5503.

1. Trade-marks and trade-names ¶28—Extent of use not material.

In determining right to a trade-mark, the fact that plaintiff's business, in connection with which the mark was used, was larger than that of defendant, is not decisive, since it is not essential that use of the trade-mark has been long-continued, or that the article is widely known, or has great reputation.

2. Trade-marks and trade-names ¶32—Abandonment involves intention to abandon.

Abandonment of a trade-mark by the owner, which defeats his rights thereto, rests upon an intent to abandon.

3. Trade-marks and trade-names ¶93(1)—Burden is on party claiming abandonment to prove it.

In a suit for infringement, the burden is on the party claiming abandonment by another of his trade-mark to prove the intention to abandon the business under the trade-mark.

4. Trade-marks and trade-names ¶32—Engaging part time in other employment, while business was continued by others, not abandonment.

The owner of a trade-mark did not abandon his rights thereto by accepting employment for another for a period of eight months, during part of which he was out of the city, where the business was conducted in the meantime, either by himself outside of working hours or by his wife and sisters.

5. Trade-marks and trade-names ¶97—Delay of two years in bringing suit held not laches, barring injunction.

A delay of two years in bringing suit to restrain the use of trade-mark after knowledge of the infringement, and then seeking infringement only by cross-complaint in a suit by the owner of the other trade-mark, is not such laches as bars the right to injunction.

6. Trade-marks and trade-names ¶45—Registration of plaintiff's trade-mark does not affect rights to unregistered trade-mark first used by defendant.

Neither defendant's failure to register his trade-mark, nor the regis-

tration of plaintiff's trade-mark before application by defendant, affects defendant's right to a trade-mark which he used first.

7. Trade-marks and trade-names ☞93(3)—Evidence held not to show fraud to defeat trade-mark.

The representation that defendant's trade-mark was registered, made in the belief that he could use that statement after his application to register, and statements as to the composition of his product, *held* not to show fraud, nor to show that his preparation was dangerous, and therefore not to defeat his right to trade-mark.

8. Trade-marks and trade-names ☞59(5), 97—"Lash-Brow-Ine" held to infringe "Lashbrow."

Plaintiff's trade-mark, "Lash-Brow-Ine," is sufficiently similar to defendant's prior trade-mark, "Lashbrow," to constitute an infringement, and to entitle defendant to an injunction restraining further use of its trade-mark.

9. Trade-marks and trade-names ☞65—Infringing trade-mark need only be calculated to deceive ordinarily cautious purchasers.

It is sufficient to constitute infringement that the infringing trade-mark is calculated to deceive ordinary purchasers using ordinary caution.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by Thomas L. Williams, doing business as the Maybell Laboratories, against Benjamin Ansehl, doing business as the Lashbrow Laboratories Company. From a decree enjoining defendant from using the alleged trade-mark, and from unfair competition, defendant appeals. Reversed and remanded, with directions to restrain plaintiff from further use of its trade-mark.

Robert D. Totten, of Pittsburgh, Pa. (Kay & Totten and Robson D. Brown, all of Pittsburgh, Pa., on the brief), for appellant.

James Rosenthal, of Chicago, Ill. (Marion C. Early, of St. Louis, Mo., on the brief), for appellee.

Before HOOK and CARLAND, Circuit Judges, and TRIEBER, District Judge.

CARLAND, Circuit Judge. Appellee brought this action against appellant for trade-mark infringement and unfair trade competition. Appellant filed a cross-complaint, alleging infringement of his trade-mark and unfair trade competition on the part of appellee. A decree was rendered enjoining appellant from using his alleged trade-mark and from unfair competition. No accounting was granted. The material facts as shown by the record are as follows:

In September, 1915, appellee, under the name of Maybell Laboratories, commenced selling at Chicago, Ill., a preparation for promoting and stimulating the growth of eyebrows and lashes, under the trade-name of Lash-Brow-Ine. The name was suggested by preparations of a similar character then on the market under the names of Eye-Brow-Ine and Lashneen. The suffix "ine" was used, because the principal ingredient contained in appellee's preparation was chiefly petrolatum, a form of vaseline. Appellee commenced to advertise his preparation in October, 1915, and since then has advertised in over 50 different maga-

zines, and had paid for advertising at the time of trial \$67,084.19; the monthly expense for advertising having increased to about \$3,000 per month. The preparation, sold directly to consumers at 50 cents per box, had amounted to 149,000 mail orders since the business was started. Sales were also made in gross to about 3,000 dealers, located in every state of the Union. Appellee testified that he never heard of Lashbrow, or Lashbrow Laboratories, until about September 1, 1918. About November 1, 1918, appellee caused appellant to be notified to cease infringing appellee's trade-mark. Appellant refusing so to do, this suit was commenced December 17, 1918.

Since commencing the sale of his preparation appellee has done a business amounting to \$111,759.73. The trade-mark Lash-Brow-Ine was registered in the United States Patent Office April 24, 1917. The main ingredients of the preparation sold by appellee were a superfine petrolatum and paraffine, a high-grade perfume, and other small ingredients. No reply was received by appellee to the notification above stated until November 11, 1918, when the receipt of the letter of appellee of November 1, 1918, was acknowledged with a statement that appellant had used the trade-mark "Lashbrow" much earlier than 1915, and a request that appellee desist from infringing the same, or suit would be brought by the appellant for an injunction and an accounting. No such suit was brought.

There was introduced in evidence a large number of advertisements appearing in various publications. The evidence on the part of appellant showed that he conceived the idea of manufacturing and putting on the market a preparation for stimulating and promoting the growth of eyebrows and eyelashes in 1911; that the formula for this preparation was one used by his mother for her eyebrows and eyelashes when she was a girl. Appellant commenced selling his preparation in the spring of 1912, under the trade-mark of "Lashbrow," to a small drug store on Jefferson and Lafayette avenues in the city of St. Louis, Mo. This was followed by soliciting trade from all the large dealers and retail stores in St. Louis, where the preparation was offered for sale. Appellant then started a campaign of advertising which began on October 12, 1912, in the St. Louis Post-Dispatch. This advertising brought him business from nearby states, such as Illinois and Indiana, and the entire Southwest. Appellant's business has been conducted since its commencement at 1755 Preston street, St. Louis, Mo., where he was doing business when enjoined in May, 1919. The stores referred to by appellant in his testimony were Wolf-Wilson, Judge & Dolph, Grand Leader, Famous & Barr, Nugent's, Hirsch's Hair Bazaar, and Schaper, being the leading stores in St. Louis. The preparation was sold through these stores in 1912. Appellant had printed 1,000 cardboard fliers and 1,000 transparent fliers, which were mailed to about 1,500 stores throughout the United States. A counter display card was also distributed throughout the country in 1913. A sample of appellant's preparation was mailed to the buyers of about 800 or 900 department stores throughout the country.

In order to get quicker national distribution, appellant testified that he called upon Meyer Bros. Wholesale Drug Company, in St. Louis,

the largest wholesale drug concern in the world, as appellant understood, and asked them to make a thorough analysis of Lashbrow, with a view of having all of their 75 salesmen, who traveled in all parts of the United States, sell Lashbrow. Mr. Peet was then the buyer at Meyer Bros., and offered to do this, and as a result of appellant's request Lashbrow was entered upon the regular catalogue price list of Meyer Bros. This was late in 1912. Lashbrow has been carried by Meyer Bros. Drug Company in their catalogue until the present time and sold throughout the entire United States. Appellant also introduced it to the J. S. Merrill Wholesale Drug Company, in St. Louis, in 1912, and since said date, until the present time, the preparation has been carried by the most reputable wholesale drug houses in the United States, such as McKessen & Robbins, Lehn & Fink, and Schifflein, of New York City, J. W. Crowds Wholesale Drug Company, Dallas, Tex., Alexander Drug Company, Oklahoma City, Okl., Stewart & Palmer, Seattle, Wash., and numerous others that the witness did not recall.

Appellant had very little means with which to exploit his preparation at first, and the business carried on did not reach the extent of that of appellees. The evidence shows, however, that appellant has done the best he could in the way of promoting the sale of his preparation. From 1912, down to December, 1915, three months after appellee had first adopted his trade-mark, appellant had advertised in 16 national magazines such as "Grit," "Red Book," "Cappers Weekly," "Photoplay," etc. In 1914 appellant ran a campaign of advertising in the St. Louis Globe-Democrat. He testified that during 1912, he spent \$500 or \$600 in advertising Lashbrow; during 1913, about \$900 or \$1,000; during 1914, about \$2,500; during 1915, about \$2,500 or \$3,000; during 1916, a little over \$2,000; during 1917, between \$4,000 and \$5,000; and in 1918, about \$6,000. Up to 1915 he had purchased at least 79,056 jars or 549 gross, and invoices were produced for these amounts. Appellant's Exhibit 10, introduced in evidence, showed 243 original orders for Lashbrow, coming from 31 states of the Union, during the years 1912, 1913, 1914, 1915, 1916, and 1917.

[1] The foregoing in a general way is what the evidence shows as to the business done by appellant and appellee. That of appellee was larger than that of appellant, but this fact is not decisive. In the case of *Kathreiner's Malzkaffee Fab. v. Kneipp Medicine Co.*, 82 Fed. 321, 27 C. C. A. 351, the Court of Appeals of the Seventh Circuit said:

"It is not essential that its use has been long continued, or that the article should be widely known, or should have attained great reputation. The wrong done by piracy of the trade-mark is the same in such case as in that of an article of high and general reputation, and of long-continued use. The difference is but one of degree, and in the quantum of injury. A proprietor is entitled to protection from the time of commencing the user of the trade-mark."

See, also, *Waldes et al. v. International Manufacturers' Agency (D. C.)* 237 Fed. 502; *Walter Baker & Co. v. Delapenha (C. C.)* 160 Fed. 746.

[2] To avoid the force of appellant's prior use of his trade-mark, appellee claims that there was an abandonment of the same by appellant. Upon the question of abandonment it was said by the Supreme Court in the case of *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713:

"It results from the general principles thus far discussed that trade-mark rights, like others that rest in user, may be lost by abandonment, nonuser, laches, or acquiescence. Abandonment, in the strict sense, rests upon an intent to abandon; and we have no purpose to qualify the authority of *Saxlehner v. Eisner*, 179 U. S. 19, 31, to that effect. As to laches and acquiescence, it has been repeatedly held, in cases where defendants acted fraudulently or with knowledge of plaintiffs' rights, that relief by injunction would be accorded, although an accounting of profits should be denied. *McLean v. Fleming*, 96 U. S. 245, 257; *Menendez v. Holt*, 128 U. S. 514, 523; *Saxlehner v. Eisner*, 179 U. S. 19, 39. So much must be regarded as settled."

[3, 4] The burden of showing abandonment was upon appellee, and we find no evidence that appellant intended to abandon the business of selling his preparation under the trade-mark adopted by him. It does appear that appellant was employed for 8 months during the year 1917, by Crundin-Martin Manufacturing Company, of St. Louis. During that time he spent 2 months in Cincinnati. In regard to this employment appellant testified:

"A large part of this 8 months I was right here in St. Louis, and I attended to my Lashbrow business in the evening, and also called upon the stores in the daytime. I was outside all the time, and the short time I was away from St. Louis, as is customary any time I am away from St. Louis, my folks attended to my business, and the business is conducted right in the house. This 8 months were about the first 8 months in the year. I was in St. Louis for that concern about 6 months out of the 8. I do not know how long I was in Cincinnati; my recollection is 2 months."

Appellant's place of business was in an old residence consisting of two flats, the lower one of which was used for the Lashbrow business the upper as a residence. Mr. Bernayas, who was the secretary and manager of the Crundin-Martin Company, testified that, out of the 8 months appellant was employed in 1917 by that company, he spent all of the time, with the exception of 60 or 90 days, in Cincinnati. Mr. Bernays subsequently filed an affidavit in this cause, which appears in the record wherein he testified that after an examination of the company's books he found that instead of appellant being away from St. Louis for from 5 to 6 months of said period of 8 months, he was away only 73 days; the balance of the period being spent in St. Louis. We do not think that this absence of 73 days showed any intention of abandonment by appellant, as the evidence shows that the business was carried on continuously during said absence by his wife and sister, they being perfectly competent to fill all mail orders, and in view of the further fact that Mr. McTigue, of Meyer Bros. Drug Company, testified that there was no cessation of the efforts made by appellant in advertising and popularizing Lashbrow. *Baglin v. Cusenier*, 221 U. S. 580, 31 Sup. Ct. 669, 55 L. Ed. 863. There is also no evidence of nonuser by appellant. He used the trade-mark contin-

uously from the time he entered the field in 1912 until the injunction was issued in this cause.

[5] Appellee also claims that appellant was guilty of laches, because of his failure to bring suit to establish his common-law rights under his trade-mark. The evidence shows that appellant learned some time in 1916 that Lash-Brow-Ine was on the market. He testified that he wrote a letter to appellee, calling his attention to the matter. In November, 1918, appellant again notified appellee that he was infringing appellant's trade-mark, and of his intention of bringing suit for infringement. It was about 2 years from the time that appellant first learned about the use of his trade-mark by appellee until litigation was begun. Litigation, especially patent and trade-mark litigation, is expensive, and we do not think that the delay in this case should bar appellant from asserting his rights in this action. The Supreme Court of the United States, in *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526, held that mere delay in bringing suit to restrain infringement of a trade-mark, while it might preclude recovery for prior infringement, would not defeat the right to an injunction against future infringement. In the cases where laches has been held to bar the right of action, it has extended over a greater period than 2 years, and in the case of *Saxlehner v. Eisner*, supra, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60, there was a delay of 20 years. In *Rahtjen's American Composition Co. v. Holzapfel's Composition Co.*, 101 Fed. 257, 41 C. C. A. 329, it was held under the facts in that case that a delay of 8 years in bringing suit to restrain infringement would not bar complainant's right to relief. In the case of *Peter H. Fahrney & Sons Co. v. Ruminer et al.*, 153 Fed. 735, 82 C. C. A. 621, plaintiff's laches was held not to be a defense to its right to an injunction restraining defendant's further misconduct. To the same effect is *Eagle White Lead Co. v. Pflugh* (C. C.) 180 Fed. 579.

[6] Appellant's failure to register his trade-mark before that of appellee in no way affects appellant's rights. Neither does the registration of appellee's trade-mark confer a right to infringe that of appellant. *Glencove Mfg. Co. v. Ludeling* (C. C.) 22 Fed. 823; *Brower v. Boulton*, 58 Fed. 888, 7 C. C. A. 567; *Revere Rubber Co. v. Consolidated Hoof Pad Co.* (C. C.) 139 Fed. 151; *United Drug Co. v. Rectanus Co.*, 248 U. S. 90, 39 Sup. Ct. 48, 63 L. Ed. 141.

[7] It is further insisted that appellant made certain misrepresentations in regard to his business and the sale of his goods, which bars him from relief. One of these misrepresentations is that on certain of his advertising matter appellant used the words "Trade-mark, reg. U. S. Pat. Off.," and that he issued a certain booklet in which was printed, "Copyright Lashbrow Laboratories Company." Appellant's excuse for this is that he had applied for registration of the trade-mark, which had been refused on the previous trade-mark of appellee; that his understanding was that, the application for registration having been made, he had the right to use these words. This is a mistake that might be made by a layman, and we do not think that it was such a misrepresentation that would in any way injure the public or affect the rights of the public. *Solis Cigar Co. v. Pozo*, 16 Colo.

388, 26 Pac. 556, 25 Am. St. Rep. 279; *M. B. Fahey Tobacco Co. v. Senior* (D. C.) 247 Fed. 809; *Wormser v. Shayne*, 111 Ill. App. 556.

It is further insisted by appellee that appellant should be barred from equitable relief for the reason that he referred in his advertisement to Lashbrow as of two qualities, "Natural Growth" and "Dark Growth." The preparation that was referred to as "Dark Growth" contained charcoal, and appellant claimed he never intended that this would create a dark growth, but, as he testified, was intended to induce a natural growth and at the same time darken the color of the eyebrows and lashes. He further testified that the dark growth—"is a preparation to stimulate the growth of eyebrows, and at the same time to darken their color. I claim that my preparation will darken light eyebrows, positively so; that they will keep their color, I do not claim. * * * We do not advertise that it produces a dark growth."

There was no doubt some puffing in regard to the dark growth, but it did not amount to fraud upon the public. Nims on Unfair Competition and Trade-Marks, § 404. We are of the opinion that it is not shown that appellant's preparation is so inferior as to bar his right to relief. The chemist who testified in regard to its composition did not claim that it was dangerous for the purpose intended. He did testify that, if it was not applied according to directions and got into the eye, it would irritate the eyelids, on account of the insoluble material which he found in the preparation. In opposition to this evidence the appellant called an expert witness, an oculist of 25 years' practice in St. Louis, who testified that the salve or compound made up of beeswax and vaseline and powdered willow carbo-lignite, which was the compound of appellant's preparation, when applied to the eyebrows and eyelashes, could not injure the eyes. Appellant also testified that he had never had any complaint in regard to any injurious effect from the use of Lashbrow of either color. As between appellant and appellee, there can be no question as to who was the first to adopt the trade-mark. In the case of *United Drug Co. v. Rectanus Co.*, supra, 248 U. S. 90, 39 Sup. Ct. 48, 63 L. Ed. 141, the Supreme Court said:

"Undoubtedly, the general rule is that, as between conflicting claimants to the right to use the same mark, priority of appropriation determines the question. See *Canal Co. v. Clark*, 13 Wall. 311, 323; *McLean v. Fleming*, 96 U. S. 245, 251; *Manufacturing Co. v. Trainer*, 101 U. S. 51, 53; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 463."

[8, 9] We are also of the opinion that there is such a similarity between the appellant's trade-mark and that of appellee that the trade-mark of appellee clearly infringes that of appellant. The following have been held to be infringements: In *Rowley v. Houghton*, 2 Brewst. (Pa.) 303, "Heroine" and "Hero"; *Fairbanks Co. v. Luckel et al.*, 102 Fed. 327, 42 C. C. A. 376, "Gold Drop" and "Gold Dust"; *Little v. Kellan* (C. C.) 100 Fed. 353, "Sorosis" and "Sartoris"; *Burnett v. Phalon*, *42 N. Y. 594, "Cocaine" and "Cocaine"; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* (C. C.) 32 Fed. 94, "Celluloid" and "Cellonite." It is sufficient that the infringing trade-mark is calculated to deceive ordinary purchasers, using ordinary caution. *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, 25 L. Ed. 993.

In view of the facts appearing in the record, we think the decree below must be reversed, and the case remanded, with directions to enter a decree enjoining the appellee from further use of the trade-mark Lash-Brow-Ine, but, in view of the record, we do not think there should be an accounting.

Reversed.

PRENTISS v. EISNER, Internal Revenue Collector.*

(Circuit Court of Appeals, Second Circuit. June 16, 1920.)

No. 189.

1. Taxation ⚡856—Death duties generally levied on right to transmit estate.

Death duties, by whatever name they may be known and by whatever means collectible, are as a general rule levied on the right to transmit the estate, not on the right to take the estate transmitted.

2. Courts ⚡370—Construction of state statute by United States Supreme Court, not modified by state court, is binding.

The construction by the United States Supreme Court of the New York Inheritance Tax Law then in force, which has not been disclaimed by any subsequent decision of the New York Court of Appeals, is binding as to the construction of a later tax law having no substantial difference from the one there construed.

3. Internal revenue ⚡7—Taxation ⚡856—New York transfer tax is levied on estate, and not deductible from income.

The New York Transfer Tax Act, under which the tax is a lien on the estate payable by the executor or administrator but deducted from the legacies, is a tax on the right to transmit property, not a tax payable by the legatee, and therefore no deduction for the payment of such tax can be made in the income tax return pursuant to Act Oct. 3, 1913, § 2.

In Error to the District Court of the United States for the Southern District of New York.

Action by Elizabeth S. Prentiss against Mark Eisner, Collector of Internal Revenue, Third District of New York. Judgment for defendant (260 Fed. 589), and plaintiff brings error. Affirmed.

Sullivan & Cromwell, of New York City (Eustice Seligman and Philip L. Miller, both of New York City, of counsel), for plaintiff in error.

Francis G. Caffey, U. S. Atty., of New York City (Vincent H. Rothwell, Sp. Asst. U. S. Atty., of New York City, of counsel), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. This is an action to recover from the defendant the sum of \$7,432.88, with interest, which amount the plaintiff alleges she was wrongfully compelled to pay to the defendant as collector of internal revenue. It appears that the plaintiff and her then husband, since deceased, filed with the defendant a joint return of their net income for the year 1913, pursuant to the act of Congress approv-

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 15, 65 L. Ed. —.

ed October 3, 1913. U. S. St. at L. vol. 38, pt. I, c. 16, § II, p. 166. The aforesaid act of Congress, in paragraph B, p. 167, provided as follows:

"That, subject only to such exemptions and deductions as hereinafter allowed, the net income of a taxable person shall include gains, profits, and income * * * including * * * but not the value of property acquired by gift, bequest, devise, or descent. * * *

"That in computing net income for the purpose of the normal tax there shall be allowed as deductions: * * * Third, all national, state, county, school, and municipal taxes paid within the year, not including those assessed against local benefits."

And in paragraph D, p. 168, it provided as follows:

"The said tax shall be computed upon the remainder of said net income of each person subject thereto, accruing during each preceding calendar year ending December thirty-first: Provided, however, that for the year ending December thirty-first, nineteen hundred and thirteen, said tax shall be computed on the net income accruing from March first to December thirty-first, nineteen hundred and thirteen, both dates inclusive, after deducting five-sixths only of the specific exemptions and deductions herein provided for."

It appears, too, that in the year 1913 the plaintiff inherited a portion of her father's estate, and that on the inheritance thus received by her the state of New York assessed against her an inheritance tax of \$259,805.71, which amount she paid on December 11, 1913. The plaintiff, in making her income return under the act of Congress, included therein as a deduction five-sixths of the inheritance tax which she had paid to the state of New York, which amounted to \$216,504.75. This deduction was not allowed by the Commissioner of Internal Revenue, and he levied and assessed against her an additional tax of \$7,287.14.

Thereafter the plaintiff, acting, as she alleges, under duress, paid the additional tax, which with interest, amounted to \$7,432.88. Thereupon she instituted this action to recover back the amount so paid. The complaint was demurred to, upon the ground that it did not state facts sufficient to constitute a cause of action. The court below sustained the demurrer, and dismissed the complaint.

The question of law thus presented is whether the payment by the plaintiff of the inheritance tax to the state of New York was a proper deduction from her income tax return for the year 1913. That is the sole question herein involved. The plaintiff's contention is that the inheritance tax which she paid to the state of New York was a tax paid to a state, and therefore under act of Congress the plaintiff was entitled to make the deduction of five-sixths of the amount so paid in making her income return.

The Commissioner of Internal Revenue, in making the ruling to which reference has been made, stated that:

"A collateral inheritance tax levied under the laws of the state of New York, being, as it is, a charge against the corpus of the estate, does not constitute such an item as can be allowed as a deduction in computing income tax liability to either the estate or a beneficiary thereof."

The District Judge, in sustaining the demurrer, stated that he did not regard the New York Transfer Tax Act "as imposing a tax upon the

plaintiff's right of succession which is deductible in her income tax return." The material provisions of the New York Transfer Tax Act (Consol. Laws, c. 60) may be found in the margin.¹

The right to dispose of property by will is statutory. The matter has always been recognized as within the legislative control. In the reign of Henry II (1154-1189) a man's personal property was, at his death, divided into three equal parts, if he died leaving a wife and children; one part went to his wife, another to his children, and only the remaining third could be disposed of by his will. And, at least after the establishment of the feudal system, and prior to the enactment of the statute of wills, 32 Henry VIII, the right to make a will of real estate was not known to the English law.

There has been and still is a difference of opinion among courts as to the exact nature of an inheritance tax. It is generally agreed that such a tax is not upon the property or money bequeathed. The dispute is over the question whether the tax is laid on the privilege of transmitting property or on the privilege of receiving the property so transmitted. The right to transmit and the right to receive are distinct, and each is alike under the legislative control. The distinction between

¹The New York act reads as follows, in section 220 of article X: "A tax shall be and is hereby imposed upon the transfer of * * * property * * * to persons or corporations in the following cases: * * * (1) When the transfer is by will or by the intestate laws of this state; * * * (4) when the transfer is * * * by deed * * * intended to take effect in possession or enjoyment at or after such death. * * * The tax imposed hereby shall be upon the clear market value of such property, at the rates hereinafter prescribed."

Section 224 reads as follows: "*Lien of Tax and Collection by Executors, Administrators and Trustees.*—Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the executors, administrators and trustees of every estate so transferred shall be personally liable for such tax until its payment. Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such executor, administrator or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom and shall pay over the same to the state comptroller or county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the executor or administrator or trustee, and the tax shall remain a lien or charge on such real property until paid; and the payment thereof shall be enforced by the executor, administrator or trustee, in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require."

the right to transmit and the right to receive is important, and upon the distinction depends the right to deduct or not to deduct the amount of the tax in the income return submitted to the federal government.

The Circuit Court of Appeals in the Third Circuit has recently decided *Lederer v. Northern Trust Co.*, 262 Fed. 52. In that case the question arose as to the right to deduct a tax paid under the Collateral Inheritance Tax Act of the state of Pennsylvania. The answer to be given to that question depended upon whether the Pennsylvania tax was an estate tax, the burden of which was imposed upon the estate of a decedent, as claimed by the executors, or was a legacy tax, the burden of which was imposed upon the legatee or beneficiary. It happened that the Supreme Court of Pennsylvania in *Jackson v. Myers*, 257 Pa. 104, 101 Atl. 341, L. R. A. 1917F, 821, had squarely decided that the collateral inheritance tax of that state was not levied upon an inheritance or legacy, but upon the estate of the decedent, and had held that what passed to the legatee was simply the portion of the estate remaining after the state had been satisfied by receiving the tax. The Circuit Court of Appeals held that the decision of the Supreme Court of Pennsylvania, construing the inheritance tax law of that state, was binding on the federal courts, and that inasmuch as the tax was held by that court as a tax on the estate, and not a tax on the inheritance, the amount of the tax so paid was properly deductible in computing the net estate under the act of Congress of September 8, 1916. Under a like state of facts we should have no difficulty in reaching a like conclusion. But the case with which we are dealing presents a different question, involving as it does the Tax Law, not of Pennsylvania, but of New York.

[1] In 1900 the Supreme Court in *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, had under consideration a tax imposed under the War Revenue Act of June 13, 1898 (30 Stat. 448). The opinion in that case is exhaustive and occupies about 70 pages. It deals with the subject of death duties and sustains the constitutional right of Congress to impose death duties. In the course of the opinion, which was written by Justice (now Chief Justice) White, it was said:

"Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them—that is, in the Roman and ancient law, in that of modern France, Germany, and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several states of the Union—the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

It thus appears as the opinion of the court that in general death duties are imposed on the power to transmit. However, the immediate question with which we are now concerned is whether the so-called

tax which the New York law has imposed, and which is herein involved, is a tax upon the power to transmit, or is laid on the power to receive.

[2] In 1889 a testator resident within the state of New York died, and devised and bequeathed all his estate, both real and personal, to the government of the United States. The Surrogate's Court imposed an inheritance tax upon the personal property. The case was taken on appeal to the General Term of the Supreme Court of New York, and later to the New York Court of Appeals, by each of which it was affirmed. It was then taken to the Supreme Court of the United States, by which it was in like manner affirmed. The question was whether the personal property bequeathed to the United States was subject to an inheritance tax under the laws of New York. The Supreme Court held the property to be subject to the tax. *United States v. Perkins*, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287. In the course of its opinion the court said:

"In this view, the so-called inheritance tax of the state of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the state has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee."

And the court went on to say:

"That the tax is not a tax upon the property itself, but upon its transmission by will or by descent, is also held, both in New York and in several other states."

We find no case in the subsequent decisions of the New York Court of Appeals in which that court disclaims the construction placed by the Supreme Court of the United States on the New York decisions, or in any way qualifies or overrules the proposition that the "tax" under the New York law is not one upon the property, but is one upon the right to dispose of it by will or by descent. In the absence of such a decision it seems to be our duty to follow the law as it is laid down in the *Perkins* Case, unless there can be found in the New York statute in force when the present tax was laid some substantial difference from the statute in force when that case was decided in the particular now being considered. If such a difference exists, we have failed to detect it, and learned counsel have failed to point out in what it consists.

The New York Court of Appeals in 1919, in *Matter of Watson*, 226 N. Y. 384, 399, 123 N. E. 758, 763, in discussing a provision in the New York Inheritance Tax Law (section 221b, c. 60, Consol. Laws) imposing a tax upon the transfer of property at the time of death which had not theretofore paid any tax, local or state, said:

"The beneficiary has no claim to the property of an ancestor except as given by law, and, if the state has a right to impose a tax at all upon the passing of property, the transferee takes only what is left after the tax is paid."

The opinion quotes (226 N. Y. at page 396, 123 N. E. 762) from the opinion of the Supreme Court of the United States in the Perkins Case, *supra*, that under the New York law the inheritance tax is not upon the property, but upon the right to dispose of it. There is not one word of criticism, not one word of dissent, and not the slightest suggestion of disapproval of that proposition anywhere in the opinion.

In *Matter of Penfold*, 216 N. Y. 163, 167, 110 N. E. 497, 498 (Ann. Cas. 1916A, 783), the New York court declares what it had several times before stated, that "the transfer tax is not a tax upon property but upon the right of succession to property." The language of the statute is that the tax is "due and payable at the time of the transfer"; that is, at the death of the decedent. It accrues at that time.

[3] Now a succession tax is a tax upon a transfer of property in general, and as such is distinguishable from a legacy duty, which is a tax upon a specific bequest. Under the New York law the succession tax creates a lien upon the estate of the decedent at the moment of his death. The right of the state to the amount of this lien attaches at that time, and it must be paid before the transferee, legatee, or devisee ever gets anything, and the executor or administrator is personally liable for the tax until it has been paid. Under such a law we do not see that the transferee pays the tax. In stating this conclusion we have not overlooked what was said in the *Matter of Gihon*, 169 N. Y. 443, 447, 62 N. E. 561, 562, where it is said that—

"Though the administrator or executor is required to pay the tax, he pays it out of the legacy for the legatee, not on account of the estate. The requirement of the statute that the executor or administrator shall make the payment is prescribed to secure such payment, because the government is unwilling to trust solely to the legatee."

The fact, however, remains that if a legacy left by a will is \$10,000, and the executor has paid to the state on its account a tax of \$500, and then has turned over to the legatee \$9,500, the legatee has received, not \$10,000, but \$9,500, and the legatee has been enriched only to the extent of the amount which he has himself received, and he has not paid the tax, nor has it been paid by his authority, nor by any one representing him. The payment has been made by the personal representative of the deceased, and in making it he has acted under authority of the statute. As was said by Judge Gray in *Matter of Swift*, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709:

"What has the state done, in effect by the enactment of this tax law? It reaches out and appropriates for its use a portion of the property at the moment of its owner's decease, allowing only the balance to pass in the way directed by the testator, or permitted by its intestate law."

We admit that the New York cases on the subject of taxable transfers are confused and not always clear and consistent. But, until the New York Court of Appeals authoritatively states that the law of New York is not what the Supreme Court of the United States said it was in the Perkins Case, this court has no alternative but to hold that the New York Transfer Tax Act does not impose a tax on a legatee's right of succession which is deductible in her income tax return. The legacy which the plaintiff herein received under the will of her father

did not become her property until after it had suffered a diminution to the amount of the tax, and the tax that was paid thereon was not a tax paid out of the plaintiff's individual estate, but was a payment out of the estate of her deceased father of that part of his estate which the state of New York had appropriated to itself, which payment was the condition precedent to the allowance by the state of the vesting of the remainder in the legatee.

Judgment affirmed.

PRODUCERS' COKE CO. v. McKEEFREY IRON CO.*

(Circuit Court of Appeals, Third Circuit. July 13, 1920. Rehearing Denied. September 16, 1920.)

No. 2517.

1. Sales ⇨71(1)—Contracts of dealer for sale of coke construed.

Under contracts between plaintiff, a user, and defendant, a dealer in coke, which did not produce, but bought, the coke in which it dealt, for the sale and purchase of coke to be delivered by daily shipments to plaintiff, and providing that, "if there should be a shortage of cars, shipments shall be divided from time to time in fair proportion on all orders," defendant *held* bound, during a time of car shortage, to make deliveries of all coke it then had wherever obtained, in fair proportion on its outstanding contracts, and its purchase and resale of coke in the open market on spot orders, while shipping to plaintiff only its proportion of that received on covering contracts it had made with producers, *held* a violation of the contracts.

2. Sales ⇨83—Construction of contract by parties as to duty to furnish cars governs.

A provision of contracts for the sale and purchase of coke, to be delivered "f. o. b. open top cars ovens," *held* not to require purchaser to furnish cars at the ovens, where during the several months of performance the cars were provided by seller with no demand on the purchaser for cars, and where seller was not a producer, but bought its coke from different producers, and no notice was given purchaser from what ovens shipments were to be made.

3. Sales ⇨176(6)—Payment in ignorance of facts does not estop to allege breach of contract.

The rule that a voluntary payment made by a purchaser for a commodity claimed by the seller to be in fulfillment of the contract concludes the purchaser *held* not applicable, where a seller of coke claimed that short deliveries were excused under the contract because of a shortage of cars, and the purchaser did not discover until after making payment that the seller had diverted shipments to other purchasers in violation of the contract.

Buffington, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action at law by the McKeefrey Iron Company against the Producers' Coke Company. Judgment for plaintiff, and defendant brings error. Affirmed.

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 147, 65 L. Ed. —.

W. J. Brennen, of Pittsburgh, Pa., and S. J. Morrow, of Uniontown, Pa. (W. J. Sturgis, of Uniontown, Pa., of counsel), for plaintiff in error.

Reed, Smith, Shaw & Beal, of Pittsburgh, Pa. (William M. Robinson and Samuel McClay, both of Pittsburgh, Pa., of counsel), for defendant in error.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

WOOLLEY, Circuit Judge. McKeefrey Iron Company, a Delaware corporation (plaintiff below), operated a furnace at Leetonia, Ohio. Producers Coke Company, a Pennsylvania corporation (defendant below), was a dealer in coke at Uniontown, Pennsylvania. The Coke Company had no ovens of its own and therefore did not produce coke; it bought coke from producers and sold it to coke users both on commission and its own account. The character of its business has a decisive bearing on this controversy.

In 1916 the parties made three contracts for the sale of Standard Connellsville Furnace Coke, differing in no important respect except as to quantity, price and periods of delivery. The Coke Company made monthly deliveries throughout the life of the contracts and the Iron Company made monthly payments. During the running of the contracts several things happened: First, a car shortage; second, a substantial rise in the price of coke; and third, reduced deliveries by the Coke Company. After the expiration of the last contract, the Iron Company brought this suit to recover from the Coke Company damages for its failure to deliver the full quantity contracted for. The verdict was for the Iron Company. To the judgment entered, the Coke Company sued out this writ of error.

[1] This action arose out of opposite interpretations which the parties placed upon the contracts and is brought here to review still another construction which the trial judge gave them in his rulings on evidence and instructions to the jury.

As the controlling provisions of the three contracts are in the main alike, a recital of the first contract will serve all purposes of this discussion. It is as follows:

**Producers' Coke Company
First National Bank Building**

Contract No. 654.

Uniontown, Pa., July 26th, 1916.

McKeefrey Iron Company, Leetonia, Ohio, Agrees to Buy:

and

Producers' Coke Company, Sales Agents, Uniontown, Pa., Agrees to Sell:
Material—Standard Connellsville Furnace Coke in open top self-clearing cars.

Quantity—Eight to Nine Thousand Tons per month August and September, 1916, and Four to Five Thousand Tons per month October, November and December, 1916.

Rate of Shipments—Approximately equal daily.

Price—Two Dollars and Fifty Cents (\$2.50) per net ton f. o. b. open top cars ovens.

Terms—Net cash the 20th of month for preceding month's shipment. Railroad weights at shipping point to govern settlement.

Ship to McKeefrey Iron Company, Leetonia, Ohio.

Each month's delivery is to be considered and treated as a separate and independent contract.

In case of strike or combination of workmen, accidents or any other cause or causes unavoidable or beyond their control, causing a stoppage or partial stoppage of the works of either the producer or of the consumer of the coke hereby contracted for, or unavoidable delay in shipment, delivery of material hereby contracted for may be partially or wholly suspended (as the case may be) during the continuance of such interruption; such suspension, however, shall not in any wise invalidate this contract, but on resumption of work the delivery shall be continued at the specified rate, and no liability shall be incurred by either buyer or seller for damages resulting from such suspension of shipments.

It is understood and agreed that if there should be a shortage of cars, shipments shall be divided from time to time in fair proportion on all orders.

In Duplicate.

Accepted: McKeefrey Iron Company,

By N. J. McKeefrey, Secy.

Accepted: Producers' Coke Co., Sales Agents,

By C. E. Lenhart, Vice President.

It seems from the course of this litigation that these contracts contain controversial elements in considerable number and variety. Indeed, counsel for both sides evidently regarded this case, as bearing upon transactions between purchaser and coke dealer, to be of importance to the industry equal to the case of *McKeefrey v. Connellsville Coke & Iron Co.*, 56 Fed. 212, 5 C. C. A. 482, bearing upon transactions between purchaser and coke producer, and believed that the decision in this case will, as between purchaser and dealer, constitute an authoritative rule of conduct as decisive as that pronouncement was of transactions between purchaser and producer. Upon first view we too so regarded the case, but upon second view it appears that this case is not of that rare and exceptional kind which arises but occasionally, in which radically new principles are found to be involved and from which new rules emerge; but is like most cases in that its decision rests upon its own facts and extends little beyond its own area. Therefore, in order that the precise scope of this decision may not be misunderstood, we shall endeavor very carefully to state the true questions involved. To do this we find it necessary first to rid the case of some confusion by stating what questions are not involved.

The Iron Company claimed under its interpretation of the contracts that the Coke Company's promise to make monthly deliveries of coke in named amounts required it to make up by increased deliveries in one month any shortage in deliveries of a previous month and in the end to deliver the full tonnage contracted for, notwithstanding the clause in the contracts that "Each month's delivery is to be considered and treated as a separate and independent contract." The trial court ruled against this construction, and as the Iron Company did not appeal, that question is not before this court.

The Iron Company further contended that the undertaking of the Coke Company to deliver coke in the quantities and periods named

was absolute and unconditional; and that, being a dealer in coke, not a producer of coke, the Coke Company's liability to make full deliveries, monthly and in the aggregate, was not limited or otherwise affected by the car shortage clause of the contracts. The court did not sustain this contention. As the Iron Company did not appeal, that construction also is not before us for decision.

What the court did was not to construe the contracts with reference to the absolute unconditional liability of the Coke Company to make deliveries, or with reference to the Coke Company's liability to make deliveries as its supply was curtailed by car shortage, but simply to hold the Coke Company liable to divide all coke it had actually in its possession or actually within its control (except coke it handled as agent) "in fair proportion on all orders" according to the letter of the contracts; that is, on all contracts on hand when the critical car shortage situation arose and during its continuance. It is this construction of the contracts which is the main question brought here for review, and which, accordingly, limits the range of our inquiry and the scope of our decision. Whether error is involved in this construction depends not upon the words of the contracts alone but upon the conduct of the parties under them. What the Coke Company did was this:

When it entered into the three contracts with the Iron Company, it at once entered into covering contracts with three coke producers for coke sufficient, if delivered, to meet all contract requirements. Being a large dealer in coke, buying and selling indiscriminately throughout the trade, the Coke Company did not intend to restrict its deliveries to the Iron Company to coke received under its covering contracts. In fact, it delivered to the Iron Company only about 5,000 tons of coke procured under such contracts; its remaining deliveries being made of coke gotten from twenty-five other plants.

In the beginning conditions were normal and deliveries full. Presently there developed a car shortage and a consequent reduction in deliveries to the Coke Company on its covering contracts, and reduced deliveries by the Coke Company to the Iron Company under the contracts in suit. The Coke Company excused its reduced deliveries because of the shortage in cars and justified them under the car shortage clause of the contracts upon the representation that its deliveries corresponded with the car supply as indicated by the percentages daily given out by the carriers. Whether deliveries by a dealer as distinguished from deliveries by a producer on the percentage of car shortage is or is not a valid compliance with a dealer's contract containing a car shortage clause is still another question not in this case, because the Coke Company did something more.

When the shortage in cars came, the Coke Company, procuring coke not by production but always by purchase, continued to receive some coke on its covering purchases and to buy coke wherever it was available just as before. But instead of dividing among its existing contracts coke thus newly purchased, it sold it to others in the open market for cash and immediate delivery. For its right to do this, the Coke Company claimed that, under car shortage conditions, it bought

coke and sold it "spot"; that coke which it bought for spot sales was not available for apportionment among and delivery under its running contracts; and that coke applicable to these contracts was only such as was otherwise available under the conditions. Hence the pertinency of the court's ruling that what coke the Coke Company had—howsoever gotten and without regard to its proposed disposition,—was available for delivery and should have been delivered in part upon the contracts in suit under the car shortage clause which required coke, in such event, to "be divided from time to time in fair proportion on all orders." Realizing some force in these words of the contracts, the Coke Company maintained that spot sales of coke were in substance sales on orders, and in estimating the "fair proportion" of coke deliverable under the contracts in suit spot sales or orders for immediate delivery should be included. But the court ruled that the words "all orders" include all contracts for delivery except spot sales made after the stringency of car shortage arose, and of course except sales made as agents for producers; and that, if the jury found the Coke Company had in its possession or control coke which could have been delivered to the Iron Company under the contracts in suit but was diverted to deliveries upon spot sales, they should render a verdict for the Iron Company based on the difference between what would have been a ratable distribution of the coke in hand on running orders and the distribution actually made.

Whether the court committed error in so charging the jury depends upon the true construction of the contracts, not in their entirety, but to the extent involved in the instructions. What the parties meant by their contracts is, under familiar canons of construction, to be gathered from the words they used, the subject matter with which they were dealing, and the situation, present and prospective, which they contemplated. If these were contracts between purchaser and producer for the sale of coke, we apprehend all would agree that the contracts would be interpreted and conduct under them would be controlled by the decisions in *McKeefrey v. Connellsville Coke & Iron Co.*, 56 Fed. 212, 5 C. C. A. 482; *Jessup & Moore Paper Co. v. Piper* (C. C.) 133 Fed. 108; *Haff v. Pilling* (C. C.) 134 Fed. 294. But these are contracts by a dealer for the sale of coke to a purchaser; that is, contracts by one, who, not producing coke, had to purchase it from producers in order to deliver it under sales to others. Analyzing the contracts discursively, without construing any part of them not involved in the rulings of the trial court assigned as error, it would seem that down to the clause providing against strikes and other contingencies (with which we are not here concerned) they constitute an absolute and unconditional sale of coke at fixed prices and fixed periods of delivery. As the Coke Company did not have the coke when it sold it, and as it did not produce coke, it had to buy it before it could deliver it. So far as the contracts show the Coke Company was free to procure coke to meet these contracts in any way it chose; that is, by entering into covering contracts, thereby establishing once and for all its profit in the transaction; or by postponing purchases until the periods of delivery approached and then buying it

from the market, thereby speculating as to its profit. Whether the Coke Company covered immediately or deferred its purchases was its affair; and whichever it did, it also would seem, would not change its liability to make deliveries according to the terms of its contracts. This would appear to be the meaning of the parties as disclosed by their agreement down to the strike clause; or, for our purpose, down to the car shortage clause. By this clause—the last in the contracts—the parties said:

"It is understood and agreed that if there should be a shortage of cars, shipments shall be divided from time to time in fair proportion on all orders."

This clause in the contracts had a meaning when written; it also had a bearing on all that happened afterward. If the Coke Company covered (as it did in this case), or if it did not cover and had to go upon the market in a period of car shortage to get coke with which to carry out the contracts in suit, the car shortage clause would, doubtless, require construction in order accurately to determine whether the Coke Company had made deliveries according to its undertakings. In either instance the Coke Company's ability to get coke under its covering contracts or on the market as limited by the car supply might conceivably affect its liability to make full deliveries under its contracts, and might, accordingly, reduce its liability to correspond with the car shortage percentages announced from time to time by the carriers. But however that may be, it is not involved in this case. The Coke Company *got* coke during a car shortage. It got it from two sources: First, under its covering contracts; and second, on the market. *Having* coke, the learned trial judge said in effect: It is not necessary to construe the car shortage clause in order to exonerate the Coke Company for failure to make full deliveries, for there is here involved no question of the Coke Company's inability to get coke because of lack of cars. It had coke; it had it in large quantities; and it had it in cars.

Therefore, having coke and having it on wheels, the learned trial judge limited his construction of the car shortage clause to the Coke Company's liability as declared therein to divide the coke *which it actually had* "in fair proportion on all orders." But the Coke Company said (favorable to it as this instruction was), the words "all orders" in the contracts contemplated spot sales as orders, quite as well as running contracts, among which such coke on hand should be divided. The trial judge found no expression in the clause that denoted this intention and declined to find such intention by implication, holding that an agreement so interpreted would put it within the power of the Coke Company, by increasing its spot sales and making deliveries thereupon from its fixed supply, to pare down deliveries under the contracts in suit to negligible amounts, conduct clearly not contemplated by the parties and clearly inhibited in like transactions between purchaser and producer under the decisions in *Jessup & Moore Paper Co. v. Piper and Haff v. Pilling*, *supra*.

Turning to the evidence giving by tabulation all coke shipments of the Coke Company during the car shortage period in controversy,

we take one item as illustrative of the others. For one month the table shows the following:

1916	Contract Coke Shipped	Spot Coke Shipped
September	112,024.21 tons	11,384.20 tons

The total of these items is 123,408.41 tons of coke. Therefore, in that month the Coke Company had in cars coke in the amount of this total. By selling and shipping 11,384.20 tons spot, the Coke Company diverted that tonnage from contract deliveries and in the same measure reduced deliveries on the contracts in suit. In other words, if the Coke Company had not sold this tonnage spot, it would have had it to apply to its running contracts; but by selling and delivering it spot, it to that extent diminished its capacity to make deliveries on its running contracts. Such action we find, in accord with the learned trial judge, was not intended or agreed upon either expressly or impliedly by the contracting parties. The ruling of the learned trial judge on offers of evidence and his instructions to the jury in this regard were without error.

The evidence of deliveries made on spot sales was quite sufficient to sustain the verdict of the jury under the instructions given.

[2] The remaining assignments of error of sufficient substance to merit comment are three: The first relates to the provision of the contracts:

"Price—Two Dollars and Fifty Cents (\$2.50) per net ton f. o. b. open top cars ovens,"

—and is directed to the court's refusal to charge the defendant's point that:

"Under each of the contracts in suit it was the duty of the plaintiff to furnish cars for the shipments of the coke thereby purchased, and if you believe from the evidence that the plaintiff furnished no such cars, your verdict must be for the defendant."

In support of this contention, the Coke Company relies upon a construction which a number of courts, particularly those of Pennsylvania, have placed upon the words "f. o. b cars." It claims that by settled judicial construction this phrase imposes the duty to furnish cars upon the vendee. That such is the general rule was recognized by this court in *Davis v. Alpha Portland Cement Co.*, 142 Fed. 74, 73 C. C. A. 388. Of course, the meaning of the phrase is what the parties intended, and it follows, as recognized in the *Davis Case*, that where their intention can be gathered from the terms of the contract, or from the interpretation which the parties themselves have given it, or from other circumstances indicating the parties intended something else, the courts will, as of course they must, construe the contract accordingly. Regarding the contracts as the parties contemporaneously interpreted them, it is clear that neither the Coke Company nor the Iron Company expected cars to be furnished by the latter, for throughout the entire life of the three contracts the Coke Company supplied the cars and made no request of the Iron Company for cars. True, an officer of the Coke Company did say to an officer of the Iron Company in explaining

the short deliveries, that the plants couldn't get the cars and if the Iron Company could get cars, it could have the coke. But this was not a request for cars nor an indication that the Coke Company regarded it to be the duty of the Iron Company to supply cars. Looking at the situation generally, it is clear that such was not the Iron Company's undertaking. The Iron Company knew that the Coke Company was not a producer and that it had to buy and did buy coke from many different plants (in number actually twenty-five) to carry out its contracts. The Iron Company, it may be assumed, did not know from what plants the coke was coming. Certainly it was not told to send cars to any particular plants. We are satisfied that in this situation the parties did not intend when entering into the contracts to impose a duty upon the Iron Company impossible for it to perform. Regarding the words of the contracts alone, it is equally clear that the duty to supply cars devolved on the Coke Company, for if it was the duty of the Iron Company to supply them, then the undertaking of the Coke Company to divide shipments in fair proportion on all orders in time of car shortage would be superfluous and meaningless. If the Iron Company had to furnish all cars, there would be nothing for the Coke Company to divide so far as the Iron Company was concerned, because the Coke Company's obligation then would be to deliver only so much coke as the Iron Company would supply cars for.

[3] Referring to the terms of the contracts calling for daily shipments and monthly settlements, and providing that each month's delivery shall constitute an independent contract, the Coke Company presented the following point:

"If you find from the evidence that the plaintiff had notice from the defendant, that defendant claimed the contract fully filled by shipment of a reduced amount, occasioned by a shortage of cars, and refused to ship the remaining tonnage named in the contract, due in any one month, and the plaintiff thereafter paid for coke shipped, such payment was voluntary and cannot be recovered back."

The court refused the point. The evidence to which this point relates would have sustained the finding prayed, had the court charged the point. It is conceded that the Iron Company made monthly payments for previous monthly deliveries and that the Coke Company claimed the contracts filled by the reduced shipments and refused to ship the remaining tonnage, not because of a difference of views as to the terms of the contracts which we regard to be the main question in this case, but because of a claim then asserted by the Iron Company, and later denied by the court, that the contracts were absolute undertakings for full deliveries and were continuing contracts requiring short deliveries in one month to be made up by large deliveries in another.

The Iron Company while conceding the rule relied upon (set out in *Armstrong v. Latimer*, 165 Pa. 398, 30 Atl. 990, and other cases) holds that it is not applicable here because one of the elements of the rule is, that money thus paid must have been paid with full knowledge of all the facts and without any fraud, duress, or extortion. That this is the general rule there can be no doubt. 38 Cyc. 1298,

and cases there cited. But the evidence shows that the Iron Company made its contract payments upon the Coke Company's assurance that because of car shortage the Iron Company was receiving a fair proportion of shipments as provided in the contracts. This involved not the reduction of coke deliveries because of car shortage alone but the division of coke in fair proportion on all orders. It did not come to the knowledge of the Iron Company until after all payments had been made,—indeed, it developed for the first time at the trial of the case,—that the Coke Company had diverted a portion of its coke supply to spot sales and had divided only the balance on orders of the class of the contracts in suit. On this evidence the rule falls, and the Iron Company is not precluded by what otherwise might have been voluntary payments to assert and recover on a breach of the contracts properly construed.

The remaining assignment of error concerns the ruling of the court on an offer of evidence which in turn involves the particular construction of the contracts we have already discussed. Counsel for the Coke Company asked a witness the following question:

"I want to ask you if you have prepared a schedule showing the percentage of contracts with these other people that you filled during the life of the contracts, including the percentages shipped to McKeefrey."

In support of this question, counsel, addressing the court, said:

"I offer to prove by the witness the amount of the percentage of coke shipped by the Producers Coke Company on these various contracts from any evidence, for the purpose of showing that the distribution going to the McKeefrey Plant on the McKeefrey contract was a fair proportion on all contracts. In other words, they got as large a percentage as they were entitled to get on their contracts *out of the total that we had*; to show that we kept that provision of the contract by which we agreed to make a fair distribution on all orders."

Under objection, the court said:

"In the present state of the proofs, I will have to exclude the offer. I sustain the objection and note an exception for the defendant."

Upon first view this looked like error; but a careful examination of the question asked and offer made, read in connection with the rest of the testimony, shows that what counsel offered to prove, and all he proposed to prove, was the percentage of deliveries made on running contracts without reference to deliveries made on spot sales. As there was no colloquy between counsel and the court,—or, as none appears in the record—we can only surmise the reason which moved the court to exclude the testimony. It is, that, if admitted, the testimony would prove nothing. The offer begged the question; because the evidence if admitted would only show the percentages of shipments made during the car shortage period without showing at all whether the percentages were properly arrived at by dividing shipments "in fair proportion on all orders," excluding spot sales. Hence, this ruling was not affected by error.

After giving this case deliberate and careful consideration, we are of opinion that the learned trial judge had a correct grasp of its intricacies and committed none of the errors charged to him.

The judgment below is affirmed.

BUFFINGTON, Circuit Judge (dissenting). In my judgment, the application to the great coke trade of Pennsylvania of the principle now announced in this case would be, as in the present judgment, to hold that a coke broker's agent who sells for future delivery cannot, during the car shortage periods of the running of the contract, buy any spot coke save at the peril of thereby becoming liable for the difference between the price of such spot coke and the contract price. The grave consequence of such a holding constrains me to respectfully record this dissent.

The present suit was brought by the McKeefrey Iron Company against the Producers' Coke Company, to recover damages for failure to furnish coke on a number of written contracts. Sales of Connellsville coke by coke manufacturing companies to consuming furnace companies are made on written forms of contract such as were used by the parties in this case. That usual form of contract, as will be seen by examination of its entire contents, contemplates that either the manufacturing coke company may be unable to furnish the coke by causes beyond its control, such as strikes, accidents, etc., or that the furnace company may be unable to use the coke by reason of such similar troubles arising in its furnace operation. Therefore, to avoid these impossibilities of shipment from the coke ovens and acceptance at the furnace, the parties provide for the suspension of shipments as noted in the next to the last clause of the contract. In such contract it is moreover recognized that there may be a shortage of railroad cars, and for that car shortage the succeeding clause of the contract provides. It will be understood, of course, that in the usual course of business the coke producer will have other orders from other furnace men, which will cover the entire production of his plant, and in the case of car shortage he equitably prorates his cars among all his orders. This general form of contract is in common use in the coke regions, and the rights and liabilities of the parties were judicially determined many years ago by this court in *McKeefrey v. Connellsville Coke & Iron Co.*, 56 Fed. 212, 5 C. C. A. 482, and have been since acted upon by the trade generally. If the present form of contract were between a coke manufacturer and a furnace company, it could be easily adjusted, but in the present case the form of contract suitable between manufacturer and consumer was used by one who was not a manufacturer, but a mere seller, of coke, and the result is the use of terms which were meant to apply to a different situation. But the terms, whatever they are, are in the contract, and it is the province of the law to construe and apply those terms to a contract made by a seller and not by a producer of coke; and in the final analysis the whole case turns on the construction and practical application of the last clause of the contract, viz.:

"It is understood and agreed that if there should be a shortage of cars, shipments shall be divided from time to time in fair proportion on all orders"

—words easily applicable in case of a manufacturer selling the product of his own plant, but not clear when the seller is not a coke producer.

With the view, therefore, of reasonably ascertaining the true construction of this contract, we look at two things: First, the contract in its entirety, for no contract can be properly construed, save in its entirety; and, second, the situation and surroundings of the parties when they contracted.

Now, taking the contract as a whole and in its entirety, it is an absolute agreement for the sale of a quantity of coke at a fixed price and at fixed times, and, so far as the present suit is concerned, the absolute character of that undertaking is modified and affected only by the provision as to car shortage, which I have quoted. The material is standard Connellsville furnace coke. The quantity is a certain aggregate per month for five consecutive months; the rate of shipment is approximately equal daily shipments, and each month's delivery to be considered as a separate and independent contract. Taking, therefore, say the month of August, 1916, by way of illustration: This contract absolutely bound the seller to ship from 8,000 to 9,000 tons per month during that month, in approximately daily shipments. To make those shipments, it was the duty of the seller to provide cars and deliver the coke f. o. b. in such cars, and in case there was no shortage of cars he was bound to make such deliveries on each day of the month. In case he failed to make such deliveries, he would, of course, be bound for the difference between the contract and the market price for any shortage.

But how about his obligations where there was a shortage of cars? This brings us to the working situation under which this contract was made and had to be fulfilled. Standard Connellsville furnace coke is a well-known subject of sale. It is produced in a limited region, and three great railroad systems furnish the cars and are the gates through which this great traffic of thousands of cars daily passes. The furnishing of coke cars for this great trade is under the joint control of these railroads. Requests for cars are made upon the railroads in advance, and such aggregate requests are tabulated and known. The capacity of the railroads to furnish those cars for each day is also tabulated and known. Hence the relative proportion of cars the railroad can furnish, with relation to the requirements of the region, is well known, and the daily proportion of shortage on the part of the railroads relatively is ascertained certainly. The proportion of car shortage, therefore, being ascertained, how is this provision of the contract, which provides that, "if there should be a shortage of cars," to be applied? How shall, in the words of that provision, the shipments under the contract "be divided from time to time, in fair proportion on all orders"? In other words, what did these men mean when they made this contract? Now, it seems to me that these words simply meant what they said, namely, that where a shortage of cars occurred, and only a proportionate amount of cars could be obtained by any one who wanted to ship coke, he should only be held responsible for the coke which he could ship on such proportionate amount of cars, and that for that part of the shipment for which he could not get cars he was not to be held.

This seems to me the plain, simple thing these business men meant when they used these words, and I am buttressed in that conviction by the fact that to give this simple business meaning to these words makes a rational, workable, and readily adjustable means of settling liability under this contract. For example: On the 1st day of August, it was the duty of the seller to ship approximately 300 tons of coke. Whether it had the coke itself, whether it had it under contract with others, or whether it was compelled to go out in the open market and buy it, made no difference, and its then holding or not holding a supply of coke in no way lessened, increased, or affected its general liability to ship the coke it had agreed to ship. It had sold 300 tons of coke for delivery that day, and it was bound to deliver it at the contract price, if there was no car shortage. But if there was a car shortage, then it was only bound, in my judgment, to deliver the proportionate amount of that 300 tons for which the railroads could furnish cars to the region. Suppose that regional car shortage were 50 per cent., then its obligation was to deliver 150 tons of coke, and if it failed to do so on that day the buyer could go out and purchase coke at the market price, no matter what it was, and charge it with the price of that 150 tons, or with as much of it as it failed to deliver. As to the other 150 tons, which under the contract it would have been bound to deliver in case there had been no car shortage, the car shortage clause excused it, and rightly and fairly excused it, from delivering, for so the contract had provided.

In this way it will be seen that there is a workable basis—practical, simple, easily adjustable—by which the rights and liabilities of these parties could at once be determined by each party, in case of car shortage. The quantum of the daily order and the quantum of car supply were the two elements alone which the parties by their written contract made decisive of their rights. Such being, in my judgment, the true construction of this contract, all questions of other orders, other obligations, other purchases and sales of coke by the seller, are eliminated from this controversy. The contract, as I have said, contemplated an unqualified delivery of a certain quantity of coke each day of the month, at a certain price, and the only thing that excused delivery, but which in fact did excuse delivery when it existed, was the anticipated car shortage. Such being the case, it will be apparent that such elements as the seller having numerous other contracts, as the seller protecting itself against this contract by contracts with coke producers, have no bearing on the determination of the rights of these two contracting parties.

If the Producers' Coke Company had purchased large quantities of coke to fulfill this contract, that did not increase, lessen, or affect its liability. It had contracted to ship coke at certain times, and shipment alone could fulfill the contract. If it purchased no coke to enable it to meet its contract, and was willing to run the risk of the market in buying coke to supply the daily calls of the contract as the need arose, that was a matter of prudence or speculation on the sellers' part; but it could not affect his contract duty to ship on certain days. Moreover, I am justified in saying that this contract was not

intended to prevent the seller of coke from making other purchases and sales of coke, for it nowhere says so. In the absence of such stipulation, it is unreasonable to hold that by business implication this contract meant that a broker or seller of coke could only engage in buying and selling in his business at the peril of thereby subjecting all his business operations to the domination of this contract. In that connection, it will be noted that, in the practice of the coke regions, some owners of coke ovens contract in advance for the sale of all their supply. Other oven owners refuse to contract in advance for the sale of their whole product, and prefer to sell their product from day to day. Still others make time contracts for part of their output, and leave the other part unsold, so that they can take advantage of any rise in the market.

These practices among coke oven owners lead to there always being for sale and practically immediate shipment or delivery what is called "spot" coke. The existence of this spot coke in no way affects car supply, for the owner of the coke oven, whether he has sold on time contracts or has kept his product unsold, is entitled to call on the railroad for cars to the capacity of his mine, and on such capacity he is entitled to get a proportion of cars in times of car shortage. Seeing, then, that the existence of spot coke on the market and on the cars for immediate delivery are legitimate conditions in the trade, and that such dealings in spot coke on the part of the brokers and coke sellers is not only legitimate, but affords a means of furnishing, for immediate delivery, to manufacturers whose calls are imperative and whose furnaces might be jeopardized by car shortage, it will be seen that dealing in spot coke in and of itself affords no evidence of any unfairness. It therefore seems to me that the element of the existence of spot coke on the market, and the purchase and sale of such spot coke by the Producers' Company during the time of the running of this contract, in no way lessened, increased, or affected its liability under this contract, and yet such was its effect under the ruling of the court in the heavy damages imposed by the verdict in this case.

Turning back to the provisions of this contract under discussion: If there was no shortage of cars, this contract construed in its entirety, as it must be, obligated the Producers' Company to ship 300 tons each day through August. If there was a car shortage any day, as in fact there was, it was only bound to furnish such proportion of the 300 tons as was proportionate to the available cars which the railroads could furnish to reach it. It seems to me that this method of construing the contract is the only practical, workable, and reasonable way of applying the language of this exception to the situation which both parties have created, and which both meant should be effected by its terms, and if this view were adopted I feel it would result in as much business certainty in the adjustment of coke contracts between sellers and buyers of coke as the former decision of this court (56 Fed. 212) made a workable path in cases of sales of coke by coke oven owners, under which case, in spite of the vast magni-

tude of the coke business, disputes over such contracts have practically been eliminated from this court in the last 20 years.

These considerations lead me to respectfully record my dissent in the present case.

HUTCHINSON GAS & FUEL CO. v. WICHITA NATURAL GAS CO.

(Circuit Court of Appeals, Eighth Circuit. August 17, 1920.)

No. 5535.

- 1. Injunction ☞57—Restraining breach of contract governed by same rules as specific performance.**

An injunction against the breach of a contract is a negative decree of specific performance, and as a general rule the granting of the injunction is governed by the same principles, rules, and practice as apply to specific performance.

- 2. Specific performance ☞32 (1)—Contract not mutually binding is not enforced.**

As a general rule specific performance of a contract will not be decreed by a court of equity in favor of the party against whom that court cannot compel its performance.

- 3. Specific performance ☞32 (3)—Contract for delivery of personalty dependent on will of one party not mutual.**

A contract for the delivery of personal property lacks mutuality, and cannot be specifically enforced, where the quantity delivered, if any, depends on the will or desire of one party, though it may be enforced if the quantity may be determined, as where it is for the delivery of all articles needed in a person's business.

- 4. Gas ☞13 (1)—Supplemental contract supersedes inconsistent provisions in sections not expressly modified.**

Where a contract to supply to a distributing company the natural gas it needed for distribution to the inhabitants of a city, which provided that the supply company furnish gas only to the distributing company, and the distributing company should take gas only from the supply company, was modified by a supplemental contract, which eliminated the exclusive clauses, but provided that all other provisions of the contract remain in effect, the supplemental contract also eliminated the agreement of the distributing company to take the gas it needed for the inhabitants from the supply company, contained in a provision not expressly modified.

- 5. Injunction ☞57—Modified contract for supply of gas held not enforceable, because supply depended on distributor's will.**

A breach of a contract whereby defendant agreed to supply natural gas at a stated rate to complainant for distribution to its customers will not be enjoined, where the contract had been modified, so that the distributing company was no longer required to get its gas from complainant, and the contract as modified was not mutual.

- 6. Injunction ☞57—If a substantial part of consideration for contract not mutual is unperformed, breach will not be enjoined.**

Where a contract between a gas supply company and a distributing company required the latter to construct a distributing system for delivery of gas to its customers, and to sell it at a fixed rate, a proportion of which was to be paid to the supply company, the distribution of gas furnished by the supply company at the stated rate was a substantial part of the consideration, so that breach of the contract by the supply company could not be enjoined, after the distributing company had completed its system, where there was no obligation by the distributing company to get its gas from the supply company.

7. Partnership ⚡10—Supplying and distributing companies held not partners to supply gas.

A contract whereby one corporation agreed to deliver to another at the city limits a supply of natural gas, and the second agreed to distribute the gas to the inhabitants of the city and pay the former a proportion of its gross receipts, did not make the two corporations partners for the supplying of gas to the city.

8. Gas ⚡14(1)—Contract held not to require furnishing gas from new field at old rate.

A contract whereby a corporation agreed to supply natural gas from designated fields to a distributing company at a stated rate, so long as the supply from those fields was available, not exceeding 20 years, does not require it to supply gas from more distant fields after the specified fields had become exhausted.

9. Contracts ⚡170(1)—Construction by parties does not control clear meaning.

The rule that courts follow the interpretation of contract adopted by the parties thereto is advisory, not mandatory, and is inapplicable, where the terms of the contract are clear and certain.

10. Gas ⚡13(1)—Furnishing gas from different field at old rate not construction that contract required it.

The fact that a gas supply company furnished to a distributing company for several years gas from a field other than that specified in the contract is not a construction by the parties that the contract required the furnishing of gas from new fields after the exhaustion of those specified.

11. Contracts ⚡170(2)—Continuing service after term imposes no obligation for future continuance.

The fact that a party to a contract had continued to render the service at the contract rates after his obligation to do so had expired under the contract does not impose on him any obligation to continue thereafter to render such services.

12. Injunction ⚡118(1)—Where condition precedent to contract is pleaded performance of condition must be also.

Where the bill set out a contract which by its terms required defendant to furnish gas to complainant so long as designated fields produced the gas, and also contained a notice of refusal to furnish gas for the stated reason that the specified fields were exhausted, the bill was properly dismissed for want of equity for failure to allege the production of gas from the stated fields.

Carland, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit by the Hutchinson Gas & Fuel Company against the Wichita Natural Gas Company. From a decree dismissing the bill, complainant appeals. Affirmed.

This is an appeal of the Hutchinson Company, a gas distributing corporation, from a decree of dismissal of its bill in equity against the Wichita Company, a natural gas producing corporation, to enjoin it from raising its rate for the sale of its gas, and from ceasing to supply it at a rate specified in the contracts between the two companies. The bill discloses these facts:

The Wichita Natural Gas Company is engaged in the business of producing and selling natural gas, and the Hutchinson Gas & Fuel Company is engaged in the business of selling natural gas to consumers in the city of Hutchinson, in the state of Kansas. In June, 1906, the Wichita Company controlled an acreage of gas leases with a number of gas wells thereon in the gas belt of Kansas, and J. O. Davidson was authorized by an ordinance of the city of

Hutchinson for 20 years from March 29, 1906, to maintain a gas plant, to lay and use mains and pipe lines in the streets of that city, and through them to supply the inhabitants of the city with natural and artificial gas. He had constructed or was about to construct a complete system of distributing mains and pipes in that city, to comply with the terms of the ordinance and to supply the inhabitants of the city with gas.

Thereupon, on June 19, 1906, he made a contract with the Wichita Company to the effect that the Wichita Company would lay a pipe line for conveying natural gas from its gas fields in the gas belt of Kansas to a point at the city limits of Hutchinson, where it would maintain a reducing and regulating station; that Davidson would lay his distributing pipes and connect them to the pipes of the gas company at the reducing station; that all these things should be done by December 31, 1906; that thereafter, as long as the wells and pipes were capable of so doing, not exceeding 20 years, the gas company would deliver sufficient natural gas to Davidson at its reducing station to meet the demands for domestic consumption thereof by the inhabitants of the city, and Davidson would receive into his pipes, and sell, deliver, and collect for this gas; that it should be sold to consumers at the rate of 30 cents per 1,000 cubic feet; that Davidson should pay over to the Wichita Company, for the gas it delivered, two-thirds of the gross sales thereof; that the Wichita Company made Davidson its exclusive agent; that the Wichita Company would not sell or deliver any of its gas to any other party in Hutchinson, and Davidson would not sell or distribute in that city any natural gas other than that of the Wichita Company.

On November 15, 1906, with the consent of the Wichita Company, Davidson sold and conveyed his interest in the ordinance, in the distributing plant, and in his contract with the Wichita Company to the Hutchinson Gas & Fuel Company, which assumed his liabilities thereunder. The distributing plant and the pipe line were constructed as agreed, and the Wichita Company and the Hutchinson Company proceeded with the delivery and sale of the gas under the Davidson contract until January 2, 1912, when they made a supplemental agreement to the effect that (1) the Hutchinson Company should not thereafter have the exclusive agency of the Wichita Company to distribute, market, or sell its natural gas to the city of Hutchinson or to its inhabitants, but the Wichita Company might appoint and use other agents for that purpose; (2) that the Hutchinson Company should on that date cease to be bound by its agreement not to handle, distribute, market, or sell within the city of Hutchinson the natural gas of any other party than the Wichita Company, and that it might thenceforth handle, distribute, market, and sell within that city the natural gas of any party other than the Wichita Company; and (3) that "nothing in this supplemental agreement is intended or shall be construed to change, alter, or modify any or other of the terms of the said contract entered into between the first party herein and the said J. O. Davidson, on the 19th day of June, 1906."

The Wichita Company had laid its pipe line and built its reducing station, the Hutchinson Company had laid its lines and pipes and completed its distributing system, they had connected their pipes and commenced to deliver natural gas through them, and to sell it under the contract of 1906, as early as 1907, and had continued so to do thereafter, so that when the supplemental contract was made all the covenants of the parties under the contract of 1906 had been performed, except the executory contract relating to the delivery, distribution, and sale of the natural gas of the Wichita Company subsequent to January 2, 1912. They continued to handle and sell the natural gas of that company in the same way as theretofore until the early part of 1919, when the Wichita Company notified the Hutchinson Company that the supply of gas from the Kansas wells and fields described in the original contract had been exhausted; that it was compelled to obtain its gas from more distant fields in Oklahoma at a greatly increased expense; that it could not and would not henceforth furnish its natural gas to the Hutchinson Company unless a charge of 45 cents, instead of 30 cents, per 1,000 cubic feet for natural gas for domestic purposes was made to and collected from the consumers of natural gas in Hutchinson; that the contract between them

did not require it to furnish gas from other than the Kansas fields and belt described therein; that the contract was illegal; and that the Wichita Company would cease to supply natural gas thereunder at an early date unless the 45-cent rate was adopted and used.

Thereupon the Hutchinson Company filed the bill in equity in this case against the Wichita Company, in which it alleged the facts which have been stated, and prayed for a temporary and a permanent injunction "restraining the defendant from violating the provisions of said contract and from refusing to perform the same," from increasing the price of gas to the Hutchinson Company, from disturbing that company's rights to market and deliver natural gas to the consumers in Hutchinson as the agent of the Wichita Company, and for other like relief. A restraining order was issued against the Wichita Company, and thereupon it moved to dismiss the bill, because it did not state any equity sufficient to entitle it to the relief against that company for which the complainant prayed. After a hearing and consideration of this motion the court rendered a decree of dismissal of the bill on its merits for want of equity and dissolved the restraining order. From the decree of dismissal of the bill the Hutchinson Company has appealed.

H. L. McCune, of Kansas City, Mo. (McCune, Caldwell & Downing, of Kansas City, Mo., on the brief), for appellant.

Joseph G. Carey, of Wichita, Kan., and Robert A. Brown, of St. Joseph, Mo. (John H. Brennan, of Bartlesville, Okl., R. R. Vermilion, Earle W. Evans, and W. F. Lilleston, all of Wichita, Kan., and H. O. Caster, of Bartlesville, Okl., on the brief), for appellee.

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

SANBORN, Circuit Judge (after stating the facts as above). The relief sought by the Hutchinson Company in this case is an injunction against the violation of any of the terms of the contract of June 9, 1906, and of any of the terms of any contract resulting from the supplemental contract of January 2, 1912.

[1] An injunction against the breach of a contract is a negative decree of a specific performance thereof, and the general rule is that the power and duty of a court of equity to grant the former are governed by the same principles, rules, and practice as are its power and duty to grant the latter relief. *Shubert et al. v. Woodward et al.*, 167 Fed. 47, 53, 92 C. C. A. 509, 515; *Pantages v. Grauman et al.*, 191 Fed. 317, 323, 112 C. C. A. 61, 67; 2 *Pomeroy's Equity Jurisprudence* (3d Ed.) § 1341; *General Electric Co. v. Westinghouse Electric & Mfg. Co.* (C. C.) 144 Fed. 458, 463. The question here is, therefore: Was the court below in error in its conclusion that, under the rules and principles of equity applicable to suits for the specific performance of contracts, it was not its duty, in view of the two contracts in issue, to compel the Wichita Company to continue to supply the Hutchinson Company until December 31, 1926, with natural gas for two-thirds of the 30 cents per 1000 cubic feet named in the contracts?

The contract of 1906, if it was not violative of the anti-trust laws of Kansas (*Keene Syndicate v. Wichita Gas, Electric Light & Power Co.*, 69 Kan. 284, 76 Pac. 834, 67 L. R. A. 61, 105 Am. St. Rep. 164, 2 Ann. Cas. 949; *Landon v. Public Utilities Commission of Kansas* [D. C.] 245 Fed. 954, 955), was a valid and enforceable agreement. But, if

it is not obnoxious to the anti-trust legislation, when it is read with the supplemental contract of 1912, and their provisions are carefully studied and compared, the question of the mutuality of the new agreement which resulted from the adoption of the agreement of 1912 arises, persists, and will not down; for "an agreement, when changed by the mutual consent of the parties, becomes a new agreement, which takes the place of the old, and consists of the new terms and as much of the old agreement as the parties have agreed shall remain unchanged." 13 C. J. § 615.

[2, 3] It is the general rule that specific performance of a contract will not ordinarily be decreed by a court of equity in favor of a party against whom that court cannot efficiently compel its performance. The obligation and the remedy must be mutual. *Shubert v. Woodward*, 167 Fed. 47, 55, 92 C. C. A. 509, 517; *Marble v. Ripley*, 10 Wall. 339, 358, 19 L. Ed. 955. So the question becomes: Can a court of equity efficiently compel the Hutchinson Company to perform the contract which counsel for that company contend exists between it and the Wichita Company, in view of the established rule that "a contract for the future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties; but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty"? *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, 81, 52 C. C. A. 25, 29, 57 L. R. A. 696; *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; *Woerheide v. Barber Asphalt Paving Co.*, 251 Fed. 196, 204, 163 C. C. A. 352, 360; *Northern Iowa Gas & Elect. Co. v. Inc. Town of Luverne* (D. C.) 257 Fed. 818, 821; *Transcontinental Petroleum Co. v. Interoccean Oil Co.*, 262 Fed. 278, 280 (C. C. A., dated December 12, 1919).

The answer to this question must be found in the true meaning of the terms of the new agreement. Counsel for the Hutchinson Company in their reply brief write that the law is correctly stated in *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, 81, 52 C. C. A. 25, 29, in these words:

"An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer. * * * But an accepted offer to sell or deliver articles at specified prices during a limited time in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity, is without consideration and void, because the acceptor is not bound to want, desire, or take any of the articles mentioned."

And counsel add:

"If plaintiff's construction is proper, the first sentence of the foregoing quotation applies; if defendant's construction is correct, then the second sentence is in point."

They insist that the new agreement brings this case under the first sentence of the quotation. They rely upon these terms of the contract

of 1906 to establish this position. The second paragraph of that contract contains a covenant of the Wichita Company to supply during the term of the contract—

“natural gas in a volume sufficient to maintain a pressure not to exceed four to eight ounces to the square inch on the low-pressure lines of the said system in the said city, and at all times fully meet the demand for all purposes of domestic consumption as provided for in this contract.”

The third paragraph provides that the Wichita Company shall not be liable for any loss or damage to the Hutchinson Company from any shortage or interruption in the supply of gas—

“arising from any cause whatever; but the gas company agrees to use diligence in furnishing an adequate supply of merchantable gas for all the domestic consumers the party of the second part may secure within the corporate limits of the said city of Hutchinson.”

The fourth paragraph contains the grant to the Hutchinson Company of the exclusive agency to distribute, sell, and deliver the Wichita Company natural gas in Hutchinson, and the covenant of the latter not to distribute or sell to other agents any gas for domestic purposes therein. In the fifth paragraph the Hutchinson Company agrees that it—

“will actually begin to receive the said gas from the said gas company and distribute and sell the same through his said system to domestic consumers thereof within the said city on or before December 31, 1906.”

Paragraph 11 contains a covenant of the Hutchinson Company that it will not, “during the term of this agency, handle, distribute, market, or sell the natural gas of any” party other than the Wichita Company, in the city of Hutchinson. The supplemental contract contains five sentences of recitals which precede the terms of the agreement. One of them is that by the fourth paragraph of the contract of 1906 the Wichita Company granted the exclusive agency to the Hutchinson Company to distribute and sell its natural gas in Hutchinson, and another is that in the eleventh paragraph the Hutchinson Company covenanted not to sell in the city of Hutchinson the natural gas of any one but the Wichita Company. The supplemental contract of 1912 provided: (1) That the exclusive agency of the Hutchinson Company should cease on January 2, 1912, and the Wichita Company might thereafter appoint other agents to distribute and sell its gas in Hutchinson; (2) that the covenant of the Hutchinson Company not to sell, market, or distribute the natural gas of anybody except the Wichita Company in Hutchinson should cease on January 2, 1912, and thereafter it might handle, market, distribute, and sell the natural gas of others therein; and (3) that nothing in the supplemental agreement “is intended or shall be construed to change, alter, or modify any or other of the terms of the said contract” of June 19, 1906.

[4] Counsel for the Hutchinson Company present an ingenious argument that the effect of the new contract resulting from the agreement of 1912 is (1) a covenant of the Wichita Company to use due diligence to furnish the Hutchinson Company as its agent such natural gas as shall be needed, required, and consumed by the established busi-

ness of that company during the remainder of the term; and (2) a covenant of the Hutchinson Company to receive, distribute and sell that gas during the term. They contend that the provision of the supplemental agreement that it shall not be construed to alter or modify "any or other of the terms" of the contract of 1906 means any other paragraphs of the latter contract than the fourth and the eleventh, which treat of the exclusive agency and are specifically referred to in the preamble of the supplemental agreement. But the court is unable to find anything of that nature in the body of the agreement itself. That agreement is now a part of the new contract, which supercedes the old one, and it is the new part of that new agreement, which, as the evidence of the last meeting of the minds of the parties, must prevail over any inconsistent part of the new agreement which was taken from the old one. The agreement of 1912 was made for the express purpose of modifying the old one in this case, and it must be given that effect. It expressly provides that the Wichita Company may sell and deliver its gas through other agents than the Hutchinson Company to the inhabitants of the city of Hutchinson. Under that provision it may, through other agents, sell and deliver its gas to any or to all its inhabitants, and thus supply the demands of a part or of all of them for natural gas for domestic purposes, and its contract to deliver to the Hutchinson Company its gas in sufficient quantities to supply the demand for domestic purposes, or to use diligence so to do, is rendered so indefinite as to be futile.

Again, the old contract contained the provision that the Hutchinson Company would begin December 31, 1906, and continue as long as the gas field and supply line of the Wichita Company was capable of supplying the gas, not exceeding 20 years, to receive the gas of the Wichita Company, and to sell and distribute it to domestic consumers in Hutchinson. But the supplemental agreement provides that after January 2, 1912, it may handle, distribute, market, and sell to the inhabitants of Hutchinson the natural gas of any person, party, or corporation other than the Wichita Company. It may therefore, under the present contract, sell and deliver to its consumers, the inhabitants of Hutchinson, the natural gas of others than the Wichita Company to an amount sufficient to supply a part or all of the demand of its established business in that city. The quantity it may take of the Wichita Company is conditioned by the wish or will of the Hutchinson Company, is neither certain nor ascertainable, and it is not bound by the new agreement to take any. To be more specific, in paragraph 3 of the old contract, now a part of the new agreement, the Wichita Company agrees to use diligence "in furnishing an adequate supply of merchantable gas for all the domestic consumers the party of the second part may secure within the corporate limits of the city of Hutchinson," while by the second paragraph of the supplemental agreement the parties expressly contract that the Hutchinson Company may, after January 2, 1912, "handle, distribute, market, and sell" to its consumers, or any others in Hutchinson, the natural gas of others than the Wichita Company. It may therefore, by the express terms of the new agreement, lawfully take any or all the gas for its consumers from other than the Wichita

Company, and after January 2, 1912, it has not been and is not legally bound to take any of it from the Wichita Company.

[5] This review of the specific provisions and relations of the two contracts leaves no doubt that the effect of the agreement of 1912 was not limited to the modification of the paragraphs 4 and 11 of the contract of 1906. The purpose and the intended and actual effect of that agreement was to release the Wichita Company from its contract to furnish to the Hutchinson Company, and the Hutchinson Company from its agreement to take from the Wichita Company all the natural gas requisite to supply the demand for such gas for domestic consumption in the city of Hutchinson, and to leave the Wichita Company free to sell its gas to other agencies to supply that demand, and the Hutchinson Company free to purchase its gas to supply that demand from other owners than the Wichita Company. It could not and cannot have that effect without modifying many of the provisions in other paragraphs of the old contract than the fourth and eleventh. It did have that effect, and when it produced that effect the amount of gas the Wichita Company was to supply to the Hutchinson Company was conditioned by its will and wish, the amount the Hutchinson Company was to receive was conditioned by its will and wish, neither amount was certain or ascertainable, the Hutchinson Company was not legally bound to take, and cannot be lawfully compelled to take, under the new contract, any amount whatever from the Wichita Company, and the new agreement was void for want of mutuality. As to the future, the new contract fell under the rule that accepted orders for goods under such void contracts constitute sales of the goods thus ordered at the prices named in the contracts, but they do not validate the contracts as to articles which the one refuses to purchase or the other refuses to sell or deliver under the void contracts, because neither party is bound to take or deliver any amount or quantity of these articles thereunder. *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, 81, 52 C. C. A. 25, 29, and cases there cited.

With enviable ability, industry, and patience counsel have sought out and cited many cases which they deem exceptions to the general rules (1) that a suit for an injunction against the breach of a contract should be determined by the same rules that cover a suit for the specific performance thereof, and (2) that a court of equity will not ordinarily decree specific performance of an agreement for one against whom it cannot efficiently enforce such performance, and have argued that this case should be ruled by the opinions in these exceptional cases. They have cited, and the court has read and considered, the opinions in *Guffey v. Smith*, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856; *Singer Sewing Machine Co. v. Union Button-hole & Embroidery Co.*, 22 Fed. Cas. 220, No. 12,904; *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843; *Texas Co. v. Central Fuel Oil Co.*, 194 Fed. 1, 5, 22, 24, 114 C. C. A. 21, 25, 42, 44; *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776; *People's Natural Gas Co. v. American Natural Gas Co.*, 233 Pa. 569, 82 Atl. 935, 938, 939; *Columbus Ry. Co. v. Columbus*, 249 U. S. 399, 408, 39 Sup. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648; *Western Union Telegraph Co. v. Union*

Pacific Ry. Co. (C. C.) 3 Fed. 423, 425, 427; City of Moorehead v. Union Light, Heat & Power Co. (D. C.) 255 Fed. 920, 923; Mobile Electric Co. v. City of Mobile, 201 Ala. 607, 79 South. 39, 43, L. R. A. 1918F, 667; Great Northern Ry. Co. v. Sheyenne Telephone Co., 27 N. D. 256, 263, 145 N. W. 1062; Marble Co. v. Ripley, 10 Wall. 339, 359, 19 L. Ed. 955, and in many other cases; but for various reasons neither these opinions nor the arguments of counsel regarding them have persuaded that this case should not be determined in accordance with the general rules.

[6] For example, counsel invoke the conceded rule that, where the entire consideration for the agreement of a defendant in a suit for the specific performance of a contract executory on his part was paid by the plaintiff before the commencement of the suit, a court of equity will enforce performance by the defendant, and then contend that, because before this suit was commenced the Hutchinson Company laid its mains and pipes in the city of Hutchinson and received and paid for the gas that was delivered to it, the court below should have compelled the Wichita Company to continue to deliver gas at the 30-cent rate during the remainder of the term of the contract. But the answer to this contention is that the complete performance of a part of the consideration for an executory agreement while another substantial part thereof remains executory, and so indefinite and shadowy as to be unenforceable, is fatal to a suit for the specific performance of it. *Woerheide et al. v. Barber Asphalt Paving Co.*, 251 Fed. 196, 204, 163 C. C. A. 352, and cases there cited. And in the case at bar the agreement of the Hutchinson Company to take and pay for the gas after January 2, 1912, was and is a substantial part of the consideration of the new contract, and is so indefinite as to be unenforceable and void. Moreover, when the new agreement was made in January, 1912, the parts of the consideration of the old contract which counsel cites as paid had been fully performed, and not only the substantial, but practically the entire, consideration for the covenant of the Wichita Company to deliver gas after January 2, 1912, was the unenforceable and imaginary contract of the Hutchinson Company to receive and pay for it thereafter.

Counsel cite cases in which suits for specific performance brought by holders of options to discontinue their performance at will, which inhered in the agreements or were expressly granted to them thereby when the contracts were made, were sustained by the court; but in those cases neither the continuance of performance by the optionees for a fixed term nor their covenant to so continue was any part of the consideration of the agreements by the defendants to continue performance, while in the case at bar it is plain that the supposed covenants of the respective parties to continue performance constituted the real considerations each for the other of the new contract, and a decree for the performance by one of the parties while performance by the other cannot be enforced by the court, would work inequity, instead of equity.

[7] Counsel insist that the Wichita Company should be decreed to furnish and deliver gas at the 30-cent rate during the remainder of the

term of the contract, because it and the Hutchinson Company are engaged in the enterprise of supplying the public with gas, and because their relation to each other is in the nature of a partnership. They are not partners, and, whatever their relation to the public or to each other may be called, the new agreement fixes the rights and measures the liabilities of the Wichita Company, in the absence of any attempt by proper authority to exercise the police power of city, state, or nation to modify or affect their agreement.

And the conclusion is that this suit should be determined in accordance with the general rules set forth in the opening of this opinion, that the new agreement is, and has been ever since it was made on January 2, 1912, unenforceable and void for lack of mutuality as to the furnishing and delivery of any gas which the Wichita Company declines to deliver or the Hutchinson Company to receive, that a court of equity ever since that date has been and is without jurisdiction or power to compel the Hutchinson Company to receive from the Wichita Company any natural gas or to pay for any natural gas which it does not wish to receive, and that therefore a court of equity ought not to enforce specific performance of this agreement against the Wichita Company. The conclusion of the court below that there was no equity in the bill and its dismissal thereof was just and equitable.

[8] There is another reason why there was no error in the decree of the court below. That part of the old agreement which became a part of the new one contains a recital that "whereas, the gas company controls an acreage of gas leases, with a number of gas wells thereon, in the gas belt of Kansas, and desires to market the gas therefrom," a covenant that the gas company will lay a pipe line on or before December 31, 1906, for conveying natural gas from the said gas fields of Kansas to a point at the city limits in the city of Hutchinson, and a covenant that as long as the wells and gas fields in Kansas mentioned therein are capable of producing it, not exceeding 20 years, the Wichita Company will—

"supply and deliver through its said pipe line, and through its said reducing and regulating station, natural gas in a volume sufficient to maintain a pressure not to exceed four to eight ounces to the square inch on the low-pressure lines of the said system in the said city, and at all times fully meet the demand for all purposes of domestic consumption as provided for in this contract. However, as the production of gas from wells and the conveying of it over long distances is subject to accidents, interruptions, and failures, the gas company does not by this contract undertake to furnish an uninterrupted supply of gas for the period named herein, but only to furnish such a supply for such a period of time as the wells and pipe line of the gas company are capable of supplying.

"It is expressly understood and agreed, however, that the gas company shall not be liable for any loss, damage, or injury to the party of the second part resulting directly or indirectly from any shortage or interruption in the supply of gas arising from any cause whatever; but the gas company agrees to use diligence in furnishing an adequate supply of merchantable gas for all the domestic consumers the party of the second part may secure within the corporate limits of the said city of Hutchinson as the said limits now exist or may hereafter be established by law."

The written notice of the Wichita Company, served on the Hutchinson Company, that it would not continue to supply its natural gas for two-thirds of 30 cents per 1000 cubic feet, contains a notice:

That the contract "substantially provided that the supply of gas to be furnished by the pipe line company should come from a certain gas belt then situated in the state of Kansas," that "for some time thereafter the gas supply did come from said wells," that "this local field constituted a limitation of the pipe line as to furnishing a supply of gas," that "since these years the gas belt alluded to in the contract has been exhausted," and that "the contract is void and unenforceable on account of the exhaustion of the supply involved therein."

The complainant has pleaded this contract and this notice—has attached them to its complaint and made them a part thereof. It has alleged in that complaint:

"That by the terms of said contract the defendant agreed to furnish only such a supply for such a period of time as the wells and pipe line of the defendant were capable of supplying, but the defendant agreed to use diligence in furnishing an adequate supply of merchantable gas for all domestic consumers the said J. O. Davidson might secure within the corporate limits of said city of Hutchinson as the said limits existed or might thereafter be established by law."

It alleged:

"That on account of the provisions of said contracts the defendant is obligated to use due diligence in supplying natural gas to the said city [of Hutchinson] and its inhabitants at not exceeding the rates fixed by said franchise. That the defendant now has available and is supplying said city and its inhabitants with an adequate quantity of natural gas."

The quotations which have been made embrace all the provisions in the contract pertinent to the extent of the Wichita Company's obligation to procure and supply natural gas to the Hutchinson Company. A careful consideration of the circumstances surrounding and the situation of the parties when the contract of 1906 was made, the known uncertainty of the amount of gas in the Kansas field, of the usual exhaustion of such fields in a few months or years, of the possible length of the term of the contract, of the purpose of the parties in making the agreement, of the express terms of that contract which have been quoted, of the context in which they stand in the agreement and of the entire body of the contract, have thoroughly satisfied that the intention of the parties in making the agreement and the true meaning and effect of it was and is that the Wichita Company agreed that as long as, not exceeding 20 years from December 31, 1906, the wells and the Kansas field in the Kansas belt described in the contract should be capable of furnishing a supply of natural gas sufficient to meet the demand for domestic consumption in the city of Hutchinson, it would furnish that supply and use diligence in furnishing from those wells and that field an adequate supply of merchantable gas for all the domestic consumers of Davidson and his successors in interest in the city of Hutchinson, but that it should not be liable for any loss or injury to them or either of them "resulting directly or indirectly from any shortage or interruption in the supply of gas from any cause whatever."

[9-11] If the suggestion should occur that the Wichita Company has continued to deliver and the Hutchinson Company to receive under the contract natural gas derived from other and more distant fields after the exhaustion of the Kansas field, and the rule should be invoked that courts incline to follow the interpretation of contracts which the parties thereto have adopted, the answers are: (1) This rule is advisory, not mandatory, it is inapplicable where the terms of the contract and the meaning of the agreement are clear and certain, and the terms of this contract leave no doubt of their meaning; (2) the conclusion that the parties adopted the construction that required the Wichita Company to furnish natural gas to the Hutchinson Company from other fields more distant than that specified in the agreement is not established by the fact that it has been furnishing such gas and the Hutchinson Company has been receiving it on the terms of the contract since the Kansas field was exhausted; and (3) the fact that a party to a contract has continued to do the same acts after its term has expired that he agreed to do during its term in no way obligates him to continue so to do.

The contract of the Wichita Company then was that it would furnish the gas as long as the Kansas field and wells and the pipe line were capable of supplying it. By the terms of this agreement their capability to furnish this supply was a condition precedent to the existence of the Wichita Company's obligation to furnish gas at every moment after the original contract was made. If at any time that capability existed at that time the obligation existed. If at any time the capability did not exist at that time the obligation did not exist. The complainant appealed to the court of equity below to compel the Wichita Company to perform that obligation in October, 1919, and thenceforth until December 31, 1926; but it did not allege that the capability of the wells and gas field of Kansas which conditioned that obligation then was or thereafter would be in existence, and for that reason the bill stated no equity against the Wichita Company, and it was rightly dismissed.

[12] The arguments of counsel and the authorities they cite, to the effect that the incapability of the wells and the Kansas field was a matter of defense, and that it was not necessary for the complainant to allege their capability, have been read and carefully considered; but they have failed to convince that, after the complainant had set out and made the contract which shows the capability of the wells and field to be a condition precedent to the existence at any time of the obligation it seeks to enforce, and had set out and made a part of its complaint the notice of the Wichita Company which shows that it claims that the capability did not and does not exist, its complaint stated any cause of action in equity against the defendant without an averment of the existence of the condition precedent without the existence of which the obligation it sought to enforce was not.

Let the decree below be affirmed.

CARLAND, Circuit Judge. I concur in the judgment of affirmance on the ground of want of mutuality of the contract. I dissent from the

reasoning whereby the affirmance of the judgment below is sought to be sustained on account of the alleged exhaustion of gas in the Kansas field.

CITY OF WINFIELD v. WICHITA NATURAL GAS CO. et al.

(Circuit Court of Appeals, Eighth Circuit. August 17, 1920.)

No. 5461.

1. Removal of causes ⇨48—Distinct causes of action against different parties constitute "separable controversies."

Where the record in a suit discloses separate and distinct causes of action, upon either of which a separate suit could have been maintained, and the determination of neither of which is essential to the disposition of the other, there are "separable controversies," within the meaning of the acts of Congress for the removal of causes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Separable Controversy.]

2. Removal of causes ⇨57—Only indispensable parties should be considered in determining removability.

In determining the right to remove causes, indispensable parties only should be considered.

3. Removal of causes ⇨57—Company supplying gas not indispensable party to suit between city and distributing company.

In a suit to compel a gas company to continue to furnish gas to the inhabitants of a city at the rate specified in the franchise, the company which contracted to supply gas to the distributing company for distribution at that rate is not a necessary party.

4. Removal of causes ⇨57—Gas distributing company not indispensable party to determination whether supply company had assumed obligations to city.

In a suit to compel the supplying of gas to a city at the franchise rates, the corporation which had the franchise to distribute the gas is not an indispensable party to the determination of the question whether the company supplying the gas had assumed an obligation to the city to supply gas at the stated rate, so that controversy could be removed, though the distributing company was a domestic corporation.

5. Removal of causes ⇨61—Facts, not pleaded conclusions, determine removability.

In determining removability of a cause, the allegations of specific facts control the general conclusions deduced therefrom, so that removal will not be denied because of allegations that the foreign and domestic corporations were jointly interested and had a joint liability, where the contract between those corporations was pleaded and did not establish such liability.

6. Appeal and error ⇨954(4)—Dissolution of interlocutory injunction reviewable only for abuse of discretion.

The dissolution of an interlocutory injunction, like the granting of such injunction, is intrusted to the sound discretion of the court of original jurisdiction, and the appellate court can review such dissolution only on proof of a violation of the rules or principles of equity, or of an abuse of discretion.

7. Gas ⇨14(1)—Contract to supply gas to distributing company held not to assume obligation to city.

The company, which contracted with a holder of a franchise for the supply of gas to the inhabitants of a city at specified rates to supply gas

to the holder of the franchise, did not thereby assume an obligation to the city or its inhabitants to supply the gas to them at the stated rate.

8. Gas ⚡6—Purchaser of distributing company, owning stock of new corporation, not bound by contract of latter.

A gas supply company, which purchased at receiver's sale the assets of a corporation holding a franchise to distribute gas at stated rates, and transferred such assets to a newly organized corporation, of which it owned all the stock, and which assumed the obligations of a franchise, did not thereby bind itself to the city to continue to furnish gas at the specified rate.

9. Corporations ⚡406(1)—Supply company, using gas distributing company as agent, bound only to extent of its contract with agent.

Where a company supplying natural gas used another corporation as its agent to distribute the gas to the inhabitants of a city under a contract between the two corporations, the supply company was bound by the contract of its agent with the city only to the extent of the obligations assumed in its contract with the agent.

10. Gas ⚡14(1)—Improvements in reliance on gas supply do not extend liability of supplying company beyond its contract.

The fact that the inhabitants of a city had made improvements in reliance on a supply of natural gas at rates stated in the franchise to the distributing company does not impose on the supplying company any obligation to continue to supply gas beyond the terms of its contract with the distributing company.

11. Gas ⚡13(3)—Supply company, if joint adventurer with distributing company, is not bound by latter's franchise.

A company supplying natural gas to the holder of a city franchise for distribution in the city, if a joint adventurer with the distributing company, is not thereby bound to furnish gas to an extent not expressly provided for in the contract.

12. Corporations ⚡215—Sole stockholder not bound in equity by contract with corporation.

Courts of equity recognize the sole stockholder of a corporation as distinct from the corporation, and do not hold the stockholder bound by the contracts of the corporation.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit by the City of Winfield against the Wichita Natural Gas Company and others. From an order dissolving an interlocutory injunction, complainant appeals. Affirmed.

The city of Winfield has appealed from an order of the court below, which dissolved an interlocutory injunction that forbade the defendants below, the Wichita Natural Gas Company, a corporation of Delaware, engaged in producing, buying, and selling natural gas, and the Winfield Natural Gas Company, a corporation of Kansas, engaged in the business of distributing and selling natural gas to consumers in the city of Winfield, from raising the price of natural gas to consumers for domestic purposes in that city above 30 cents per 1,000 cubic feet, from discontinuing the supply of gas to the plaintiff and the inhabitants of the city, and forbade the Wichita Company from raising the price of gas to the Winfield Natural Gas Company above two-thirds of the 30-cent rate per 1,000 cubic feet fixed therefor by the contract between them.

When the suit was commenced, when the injunction was issued, and when it was dissolved, the Winfield Natural Gas Company was distributing and selling natural gas to the city and its inhabitants under Ordinance No. 776 of the city of Winfield, which had been accepted by the grantee, Pattison, on November 13, 1906. This ordinance provided that the grantee should supply

natural gas for domestic purposes to the inhabitants of the city of Winfield for a price not exceeding 30 cents per 1,000 cubic feet. By several assignments the rights and privileges of Pattison under this ordinance had been conveyed, before this suit was brought, together with the distributing mains and pipes in the streets and alleys of Winfield, to the Winfield Natural Gas Company, which had accepted them and had assumed the obligations to the city, which conditioned the grant therein of the right to use the streets for its mains and pipes. The Winfield Natural Gas Company was, and had been since 1909, obtaining its supply of gas from the Wichita Company under a contract, dated November 25, 1906, between that company and the Winfield Gas Company, taken in the name of W. P. Hackney. This Winfield Gas Company was a corporation which in 1906 had a plant in Winfield for the distribution of artificial gas, which it subsequently changed and used to distribute the natural gas of the Wichita Company. It became insolvent. A receiver was appointed for its property, which was sold under a decree of court and vested in the Winfield Natural Gas Company in June, 1909, and the old Winfield Company then ceased to function.

On June 2, 1912, the Wichita Company and the Winfield Natural Gas Company made a supplemental agreement, by which they modified the terms of the Hackney contract of June 25, 1906. In the early part of the year 1919 the Wichita Company gave notice to the Winfield Natural Gas Company that the natural gas in the field from which it had agreed to furnish it in the supply contract was exhausted; that the expense of providing it from more distant fields was so great that it could not and would not longer supply it for two-thirds of 30 cents per 1,000 cubic feet, the price fixed therefor in the Hackney contract, nor for less than 45 cents per 1,000 cubic feet; that the supply contract was illegal, and did not by its terms require it so to do; and that it would cease to supply natural gas to the Winfield Natural Gas Company at an early date unless the 45-cent rate was adopted and used.

Thereupon the city of Winfield brought this suit in the district court of Cowley county, Kan., prayed that the defendants be enjoined from changing the rate at which they were furnishing the gas to the city and its inhabitants, and from ceasing to furnish gas on account of any failure to pay any sums in excess of the 30-cent rate, and applied for and obtained the interlocutory injunction. The Wichita Company removed the case to the court below on the ground that there was a separable controversy between it and the plaintiff. A motion to remand was made and denied, the Wichita Company moved for a dissolution of the injunction, and that motion was heard on the complaint, affidavits, and testimony and was granted.

The terms and provisions of the ordinance contract between the city and the Winfield Natural Gas Company, of the supply contract, of the supplemental agreement between the Winfield Natural Gas Company and the Wichita Company, and of the notice of the Wichita Company to the Winfield Natural Gas Company are the same in material respects, *mutatis mutandis*, as the terms and provisions of those instruments in the case of *Hutchinson Gas & Fuel Co. v. Wichita Natural Gas Co.*, 267 Fed. 35, in which the opinion is handed down herewith. Reference to the statement and opinion in that case is here made for a more extended recital of those terms, which it is thought it is useless to repeat in this case.

S. C. Bloss and A. M. Jackson, both of Winfield, Kan. (J. E. Torrance, of Winfield, Kan., on the brief), for appellant.

Joseph G. Carey, of Wichita, Kan., and Robert A. Brown, of St. Joseph, Mo. (John H. Brennan, of Bartlesville, Okl., and R. R. Vermilion, Earle W. Evans, and W. F. Lilleston, all of Wichita, Kan., and H. O. Caster, of Bartlesville, Okl., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

SANBORN, Circuit Judge (after stating the facts as above). [1, 2] Counsel first argue that the order dissolving the injunction should be reversed for want of jurisdiction of the District Court, because there was no separable controversy between the city and the Wichita Company, a corporation of Delaware, while the other defendant was a corporation of Kansas, a corporation of the same state as was the plaintiff.

"Separate and distinct causes of action disclosed by the record in a single suit, upon either of which a separate suit could have been maintained, and the determination of neither of which is essential to the disposition of the other, constitute separable controversies, within the meaning of the acts of Congress."

"In a determination of the jurisdiction of the national courts, and the right to remove causes of action to them, indispensable parties only should be considered, because all other parties may be dismissed and disregarded, if their presence would oust or restrict the jurisdiction or the right."

These rules were stated and the authorities sustaining them were cited many years ago by this court. *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 658, 663, 68 C. C. A. 288, 296, 301. The opinion and decision in that case was twice challenged and affirmed in the Supreme Court. *Fritzlen v. Boatmen's Bank*, 198 U. S. 586, 25 Sup. Ct. 803, 49 L. Ed. 1174; *Fritzlen v. Boatmen's Bank*, 212 U. S. 364, 371, 29 Sup. Ct. 366, 53 L. Ed. 551. The later decisions of the national courts have not disturbed these rules. *Texas Co. v. Central Fuel Co.*, 194 Fed. 1, 10, 114 C. C. A. 21, 31.

[3] Neither of the defendants is bound in morals or in law to supply natural gas to the city of Winfield for 30 cents per 1000 cubic feet, or for any other price, unless it has agreed with that city so to do. The only cause of action the complaint in this case presents against the Winfield Company is that by its purchase, receipt, and acceptance in June, 1909, of the conveyance to it of the property of the old Winfield Gas Company, and of its rights and privileges under the ordinance contract, and by its subsequent use thereof, it assumed the obligations of that company under the ordinance contract to supply natural gas to the city and its inhabitants at the 30-cent rate. If the complaint discloses any controversy between the Winfield Natural Gas Company and the city, it relates to and involves this contract of assumption, and to the trial and determination of that issue the Wichita Company is neither an indispensable, necessary, nor proper party.

[4] There is no averment in the complaint that the Wichita Company ever made any direct agreement with the city, or with any of its inhabitants, to sell, deliver, furnish, or supply to it, or any of them, natural gas at 30 cents per 1000 cubic feet, or at any other price, or that the city or its inhabitants ever gave to that company any franchise, consideration, or grant for any such agreement. The complaint contains averments, however, that the Wichita Company assumed the obligation of Pattison and his successors in interest in the ordinance contract so to do: First, by supplying gas to the receiver of the old Winfield Company, and through him to the city and its inhabitants, under and pursuant to the terms of the Hackney supply contract, dated

November 25, 1906; second, by paying, as the principal bondholder and creditor of the old Winfield Company, the purchase price at the sheriff's sale of that company's property to John D. Neely, its president, in June, 1909, causing its officers and agents to incorporate the Winfield Natural Gas Company, causing the title to the property, rights, and privileges of the old Winfield Company to be vested in this new corporation immediately after the sheriff's sale, and taking, holding, and owning the capital stock of that company; third, by using the Winfield Natural Gas Company as its agent to send its gas through the mains and pipes of that company in the city of Winfield, to the city and its inhabitants, in accordance with the terms of the supply contract of November 25, 1906, which was assumed and ratified by the Winfield Natural Gas Company and is in full force and effect; fourth, by the facts that the city and its inhabitants have known of the ordinance contract, of the supply contract, and of the furnishing of gas thereunder, and have made expensive improvements in reliance thereon.

If the Wichita Company has not assumed and agreed by one or more of these acts thus pleaded to perform the original agreement of Pattison in the ordinance contract to supply natural gas to the city and its inhabitants at not exceeding the 30-cent rate, it is not bound under the complaint in this action to the city so to do, and the only controversies between the Wichita Company and the city are whether or not it has made any of these alleged assumptions. Each of the controversies concerning these assumptions, however, is conditioned by the acts, writings, and sayings of the Wichita Company, and by those alone. The trial and the determination of these controversies cannot adjudge or affect the issue whether or not, by the Winfield Natural Gas Company's purchase and use of the property, rights, and privileges of the old Winfield Company it assumed and agreed to perform the conditions of the ordinance contract. It was not and is not, therefore, an indispensable or necessary party to the trial and adjudication of the controversies between the city and the Wichita Company.

Those controversies arise from, and their determination is conditioned by, alleged agreements of assumption by the Wichita Company of the obligations of the grantee of the ordinance contract and its successors, distinct and separate from the alleged agreement of assumption thereof by the Winfield Natural Gas Company by its purchase, acceptance, and use of the property and franchises of the old Winfield Company. The causes of action alleged against the Wichita Company, on the one hand, and that averred against the Winfield Natural Gas Company, on the other hand, were separate and distinct, conditioned by separate alleged contracts, upon either of which a separate suit might have been maintained, and the determination of none of the alleged causes of action against one of these corporations was essential to the determination of any of the causes of action against the other. Their controversies with the city were therefore separable, and the court below had jurisdiction of this suit.

[5] The contention of counsel for the city and the authorities cited in support thereof to the effect that these controversies were inseparable, because the two companies were jointly associated together, be-

cause each was interested in the business they were conducting under the supply contract, because under that contract the Winfield Natural Gas Company was the agent of the Wichita Company, because it was controlled by the latter by its ownership of the Winfield stock, and because a joint liability is alleged and a joint injunction is prayed, have received careful attention and meditation; but, in pleading, general averments are always controlled and limited by specific allegations regarding the same subject-matters. *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 659, 68 C. C. A. 288, 297; *Moyer v. Ft. Wayne, C. & L. R. Co.*, 132 Ind. 88, 31 N. E. 567, 568; *Reynolds v. Copeland*, 71 Ind. 422; *Pinney v. Fridley*, 9 Minn. 34 (Gil. 23). It is the controversies, the facts pleaded in the complaint portray, not the legal conclusions the pleader alleges result from those facts, nor his averments of joint liability or joint action, nor his prayer for relief, that determine whether or not the controversies disclosed by the complaint are separable. The material facts pleaded in this complaint have been thoughtfully considered in view of this rule of pleading, and the conclusion is irresistible that the controversies between these parties which they disclose are separable.

[6] We come, then, to the question: Is there clear proof in the record in this case that the dissolution of the interlocutory injunction by the court below was an abuse of its discretion? for the granting or dissolution of an interlocutory injunction is intrusted, not to the appellate court or its discretion, but to the sound discretion of the court of original jurisdiction, guided by the applicable rules and principles of equity; and its decision may not be reversed without plenary proof of a violation of some of these rules or principles, or of an abuse of that discretion. *American Grain Separator Co. v. Twin City Separator Co.*, 202 Fed. 202, 206, 120 C. C. A. 644, 648.

Unless the Wichita Company contracted with the city to supply it and its inhabitants with natural gas at the 30-cent rate by some written or verbal promise, or by acts equivalent thereto, it is not lawfully bound so to do, and it has the right to refuse to sell or deliver it at that rate, or at any other rate. There is no allegation in the complaint that it ever made any written or verbal promise to the city or its inhabitants to that effect. The complaint contains averments, however, that by certain acts, which it sets forth in detail, that company assumed the obligation so to do of C. H. Pattison and his successors and assigns under the ordinance contract of 1906.

[7] In the first place, it contains averments that the Wichita Company assumed that obligation by virtue of these alleged facts: It made or assumed the Hackney supply contract of November 25, 1906, with the old Winfield Company; that contract provided that the Wichita Company would deliver to the Winfield Company at its reducing and regulating station at the city limits, as long as its wells and pipe line were capable of supplying it, not exceeding 20 years, a supply of gas sufficient to meet the demand for domestic consumption in the city of Winfield; that the Winfield Company would receive, sell, and distribute this gas through its pipes and mains to domestic consumers in Winfield at the 30-cent rate, and pay the Wichita Company two-thirds

of the proceeds of the sale, that the Winfield Company should have the exclusive agency of the Wichita Company to distribute and sell its gas in Winfield, and that it would distribute and sell the natural gas of no other party therein; that the Winfield Company at its own expense would own and maintain the distributing system, receive the gas from the Wichita Company at the latter's reducing station, transport and distribute it through its mains and pipes, sell and deliver it, and collect payment for it, but that the title to the gas should remain in the Wichita Company until it was sold and delivered to the consumers. In 1906-07 the Winfield Company, in order to transform its distributing plant for artificial gas into a plant for the distribution of natural gas, obtained large quantities of pipe, fittings, materials, payments for labor, and some money from the Wichita Company, which supervised the making of these changes, and thereby the Winfield Company became indebted to the Wichita Company in the sum of \$114,935.08. The Winfield Company made a mortgage on its plant for \$100,000 and a second mortgage for \$30,000. It delivered to the Wichita Company \$51,000 of its first mortgage bonds and \$25,000 of its second mortgage bonds in part payment of its indebtedness. These mortgages covered its distributing plant and its franchise rights under the ordinance contract. They were made in 1907, and the Winfield Company was then receiving and distributing natural gas to the city and its inhabitants under the Hackney supply contract, which it had assumed. On December 11, 1908, the Winfield Company had become insolvent, and the Wichita Company brought a suit upon the debt of the Winfield Company to it, for a receiver, the sale of its property, and the distribution of its proceeds to its creditors, and a receiver was appointed who operated its plant until the sale under the decree of the court of its property and its franchise rights for \$75,045 on June 1, 1909. From March 20, 1907, until July, 1909, the Wichita Company supplied its natural gas to the city and the inhabitants of Winfield first, and until the appointment of the receiver, through the old Winfield Company, and thereafter through the receiver until the sale under the decree.

Now, counsel for the city claim and have alleged in the complaint, that by the facts and acts just stated, the Wichita Company assumed and agreed to perform the obligation of Pattison and his successors under the ordinance contract to furnish natural gas to the city and its inhabitants at the 30-cent rate until October 23, 1926; but one who thoughtfully reads the complaint cannot fail to see from it that the only way in which the Wichita Company supplied gas to the city or its inhabitants through the old Winfield Company or the receiver, during these years, was through the performance of its Hackney supply contract of November 25, 1906, which had been assumed by the Winfield Company, and under the terms of that contract. That agreement evidenced and governed the relation of the Wichita Company to the Winfield Company, and the ordinance contract covered the relation of the Winfield Company to the city and its inhabitants. Neither the city nor any of its inhabitants was a party to the Hackney supply contract of the Wichita Company. They were parties to the ordinance contract with the Winfield Company and to no other. They purchased their gas

from the Winfield Company, and paid for it under that contract to which the Wichita Company was not a party; and there is no rational method of escape from the conclusion that neither the Hackney supply contract nor the performance of it by the Wichita Company, by delivering gas to the Winfield Company and its receiver, nor any of the acts and facts which have been recited, ever wrought any assumption by the Wichita Company of any of the obligations of Pattison or of any of his successors under the ordinance contract.

[8] In the second place, the city alleges that the Wichita Company assumed those obligations by these alleged acts; at the sheriff's sale of the property and franchise of the old Winfield Company, Mr. Neely, the president of the Wichita Company, bought that property for the Wichita Company and as its agent, used the money and funds of that company to pay for it, that company became the owner thereof, including the rights and privileges granted by the ordinance contract, and it became its duty to supply the city and its inhabitants with natural gas thereunder at the 30-cent rate until October 23, 1926. The sale was on June 21, 1909. The Wichita Company, through its agents, organized and procured a charter of incorporation for the Winfield Natural Gas Company, which was filed with the secretary of state on June 23, 1909. The Wichita Company's agents were the first stockholders and directors of the new company. The Wichita Company organized that corporation to take over, and it caused Mr. Neely to turn over and vest in that company, the title to the property bought by him at the sheriff's sale. The Wichita Company took and still owns all the stock of the Winfield Natural Gas Company. It organized that corporation to act as its agent in supplying the inhabitants of the city with gas, and it has used and is using that company as such agent to perform the obligations of Pattison and his successors under the ordinance contract. The Winfield Natural Gas Company assumed and ratified the Hackney supply contract with the Wichita Company of November 25, 1906, the latter company has treated the former company as a substituted party for the old Winfield Company, and the Hackney supply contract of 1906 is in full force and effect between the Wichita Company and the Winfield Natural Gas Company.

But these acts and facts tend rather to prove the intention and careful provisions not to assume rather than an assumption by the Wichita Company of the obligations of Pattison and his successors under the ordinance contract. If it had intended to agree with the city to assume those obligations, it would naturally have purchased the property and franchise of the old Winfield Company in its own name and vested their title in itself, and then have ended the supply contract of November 25, 1906. If, as alleged, it became the owner of the property and franchise held by the old Winfield Company by the sale, it was then the owner of that company's interest in the Hackney supply contract at the same time. It could then have merged them and ended the supply contract. The legal presumption is that it did not intend to and did not do so, and the fact that the Winfield Natural Gas Company assumed the obligations of the old Winfield Company thereunder, and

that the supply contract remained in force between it and the Wichita Company, constituted plenary proof that it did not do so.

In considering these transactions, the fact must be constantly remembered that the Wichita Company owed no duty to supply gas to the city or its inhabitants, and that it had no contract with the city or its inhabitants to assume any obligation to them to furnish gas, and that there is no fraud or deception alleged in any of these transactions. It had the right to refuse to assume, and to prevent assumption, of the obligations of its insolvent debtor to the city, and this is what it did; and it did it in the ordinary, natural, and normal way, by organizing a corporation that made that assumption, and thereby prevented its stockholder, the Wichita Company, from so doing. Stripped of legal inferences and conclusions of the pleader, this was the transaction: The Wichita Company was the largest creditor of the old insolvent Winfield Company. To save something from its wreck, as the judicial sale of its debtor's property approached, it organized the new corporation, the Winfield Natural Gas Company, to take its property and assume its obligations to the city under the ordinance contract and to the Wichita Company under the Hackney supply contract. It caused its president to bid in the property of the insolvent debtor at the sheriff's sale and to convey it to the new company. It paid the sheriff the purchase price with its funds and money, doubtless chiefly, with the mortgage bonds of its debtor which it held, and in payment by the new company for this property of the debtor, the title to which it caused Neely to vest in the new company, it took the stock of that company.

It is not denied that one may purchase the property and franchise of a public utility corporation, and so use it or refuse to use it as to make himself liable for the obligations of the former holder to operate it; but it is the common practice at the judicial sales of property and franchises of insolvent railroad companies, water companies, light companies, and other such corporations for one or more of their creditors, or a committee for them to organize a new corporation to take this property, for one or more of the creditors or the committee to bid in the property at the sale, for the creditors to pay the purchase price chiefly with the securities of the insolvent debtor which they hold, for the bidder or bidders to convey to and vest the title to the property and franchises in the new corporation, which accepts and uses them, and for the creditors or some of them to take the stock of the new company in payment therefor. No decision or opinion of any court has been cited or discovered to the effect that such bidders at such sales, who constitute in fact a mere conduit through which to pass the property and franchise rights to the new corporation, or the creditors who pay the purchase price therefor and take the stock of the new company, thereby assume the obligation of the railroad company perpetually to operate its railroad, or of the other like corporations to discharge their franchise duties to the public after the new corporation has assumed and entered upon the discharge of them. This method of transferring the property and franchises to a new corporation was devised and has been practiced for the express purpose of preventing such a result, and this court will hesitate long before holding that Mr. Neely or the

Wichita Company, by adopting this common device to prevent the assumption of such obligations, assumed the obligations of the insolvent Winfield Company under the ordinance contract of 1906 to furnish natural gas to the city of Winfield at the 30-cent rate from June, 1909, when the Winfield Natural Gas Company took the property and assumed the obligations of the ordinance contract until October 23, 1926.

[9] The averment of the complaint that the Wichita Company organized the Winfield Gas Company to act as its agent, and that it is using and has used it as such agent to perform the obligations of Pattison and his successors, has not escaped our memory. But the allegation that the Winfield Natural Gas Company assumed the obligations of the old Winfield Company under the Hackney supply contract shows in what way the Wichita Company used the Winfield Natural Gas Company as its agent, and that under and by means of that contract and its performance it refused to assume and advisedly and legally protected itself against the assumption of the obligations of Pattison and his successors under the ordinance contract. The supply contract demonstrates the fact that the Winfield Natural Gas Company was not a general agent of the Wichita Company, and that it was not authorized to agree on its behalf to assume any of the obligations of the ordinance contract, for its powers were defined and strictly limited by the supply contract. So it is that the facts pleaded in the complaint regarding the purchase of the property and franchises of the old Winfield Company at the judicial sale, the payment for the purchase, the organization of the Winfield Natural Gas Company, the vesting in it of the title to that property and its franchises, and the taking and ownership of the stock of the new company by the Wichita Company are insufficient to indicate that the Wichita Company thereby assumed any of the obligations of Pattison or his successors under the ordinance contract of 1906 to the city or its inhabitants. They tend rather to establish clearly that, as it had the right to do, it did not intend to make such an assumption, and by its acts and its supply contract it sedulously and legally protected itself against such an assumption.

In the third place, the city alleges that the Wichita Company has assumed the obligation of Pattison and his successors by these alleged facts: Since July, 1909, it has, by virtue of the terms of the ordinance contract and the acceptance thereof, and through the agency of the Winfield Natural Gas Company, occupied the streets, alleys, and avenues of that city, by maintaining therein its gas mains, pipes, etc., formerly belonging to the old Winfield Company, and carrying its gas through these mains and pipes, and selling it to the inhabitants of the city at the 30-cent rate. But while the complaint recites the acceptance by the Wichita Company of the ordinance contract, it also alleges the facts which the pleader claims constitute this alleged acceptance, and these alleged facts not only fail to evidence such an acceptance, but show that there was no acceptance. The complaint discloses the fact that the Wichita Company's only occupancy or use of the streets and alleys was by the fact that the Winfield Natural Gas Company distributed the gas which the Wichita Company delivered to it at the limits of the city through the mains and pipes of the Winfield Natural

Gas Company which it owned and maintained, and which the Wichita Company did not own or maintain, and the Winfield Natural Gas Company sold this gas to the inhabitants of the city under and in accordance with the provisions of the Hackney supply contract, which had been assumed by the Winfield Natural Gas Company. In view of these facts which appear in the complaint there was no assumption of the obligations of Pattison and his successors under the ordinance contract by the Wichita Company here.

[10] In the fourth place, there are averments in the complaint to the effect that the city and the inhabitants knew the conditions of the ordinance contract and the terms of the Hackney supply contract, that the Wichita Company had accepted and assumed the former, that the latter was made for the benefit of the city and its inhabitants, that these contracts were being carried out according to their terms, and that in reliance upon these facts the city and its inhabitants expended and invested large amounts in making improvements and preparing to use natural gas at the 30-cent rate, which will be greatly and irreparably depreciated in value unless the Wichita Company is compelled by the court to furnish gas to them at that rate until October 23, 1926. These allegations are found in paragraph 24 of the complaint, after the averments of the alleged facts which the plaintiff asserted effected an acceptance of the ordinance contract and an assumption of the obligations of Pattison and his successors by the Wichita Company, which for the reasons already stated are thought to be insufficient to effect any such acceptance or assumption. The averment that the supply contract was originally made by the Wichita Company, or was assumed and ratified by the Winfield Natural Gas Company, for the benefit of the city and its inhabitants, is an averment of a conclusion or belief of the pleader that is not sustained by the contract itself, or by the averments of the circumstances and conditions of its creation and performance, which tend to prove that it was made for the benefit of the parties to it, and there are no other alleged facts which tend to indicate that those who made and assumed it had any other object. If, therefore, the city and its inhabitants knew the terms of the two contracts as alleged, they knew that the Wichita Company was not bound to the city and its inhabitants to supply gas to them at the rate of 30 cents per 1000 cubic feet, that its only obligation to supply gas was to the Winfield Natural Gas Company, to supply it to the extent and on the terms stated in the Hackney contract, and, if they made improvements with this knowledge, the Wichita Company is not liable for depreciation in their value which may result from its change in the rate at which it supplies its gas, or in its failure to continue to supply it at all, unless such action is a violation of the supply contract which it made.

[11] Counsel for the city contend that the two defendant corporations are joint adventurers or coadventurers in the joint enterprise of owning, managing, controlling, and using the property and franchises involved for the city and its inhabitants. Even if they were or are, that fact would not and does not create a contract of assumption of the obligations of Pattison and his successors to the city and its inhabitants by the Wichita Company, which never assented to any such contract,

and which, to prevent such a contract and to limit its liability, made the Hackney supply contract, whereby the extent of its liability was clearly fixed. A railroad company, which owns and operates its railroad, and an independent express company, which sends its express packages and messengers over it under a contract whereby the two companies share in certain proportions the income from the express business, are joint adventurers or coadventurers in that business, in the same sense as are the two defendants here. But the express company does not thereby assume the obligations of the railroad company to the grantor of its franchise or to the public perpetually to operate its railroad for their benefit. The express company's duty and liability are conditioned by the terms of its contract with the railroad company. By the same mark the duty and liability of the Wichita Company in this case is described and fixed by the terms of the Hackney supply contract of 1906, and by those terms the Wichita Company is not bound to the city of Winfield or its inhabitants, none of whom is a party to that contract, to supply natural gas to any of them at the 30-cent rate, or at any other rate, until October 23, 1926.

The analysis and consideration of the averments of the complaint which have now been made have resulted in the conclusion that they are insufficient to show that the Wichita Company ever made or assumed any agreement with, or obligation to, the city or its inhabitants to supply natural gas to them, unless that agreement or assumption can be found in the Hackney supply contract. Two questions therefore arise: Was the Wichita Company on June 14, 1919, when the court below dissolved the injunction, bound by the Hackney supply contract, as changed by the supplemental agreement of January 2, 1912, to the Winfield Natural Gas Company, by a lawful contract, enforceable in equity, to deliver natural gas to that company at the rate fixed in that contract or at any other rate? Second, if it was so bound, was the city of Winfield the proper party to enforce that obligation?

The first of these questions must be answered in the negative; (1) because that contract was void for lack of mutuality ever after January 2, 1912, as to natural gas not delivered and accepted; and (2) because, under the complaint and the evidence in this case, the capability of the gas wells and acreage of leases in the gas belt of Kansas, described in the contract, to supply natural gas there specified, which conditioned the existence of any obligation of the Wichita Company to supply it, did not exist on June 19, 1919, and for a long time prior thereto. For the reasons for this answer, reference is made to the opinion in *Hutchinson Gas and Fuel Co. v. Wichita Natural Gas Co.*, where this question is more exhaustively discussed.

The second of these questions must also be answered in the negative, because neither the city nor any of its inhabitants was or is a party to that supply contract, or ever became an assignee of any of the obligees of the Wichita Company thereunder, either by express assignment or subrogation.

[12] Counsel for the city, throughout the discussion of this case, have earnestly contended that the court, in the treatment of the parties to it, should ignore the difference between the rights and liabilities of

the two defendants, between the rights and liabilities of the alleged sole stockholder of the Winfield Natural Gas Company, the Wichita Company, and the rights and liabilities of the Winfield Natural Gas Company; that it should disregard the express limitations of the special agency of the Winfield Natural Gas Company for the Wichita Company created by the Hackney supply contract, treat the former as the general agent of the latter, empowered to bind it by an agreement of assumption of the obligations of Pattison and his successors, when it had no such authority; and that the court should reinstate the injunction on the theory that these parties were in effect one, and that that one ought to discharge the obligations of Pattison and his successors under the ordinance contract. If equity and justice demanded such a course of action by a court of equity, some of the contentions which counsel make might be lawfully sustained; but the complaint and evidence in this case have satisfied that equity and justice demand that this course should not be pursued, and that the court should not impose upon the Wichita Company and enforce a contract of assumption which the complaint and the evidence fail to satisfy that it ever made. The sole stockholder of a corporation is not the corporation; it is not bound by the obligations, debts, or liabilities of the corporation; it does not own, cannot sell, convey, or dispose of, the property of the corporation, or bind it by its agreement. *Watson v. Bonfils*, 116 Fed. 157, 167, 53 C. C. A. 535, 545; *Syndicate Ins. Co. v. Bohn*, 65 Fed. 165, 169, 12 C. C. A. 531, 535, 27 L. R. A. 614. Such was the legal relation of the Wichita Company to the Winfield Natural Gas Company.

The Winfield Natural Gas Company was indeed the agent of the Wichita Company. But the extent and terms of that agency were set down in plain words in the Hackney supply contract; they neither empowered nor permitted the Winfield Natural Gas Company to assume for or on behalf of the Wichita Company the obligations of Pattison and his successors under the ordinance contract. No mistake, fraud, deceit, or other equitable ground for avoidance of these legal relations of the parties has been discovered in the complaint or in the evidence. The reinstatement of the interlocutory injunction would be in effect a decree of temporary specific performance by the Wichita Company of alleged contracts which it never made, or which as to their executory parts are unenforceable and void.

The record in this case falls far short of presenting clear proof that the court below disregarded any of the applicable rules or principles of equity jurisprudence, or abused its discretion in dissolving the injunction. Its order must be affirmed; and it is so ordered.

NEWTON GAS & FUEL CO. v. WICHITA NATURAL GAS CO.

(Circuit Court of Appeals, Eighth Circuit. August 17, 1920.)

No. 5536.

Appeal from the District Court of the United States for the District of Kansas.

Suit by the Newton Gas & Fuel Company against the Wichita Natural Gas Company. From a decree dismissing the complaint, plaintiff appeals. Affirmed.

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

SANBORN, Circuit Judge. The parties in this case stipulated that it should abide by the decision in the case of Hutchinson Gas & Fuel Co. v. Wichita Natural Gas Co. (C. C. A.) 267 Fed. 35.

The decree of dismissal of the complaint, therefore, in this case, must be and it is affirmed.

CITY OF ATLANTA v. WICHITA NATURAL GAS CO. et al.

(Circuit Court of Appeals, Eighth Circuit. August 17, 1920.)

Nos. 5457-5460, 5462.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Separate suits by the City of Atlanta, by the City of Burden, by the City of Cambridge, by the City of Udall, and by the City of Arkansas City against the Wichita Natural Gas Company and another. From orders in each case, dissolving interlocutory injunctions against the defendants, plaintiff in each case appeals. Affirmed.

No. 5457:

A. M. Jackson, J. E. Torrance, and S. C. Bloss, all of Winfield, Kan., for appellant.

John H. Brennan, of Bartlesville, Okl., and R. R. Vermillion, Earle W. Evans, Jos. G. Carey, and W. F. Lilleston, all of Wichita, Kan. (R. A. Brown, of St. Joseph, Mo., and H. O. Caster, of Bartlesville, Okl., of counsel), for appellees.

No. 5460:

S. C. Bloss and A. M. Jackson, both of Wichita, Kan. (J. E. Torrance, of Wichita, Kan., on the brief), for appellant.

Joseph G. Carey, of Wichita, Kan., and Robert A. Brown, of St. Joseph, Mo. (John H. Brennan, of Bartlesville, Okl., R. R. Vermillion, Earle W. Evans, and W. F. Lilleston, all of Wichita, Kan., and H. O. Caster, of Bartlesville, Okl., on the brief), for appellees.

No. 5462:

W. L. Cunningham, of Arkansas City, Kan. (Albert Faulconer and C. L. Swarts, both of Arkansas City, Kan., on the brief), for appellant.

Joseph G. Carey, of Wichita, Kan., and Robert A. Brown, of St. Joseph, Mo. (John H. Brennan, of Bartlesville, Okl., R. R. Vermillion, Earle W. Evans, and W. F. Lilleston, all of Wichita, Kan., and H. O. Caster, of Bartlesville, Okl., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

SANBORN, Circuit Judge. These cases are of the same character as the case of City of Winfield v. Wichita Natural Gas Co. and Winfield Natural Gas

Co. (C. C. A.) 267 Fed. 47. They are here on appeals from like orders of the court below, which dissolved similar interlocutory injunctions against the Wichita Natural Gas Company and the respective distributing companies that were receiving natural gas from it and selling it to the cities and their inhabitants under ordinance contracts between these cities and the distributing companies acting therein, and supply contracts between the respective distributing companies and the Wichita Natural Gas Company in substantially the same terms as the ordinance contracts and the supply contracts in the cases of *Hutchinson Gas & Fuel Co. v. Wichita Natural Gas Co.* (C. C. A.) 267 Fed 35, and *City of Winfield v. Wichita Natural Gas Co.* and the *Winfield Natural Gas Co.*

While the facts in the cases now in hand are not identical with those in either the *Hutchinson Case* or the *Winfield Case*, they are so similar to them in each of these cases that the conclusions reached and the views expressed in the opinions in those cases are fatal to the claims of the appellants in these cases that the orders from which they appeal should be reversed, that those claims must be overruled, and that the orders which dissolved the injunctions in these cases must be and they are affirmed.

LEACH v. CARLISLE, Postmaster.

(Circuit Court of Appeals, Seventh Circuit. April 27, 1920.)

No. 2772.

1. Post office \S 26—Fraud order not proper, where question of fraud turns on contradictory opinions.

It was not the design of Rev. St. §§ 3929, 4041 (Comp. St. §§ 7411, 7573), as to fraud orders, to vest the Postmaster General with authority to determine between contradictory views held in apparent good faith on a subject the merits or demerits of which may fairly be said to be a matter of opinion among those who ought to know.

2. Post office \S 26—Fraud order against seller of sexual rejuvenator held proper.

Fraud order issued against one doing business as "Organo Product Company," advertising and selling a product called "Organo Tablets" as a remedy for sexual weakness, held proper; the advertising employed making extravagant and unfounded claims.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by Fred Leach, doing business as the Organo Product Company, against William B. Carlisle, Postmaster. From decree for defendant, plaintiff appeals. Affirmed.

Appellant, Fred Leach, under the name of "Packers' Product Company," was engaged at Chicago in the business of selling an alleged remedy for sexual weakness and disorders in men, which he called "Orchic Extract," consisting of dried and powdered sheep's testicles made into tablet form, and was advertised, sold, and remitted for through the United States mails. In 1917 he was called upon by the Postmaster General to show cause why a fraud order should not be issued against Packers' Product Company for conducting a scheme for obtaining money through the mails by false and fraudulent pretenses, etc., contrary to sections 3929 and 4041 of the Revised Statutes as amended (Comp. St. §§ 7411, 7573).¹ A hearing was had, and on April 4,

¹ "Sec. 3929. The Postmaster General may, upon evidence satisfactory to him that any person or company is conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means

1918, the fraud order issued. Thereupon Leach filed a bill to restrain the postmaster at Chicago from holding and returning mail pursuant to the order. Upon the hearing of that cause, the District Court denied the injunction and dismissed the bill. Thereupon Leach abandoned the name "Packers' Product Company," and adopted that of "Organo Product Company," and made some changes in his advertising matter, and began marketing the same product, calling it "Organo Tablets," transacting the business through the mails as before.

Proceedings were instituted to have this use of the mails declared a scheme to defraud under the statutes, and for a supplemental fraud order as to mail of Organo Products Company. Another hearing was had, in which there was a full presentation of the issues. The ground covered by the former hearing was again gone over, but far more elaborately. The Postmaster General found that this was a scheme to defraud by use of the mails, and supplemental fraud order was issued accordingly. Thereupon the bill in chancery herein was filed, wherein it is alleged that the product in question is one of great merit as a remedy for such ills, that plaintiff practiced no fraud, and did not use the mails to that end, and asking that the postmaster at Chicago be restrained from holding and disposing of the mail as prescribed in the fraud order. The bill set forth a transcript of all the proceedings (including the evidence) before the Postmaster General, and a statement of what transpired in the District Court in the first suit there. Leach moved for a temporary injunction, and the government for a dismissal of the bill for want of equity appearing on its face. The court denied the injunction and dismissed the bill, and Leach brings this appeal.

Lee D. Mathias, of Chicago, Ill., for appellant.

Charles F. Clyne, John A. Nash and James R. Glass, all of Chicago, Ill., for appellee.

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). The question which this record presents is whether, upon the facts before him, the Postmaster General was legally warranted in the exercise of the large discretion which in such matters the statutes repose in him, through making the order complained of.

The issue which was there most warmly contested was that of the

of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters arrive directed to any such person or company, * * * to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. * * *

(Act Sept. 19, 1890, c. 908, § 2, amended.)

(Act March 2, 1895.) "The powers conferred upon the Postmaster General by the statute of eighteen hundred and ninety, chapter nine hundred and eight, section two, are hereby extended and made applicable to all letters or other matter sent by mail." Comp. St. § 7412.

"Sec. 4041. The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any * * * scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, * * * and may provide by regulation for the return to the remitters of the sums named in such money orders. * * *

merit of animal testicular substances as a remedy for sexual and nervous disorders. Much evidence was adduced upon this, and many authorities cited, pro and con. By many it is maintained that they are utterly without merit, particularly when administered by the mouth, as this is, and not hypodermically, as is often the case; and it was contended for the government that such remedies in general, and particularly when so administered, are so manifestly wanting in merit that any representations to the contrary are essentially fraudulent. On the other hand, it was contended, and some evidence tended to show, that such substances, administered as this is, have proved more or less beneficial in some of such ailments.

Search for some clime or condition or spring or substance which would arrest human decay, and restore manly strength and vigor, is coeval with love of life and strength, and dread of decay and death. Whether wholly or partly predicated on superstition, or fact, or both, the thought is as old as the hills that to partake by way of food or otherwise of certain parts of animals will produce beneficial effect in the corresponding part in man—the brain, the heart, the stomach, and notably the testicles. There has long been more or less prevalent the practice of resorting to the testicles of animals as an article of food or medication for prolonging, restoring, or augmenting manly strength and sexual power. Among some it is believed that the lion, the tiger, the bull, and other animals of great strength are the most efficacious in this regard. The ram also has had favorable mention. In recent years scientific investigations have been conducted, with more or less beneficial result, respecting the employment of animal substances in the treatment of human ailments. Pepsin from stomachs is employed to treat some stomach troubles in persons, extracts from animal thyroid glands are used for human thyroid ailments, and other instances might be cited. Some decades since Dr. Brown-Sequard, a noted French neurologist, conducted a series of experiments on himself with hypodermic administration of animal testicular lymph, as to which he reported a very considerable degree of success; and his writings on the subject gave impetus to further experiments, and the use of such preparations in the treatment of sexual disorders and shortcomings.

[1] Considerable literature is extant upon the subject, and it appears that some physicians employ such remedies, and that many others decry their use. For some time back such substances have been made in considerable quantities, and the very testicular product in question is made and sold at least by one of the large packers, and by a number of the extensive manufacturers here and abroad, to supply any public demand for it. Under the record facts the most that could be said is that doctors and others, who might reasonably be supposed to possess expert knowledge upon the subject, disagree as to whether or not such substances have any remedial virtue.

It was not the design of these statutes to vest the Postmaster General with authority to determine between contradictory views held in apparent good faith upon a subject the merits or demerits of which may fairly be said to be a matter of opinion among those who ought

to know. *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90. It would follow that, if the order herein is sustainable only upon the inefficacy and absolute want of remedial virtue of the substance which appellant sells, the injunction should have issued.

[2] But any so-called remedy, however meritorious, may in its exploitation become the subject-matter of fraud. Indeed, it is too often seen that articles to which more or less merit is popularly ascribed are made a basis or vehicle to carry the grossest frauds, serving only to lend semblance of good faith to the scheme.

That modesty, or prudery, or whatever else it may be called, which puts a ban on frank and unrestricted reference to human sexual parts, and enfold their mention and consideration in secrecy and shame, has given quacks and charlatans a most fruitful field for operation, of which they have not been slow to take advantage. Sometimes boldly, but often by suggestion and innuendo, they undertake to make all men believe they have symptoms of most serious sexual disorders, when, in truth, they are more often perfectly normal, and that the natural subsidence of virility (which is generally quite as certain as the flight of years) will be arrested, and the victim restored to the vigor of robust youth, and that all sexual troubles will be corrected, if only that particular nostrum be taken, or that plan persistently followed. He who would operate in this peculiar field of endeavor must have a special care that his scheme is not calculated to instill in men unfounded fears, or inspire in them false hopes, as a means to the end of obtaining their money.

The plan for publicity for such remedies usually comprises literature which treats entertainingly, if not always scientifically or even truthfully, of the sexual parts, points out symptoms and dangers, and has somethings to say of premature decay, loss of power, etc. And then the proposed remedy, which is given some high-sounding name, but which is usually some ordinary and easily obtainable substance, is invitingly put forth as a certain cure for conditions which in most instances require no treatment, and in most others are beyond it. There is ordinarily a warning against quacks and cheats (who are intimated to be all the other workers in the same vineyard), and there is the quite unexceptional accompaniment of glowing testimonials from grateful users.

Careful perusal of the literature put out by appellant to effect the sale of his tablets induces the conclusion that it does not differ materially from the old-time stuff. It is perhaps somewhat more carefully composed, with the evident purpose of avoiding some of the more glaring misrepresentations present in that which brought about the first fraud order. But the general purport is the same.

It consists in the main of a quite lengthy introductory letter, inclosing a closely printed 20-page booklet. The letter expresses the belief of "Organo Products Company" that they offer "the very best method and remedy for regaining lost sexual power." The reader is then informed that the alluring advertisements of others who offer treatment for such ailments are intended to make every one who reads them fear-

ful of his condition. The intent is evidently to impress the reader with the complete absence of such intent on the part of this concern; the psychological effect of which apparent frankness being probably the more greatly to impress the reader with the startling statements thereafter made. It is further said in the letter that after middle age the sexual powers gradually decline, but in the booklet it is stated that "nature intended man to retain all his powers and faculties unimpaired to an advanced age." The letter then discusses somewhat sexual weaknesses, with another assertion of honest belief that "Organo tablets" will do more than any other remedy to effect a cure. A short disquisition follows on the use of extracts from animal glands as human remedies, particularly the thyroid glands, of which probably the public has more or less general information, and then it is asserted that "Organo tablets are based on the same theory or scientific principle." The letter closes with a request to read the booklet, and the suggestion that the reader "waste no further experiments, but order a course of our treatment, and we give every assurance that you will be more than pleased with its results."

The outside front cover of the booklet is occupied with the large-type legend, "Are You 100% Efficient? The present time requires energy and endurance," and inside this cover page the reader is warned in black-faced letters that:

"To be ambitious and Succeed in Life, your Nervous System must be Well and Strong, your Blood must be full of Vigor and Vitality. You must have a Bright Mind and Full Control of all your Faculties. But if you are Discouraged, Gloomy, Irritable and have a worn out Nervous System, then, each day only adds to your Misery."

The object of the booklet is stated to be to "explain to men of mature age a treatise of a private nature, which we believe will be of interest to you, even though you may not at the present time be in need of same." This introduction is of course calculated to induce those who have read thus far, eagerly to peruse the rest of it. It is arranged under attractive, large-type headings, such as "Neurasthenia," "Organotherapy," "The gauge which most accurately marks presenility or premature old age," "Prove to yourself what the blood can do," "What a wonderful sensation," "Physical decline—its causes and consequences—no man is exempt," "Appearance no indication of health and manly power," "Any man is liable to be weak," "Do not let false pride stop you from being cured," "First law of nature," "Sexual power is seldom lost," "Relation of nerves to bodily functions," "Organo tablets supply missing elements," "Organo tablets a logical remedy," "Work with nature's laws," "What manly strength is," "Reserve nerve force," concluding with the admonition, "Be fair with yourself," under which last head the reader is urged to frankly ask himself, "Do I need it?" and is solemnly adjured not to "overestimate" his condition, but to give himself "the benefit of what Organo tablets can accomplish" as "a powerful aid to the nutrition of the organs," followed by the usual assurance that it contains no "mineral or poisonous products," and that it "fully agrees and lives up to the latest Pure Food and Drug Act," again assuring the reader that this is "no fake

medical company, no C. O. D. scheme, no fake guaranties, no free trial treatments, no frauds or humbugs in any form"; and in other parts caution is urged against "patent medicines, no cure no pay, electrical belts and appliances, etc.," although the evidence discloses that some years before a similar order was lodged against Leach for exploiting a glass vacuum developer of male sexual parts. Under each of these subject heads there is duly presented a detailed and amplified discussion of the proposition stated.

In order to attest the excellence of testicular extracts, it is asserted that it "is being recommended and prescribed by leading physicians throughout the civilized world"; but to convince the reader that, aside from physicians, he must resort to appellant alone to obtain this "nature's wonderful remedy," it is stated that it is "not regularly on the market," and would have it inferred that these tablets have ingredients and qualities peculiar to themselves, and that appellant alone can supply them, in stating that "Organo tablets are prepared in accordance with our orders," and again, "We tell you frankly that this product and wonderful remedy is being compounded for us in one of the largest and best laboratories of the world," etc.; the fact being that it is a product which this manufacturing concern (and others as well) prepares, in nowise different in ingredients and qualities than are these tablets, and sells them to all comers, just as it would make and sell quinine capsules, pepsin tablets, and other preparations, infinite in variety, and having much or little merit, for which there may be demand.

But, whatever may be the remedial merit of testicular substances, their most ardent partisans do not begin to justify the extravagant and unfounded claims which the booklet makes, among these:

"Presenility or premature old age * * * can in most cases be relieved or deferred by careful or conscientious treatment with Organo tablets."

"If everything on earth has failed you, a short trial of Organo tablets will show you results which should more than repay you for the small investment required. Do not wait till it is too late. We will help you, if you believe in a good common-sense method and honest treatment."

"We cannot look into our bodies and see the organs work; therefore at times it is even difficult to apply the correct treatment, unless it be a logical remedy, such as Organo tablets."

"When he finds that nature must have assistance, he will use a full course of Organo tablets and store up a reserve fund of nerve force."

"Organo tablets are a reliable preparation for building up wasted organs and low vitality."

"Its general action is that of a powerful rebuilder and rejuvenator."

"The timely use of organo tablets for a reasonable length of time seldom fails in invigorating the functions of the body, bringing about tissue repair, so that those parts that are weak are strengthened and restored to their normal condition."

"There are in America to-day millions of men between 17 and 65 years of age who are earnestly seeking relief from sexual weakness in some form or stage."

"Every year hundreds of thousands are added to the already long list of men who suffer from lack of manly strength."

"A powerful nerve-building, strength-giving tonic and invigorating treatment, such as Organo Tablets, is needed to assist lagging energy, strengthen the nerves that control the sexual organs, and bring back to normal strength those organs that are weak."

"Testicular extract is prescribed by leading physicians throughout the civilized world for Nervous Weakness, General Debility, Sexual Decline or Weakened Manhood, Urinary Disorders, Lame Back, Lack of ambition, energy and nerve force, Sleeplessness, and Run Down System."

"Organo Tablets are not an experiment, * * * are a reliable preparation for building up wasted organs and low vitality; increases the 'stamina,' the staying power, the responsive nerve force, that makes you capable of enjoying life; invigorates man's virile strength; a reliable treatment for all Nervous Affections, Nervous Debility, Physical Weaknesses, and Functional Disorders."

The record does not warrant the conclusion that even appellant believed such broad assertions, nor that he was a physician or a scientist, or had conducted experiments or investigations; and it does not appear that he had basis for any belief whatever on the subject. The assertion of special and peculiar merit for "organo tablets" over and above, testicular products by any other name or style is wholly without basis in fact. In this particular field, with its narrow limitations, and its possibilities at best involved in uncertainty and doubt, there would be manifest difficulty in preparing advertising matter which avoids grossly extravagant and unwarranted representations. But this very difficulty, far from justifying such departure, would impose on those who glean in it, and would extract profit out of the exploitation of such articles, special care to see that what is so put forth is not calculated to deceive and defraud the public.

We are of opinion that this record, not only fails to show that the Postmaster General had no warrant in law for his order, but that, on the contrary, it shows there was abundant ground for it.

The decree of the District Court is affirmed.

THE THESSALONIKI*

Appeal of NATIONAL STEAM NAVIGATION CO., LIMITED, OF GREECE.

(Circuit Court of Appeals, Second Circuit. August 11, 1920.)

1. Shipping Ⓒ209 (3)—Evidence held to show that water in vessel, which caused abandonment, came from outside.

Evidence in proceeding to limit liability for loss of a vessel, with cargo and baggage, which showed that the vessel was abandoned after a quantity of water far greater than the contents of the boilers had entered the engine room during a storm, when the engines were stopped, held to show that the water entered from outside, not from the boilers, so that the loss was not due to unseaworthiness of the boilers.

2. Shipping Ⓒ207—Abandonment when vessel was not past saving is error of navigation, for which liability may be limited.

The abandonment of a vessel by her master and crew, when the vessel is not yet past saving, is an error of navigation, and management, for which the owners can limit their liability under the Harter Act (Comp. St. §§ 8029-8035).

3. Shipping Ⓒ209 (3)—Evidence held to show vessel was seaworthy.

In proceeding to limit liability, evidence of inspections of the vessel and her rating and condition held to show that she was seaworthy when she started on her last voyage, and that her loss was caused by perils of the sea.

*For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 63, 65 L. Ed. —.

4. Shipping ⚡166(1)—Steamship not insurer as to passengers; "ordinary care."

A steamship company is not an insurer as to passengers on the vessel, but only liable for "ordinary care"; that is, care according to the circumstances, which in case of stormy and dangerous weather conditions is a very high degree of care.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ordinary Care.]

5. Shipping ⚡120, 167(1)—Steamship not liable for loss of cargo and baggage, caused by excepted peril.

A steamship company is an insurer as to the cargo and the passengers' baggage, unless the loss was brought within an exception of the bill of lading or passenger ticket.

6. Shipping ⚡209(3)—Burden of proving negligence is on passenger or consignee.

In proceeding to limit liability, the burden is on the passenger or consignee to prove negligence by the steamship company as the cause of loss of baggage or cargo.

7. Shipping ⚡207—Defects in boilers, which would only result in delay, do not render vessel unseaworthy.

The only charges of unseaworthiness in the pleadings and proofs were connected with the boilers, engines, and sounding pipes. Assuming them all to be established, the only result would be a delay in the prosecution of the voyage, and the owners would not be liable, because the proximate cause of the loss of the vessel was a peril of the sea.

Appeal from the District Court of the United States for the Southern District of New York.

Petition by the National Steam Navigation Company, Limited, of Greece, owner of the steamship Thessaloniki, for limitation of liability. From a decree denying the petition, petitioner appeals. Reversed, with directions to enter a decree exonerating petitioner.

John D. Stephanidis and Kirlin, Woolsey, Campbell, Hickox & Keating, all of New York City (J. Parker Kirlin, Cletus Keating, and L. De Grove Potter, all of New York City, of counsel), for appellant.

Carter, Ledyard & Milburn, of New York City (Walter F. Taylor, and J. M. Richardson Lyeth, both of New York City, of counsel), for certain appealing claimants.

Harrington, Bigham & Englar, of New York City (D. Roger Englar and T. Catesby Jones, both of New York City, of counsel), for appellee and various other cargo claimants.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is an appeal from a decree of the District Court denying the petition of the National Steam Navigation Company, Limited, of Greece, owner of the steamer Thessaloniki, for limitation of liability, and at the same time claiming complete exoneration. The vessel was abandoned and sunk at sea January 6, 1916. Claims for personal injuries to passengers, and for loss of baggage and cargo, aggregating \$976,075.98, have been filed with the commissioner. The opinion of the District Court is printed in the margin.¹

The District Judge denied the petition to limit, and held the petitioner liable in full, on the ground that the steamer's boilers were in

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

¹ See note at end of case.

an unseaworthy condition at the beginning of the voyage, with the knowledge and privity of the petitioner, and that this was the cause of the abandonment of the vessel. He found as a fact that there was no proof of water coming into her from the outside at the time of abandonment, saying:

"The testimony of the witnesses for the claimants is much more satisfactory upon this point than that of the witnesses for petitioner; but, in any event, it may be said that petitioner has failed to demonstrate with satisfactory proof that waters came in through a broken porthole, or any other manner from the exterior of the ship, so as to cause damage to the engine and boiler equipment from any inrush from outside the ship. If any water did come in, it may fairly be assumed from the testimony that such water played no part, or, in any event, a very minor part, in disabling the vessel. The theory of loosened rivets and other theories more or less contradictory, advanced by the testimony on behalf of the petitioner, seem to be entitled to little consideration; whereas, the testimony reasonably supports the contention of claimants that the accumulation of water in the engine room was due to the failure of the pumps to do their work. There seems to be no doubt that the ordinary water circulating in an engine room of this character will accumulate in substantial quantities, if not continuously pumped out; obviously, when boilers are leaking continuously, the amount of water would be increased. The considerable amount of water which was in the engine room of the Thessaloniki when she was abandoned is easily explained by the leaking of the boilers and the failure to pump out the accumulated water."

There was abundant evidence that weather of most extraordinary violence was encountered for long periods between December 21st and January 5th (American calendar), when the vessel was abandoned. Certainly during the storm of December 21st water did appear in large quantities in the engine room and stoke hole, and we are convinced that it came through a broken porthole in the cross coal bunker. This water was pumped out when the place of the leak was covered, and all leaking ceased.

Shortly after midnight of January 4th, the steamer being then in tow of the steamer Patris, the towing lines broke after 36 hours of towing, and the Patris was lost sight of in a snowstorm. At 8 a. m. the chief engineer reported to the captain that water had been again appearing in the engine room and stoke hole. No water was found in the cargo holds. Although the engines were stopped, and all the steam was used on the pumps, they could do no more than keep the water from rising. The steamer was rolling in the trough of the sea, and on the morning of the 5th the water began to gain on the pumps, and at 4 p. m., with from 3 to 5 feet of water in the stoke hole, the fire in the lower furnaces put out, the officers and crew, with only the clothes they stood in and what they could carry in their hands, abandoned the vessel and went aboard the steamer Perugia, which had arrived about 3 p. m. in answer to an S. O. S. wireless call sent out on the morning of the 4th.

[1] It is said that the cause of the presence of water in the second storm is purely conjectural; but we think the evidence is irresistible that it came through the bottom of the vessel. It is neither necessary nor possible to locate the place and character of the leak precisely. The water could not have continued to rise from the accumulation of cooling water, because the engines were stopped and all steam used for the pumps. It could not have come from the boilers, because

the only leaks proved were at the ends of the tubes in the back tube plates, sufficient to reduce the steam power, but not to put out the fires. Moreover, the tubes found to be leaking, comparatively few in number, were plugged. If water had been leaking wholesale from the boilers, all danger would have been prevented by letting them empty their whole contents into the bilges. The highest estimate of their contents is 40 tons each, or 160 tons for the four boilers, whereas it would take 400 tons to reach the floor of the stoke hole, and 600 tons to reach the floor of the engine room.

[2] We think it quite incredible that a valuable steamer and cargo would have been abandoned within 300 miles of New York, if they were not past saving. However, had this been the case, it would have been an error in the navigation and management of the vessel, for which the owners would not be liable under the Harter Act (Comp. St. §§ 8029-8035), if they had exercised due diligence to make her seaworthy.

[3] The only charges of unseaworthiness in the pleadings and in the proofs are connected with the boilers, engines, and sounding pipes. We may assume them all to be established, and the only result would be delay in the prosecution of the voyage. As to the sounding pipes, we are quite satisfied that they were properly equipped with roses, which doubtless were more or less clogged by small particles of coal carried from the cross coal bunker through which the water came.

In respect to the hull, the proof is that the vessel was of most substantial construction, in excess of Lloyd's requirements; that at the time of abandonment she had the classification of the British Corporation, which is but one, and of the highest class; that the hull was examined in dry dock in July, 1913, by the marine superintendent of the Ellerman Line, the owner, and in August by the inspector of the British Corporation, and found in good condition; in April, 1915, the hull was passed on the annual inspection by the United States inspector at New York as in good condition, and the vessel's certificate as a passenger steamer continued; in September, 1915, the hull was again examined in dry dock at New York; and in November, 1915, at Piræus. This seems to us to afford abundant evidence of seaworthiness and we find that the proximate cause of the loss was peril of the sea.

[4-6] The steamship company was not an insurer as to the passengers, but only liable for ordinary care; that is, care according to the circumstances, in this case a very high degree of care. As to the cargo and passengers' baggage, it was an insurer; but, if the loss was brought within an exception of the bill of lading or of the passenger ticket, proof that the carrier was guilty of negligence lies upon the shipper or consignee and the passenger.

[7] The passenger tickets did exempt the company from liability for damage resulting from storm, and in general from all accidents on the sea, and the bills of lading exempted the carrier from liability for loss occasioned by the act of God, perils of the sea, or other accidents of navigation. The company, having proved a peril of the sea as the proximate and adequate cause of the loss, is entitled to complete

exoneration. If the claimants had filed libels in the court below, their libels should have been dismissed.

The decree is reversed, and the court below directed to enter a decree exonerating the petitioner appellant, with costs of this court, but, under the circumstances, without costs of the District Court.

NOTE.—The following is the opinion of Mayer, District Judge, referred to in the opinion above:

MAYER, District Judge. Petitioner has brought this proceeding to limit its liability as owner of the Thessaloniki, which was abandoned at sea on January 5, 1916, and presumably sank. A cargo of substantial value was lost, but there was no loss of life. Petitioner denies liability, and alleges that, if any liability exists, it arose without the knowledge or privity of petitioner.

The Thessaloniki was built for the Ellerman Line in 1890 at Belfast, and was originally the British vessel City of Vienna. In November, 1913, she was sold to petitioner, her name was changed to Thessaloniki, and thereafter she sailed under the Greek flag. She had the highest class in the British Corporation which she kept until the time of her loss. She was well built, in excess of Lloyd's requirements, and was maintained in good repair while operated by the Ellerman Line. She was a steel screw steamer of 2,895 net tonnage, deadweight capacity 6,500 tons, 412.3 feet long, 46.7 feet beam, 29.3 feet depth of hold. She had four holds, two aft and two forward of the engine room, and underneath these and the engine compartment there were six tanks, of 45 tons capacity each, for water. She was equipped with a triple expansion engine, having one high-pressure, one intermediate, and one low-pressure cylinder. The indicated horse power of her engines was 3,200, and, according to Constanditis, her chief engineer, these engines were the largest of any Greek merchant vessel. The engines normally made 56 to 58 revolutions per minute light, and about 54 loaded, which gave the ship a speed of from 10 to 10½ miles per hour.

At the outset, petitioner is faced with the burden of showing that the loss of the vessel "was occasioned by one of the perils for which he was not responsible." *Clark v. Barnwell*, 12 How. 272, 13 L. Ed. 985; *The Folmina*, 212 U. S. 354, 361, 29 Sup. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748. Under the Harter Act, the shipowner "must prove that the vessel was seaworthy at the time of beginning the voyage or that due diligence had been used to make her so." *The Wildcroft*, 201 U. S. 378, 386, 26 Sup. Ct. 467, 50 L. Ed. 794.

Claimants urge (1) that petitioner has not succeeded in explaining the loss of the steamer, or assigning a cause intelligible from or supported by the testimony; and (2) that the proximate cause of the loss was the defective condition of the boilers—a condition which, claimants assert, must have existed before the Thessaloniki left Greece on her last voyage, and could not have arisen because of acts done or occurrences on the voyage itself. As might be expected, there is a sharp conflict of testimony in regard to this vital point of the condition of the boilers; but dehors the words of witnesses there are some undisputed facts which are of service in arriving at a conclusion. In addition, in this case, the expert testimony has been of real service in presenting clearly the two different theories as to the boiler condition and action which the contending parties advance.

On November 16, 1915,² the Thessaloniki sailed from Piræus, Greece, bound for New York. She stopped at Calamata, Patras, Messina, and Algiers, passing Gibraltar on December 1st. According to her normal rate of full speed, she should have arrived in New York by about December 16th. On December 21st, however, she was still about 600 miles from New York. After various experiences, to be referred to *infra*, the vessel on December 30th, was

²The dates are given according to the American calendar, which is 13 days later than the Greek dates used in the log book.

about 300 miles from New York and finally, on January 5th, the steamer was abandoned by her crew, whose members were taken aboard the *Perugia* and thus conveyed to New York.

In accounting for the loss of the steamer, the position of petitioner is thus stated by its counsel, in their brief: "The evidence taken in the case and the records of the weather bureau show that the *Thessaloniki* met rough weather, high seas, and adverse winds almost continuously during the entire voyage, that the speed of the vessel was greatly retarded, and that on and after December 21st she encountered four cyclones and weather of extraordinary violence. These perils caused damage to the vessel's equipment and machinery, and a leak, apparently beneath the cross bunkers, which admitted water in such large quantities as to require the abandonment of the vessel. * * * It is contended on behalf of the petitioner that the slow speed of the vessel, the breakdown of the boilers, and the eventual loss of the ship were all due to the sea perils encountered on the voyage. As a matter of fact, the speed and the condition of the boilers were immaterial, as the loss of the vessel was proximately caused by the leak in the vessel, and was not in any way due to the condition of the boilers, three of which had been cleaned and repaired and were in working order when the vessel was abandoned."

We are thus led to inquire (1) as to weather conditions; (2) as to the leak, if any; and (3) as to the boiler condition during and before the voyage.

(1) *The Weather.*—Up to December 21st the weather was no different than that which might be expected on the Atlantic in November and December of any year. The best guide in particular is the captain's log, and a general guide is the testimony of Mr. Kimball, meteorologist of the United States Weather Bureau. There is also the diary of Peaskee, the ship's doctor, who reveals himself as rather an apprehensive and amusing person; but, while the doctor (who, for the purposes of this case, must be regarded as a landsman) clearly indicated that his fears were seldom absent, yet, because his descriptions cannot be regarded as the accurate statements of a trained navigator, they must be disregarded.

It is, of course, a matter of common knowledge that weather is described with different adjectives, dependent partly on impression, partly on use of language, and partly on experience, and thus two persons may mean the same condition, when one speaks of a "violent" wind and the other of a "strong" wind. It is therefore highly helpful, when a description may be read in the light of a standard, and this can be done in the case of the log of Capt. Goulandris and the skilled interpretation of Mr. Kimball.

The captain used eight words to indicate wind forces; i. e.: (1) Calm; (2) little wind; (3) moderate wind; (4) much wind; (5) strong wind; (6) violent wind; (7) gale; and (8) cyclone. Remembering this ascending nomenclature, it will be at once appreciated that "strong wind, with rough sea"—an entry which frequently appears prior to December 21st—means little of serious import; nor can any significance be attached to such an entry as that made at Calamata, when the log records, "Owing to the rough sea, three barrels of sugar fell into the lighter and were broken." The ocean in the late fall or early winter is not an inland summer stream, and much worse conditions may be found in the harbor on a windy wintry day.

A detailed examination of the log, the testimony of the captain himself, the petition of the petitioner, and the accounts, among others, of First Officer Orloff, Second Officer Piankès, and Third Officer Roonomides, show that the weather, prior to December 21st, was not in any sense unusual, nor of a character to damage a vessel which, on November 16th, sailed with a stout hull. Further, the records of Mr. Kimball showed that no vessels anywhere near the same general vicinity as the *Thessaloniki* reported any wind force in excess of No. 6 on the Beaufort scale—a strong breeze—prior to December 26th. It is true that Mr. Kimball thought, on a theoretical basis, that stronger winds might have been encountered, the most severe being force 9—a strong gale—on December 11th and 12th; but, even assuming

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this, his testimony showed, generally speaking, that the weather conditions prior to December 21st were not unusual for that time of year, indeed better than the theretofore average experience.

There was a good deal of speculative suggestion, which dealt with isobars and the like, which may at once be laid aside. Such deductions as may be drawn from an expert consideration of this kind may be useful in the scientific progress of weather forecasting—not as yet an exact science—but are unsteady service in determining the precise weather condition on a certain date at a particular place. Indeed, it is a matter of common experience that within a short distance of a light breeze there may be a considerable wind, or that it may be raining uptown and clear downtown.

On December 21st, the log records: "Hurricane, ungovernable, violent, windstorm; * * * wind became most violent as well as the sea."

This severe weather, however, continued for less than 24 hours and no damage was sustained. However a considerable amount of water collected in the engine room and the Captain called a meeting of the officers and engineers and "it was decided on account of the ship's condition to call for help SS 'Stampalia' the nearest to us; and immediately she steamed to us. We are also steaming hard to meet her."

The "Stampalia" approached and, says the log, "We pumped all the waters out. * * * We inspected the double bottoms to see whether the waters are entering again but we found them dry. After that we inspected all the holds and coal bunkers. In a bunker we found a port hole broken from which the waters came in."

At 4 A. M., on December 23d, the Thessaloniki, convoyed by the "Stampalia" encountered only a "light wind with swelling of the sea" and at 8:30 A. M., "after a conference held by the Captain and officers and the engineers, seeing that there is no danger, we decided to leave the steamer free to continue her journey and we continued our journey alone." Thereupon, the "Stampalia" was dismissed and the "Thessaloniki" proceeded only 324 miles or about $4\frac{1}{2}$ knots per hour until December 26th, although during these three days there were only about twelve hours of bad weather; i. e., from "violent wind with big rough sea," to "very strong wind with big rough sea." On December 26th the vessel encountered a very severe storm, described at 8 A. M. as "the weather became stormy" and at noon as "hurricane continues with more rage and waves rushing violently on deck." By midnight the "weather was considerably improved." "A high wave broke on the deck and caused much damage to the bridge and the deck, a boat was taken away * * * another wave smashed two of our boats and caused such other damage on the deck."

On December 27th "the weather being improved, we continued our journey." On December 28th, some of the officers, without the Captain's consent, sent out distress signals by wireless, "although" the Captain recorded in the log, "there was no immediate danger." On December 29th, sails were rigged up on both masts. About 7 P. M. "the wind became most violent and changed to a hurricane" and at midnight, "the hurricane" continued "with the same rage."

On the morning of December 30th, distress signals were sent out by common consent, the steamer then being about 300 miles from New York. On December 28th, the 2 p. m. log entry showed "a boiler was emptied for repairing and cleaning its tubes which were losing" and at midnight "we still proceed, with the cleaning and repairing of the boiler." On the morning of December 29th, the "cleaned boiler was put in use" but later in the morning "another boiler was emptied for cleaning." Later, the "cleaning of the boiler ended and was used."

The entry as of noon December 30th stated, "The engineer informed us that the boilers sustained injury, as result of which we are proceeding slowly." At the time the revenue cutter Seneca and the British steamer Florizel were approaching to assist, and while awaiting them, "we stopped the engine, and we are endeavoring to repair and clean the boilers."

On December 31st, the work on the boilers being completed, the Thessaloniki's engines could be moved slowly. At this time the Greek steamer Patris,

a ship of the same line as the Thessaloniki, had joined the group of vessels which were coming to the Thessaloniki's assistance. The Florizel came in sight at 5 p. m. on this date, and the Patris at 10:45 p. m. Upon the arrival of the Patris, the master of the Thessaloniki dismissed the Florizel, which was still standing by, and the revenue cutter Seneca, which had not yet come in sight, and on the following morning, January 1st, the passengers of the Thessaloniki were transferred in small boats to the Patris, which then put a tow line on the Thessaloniki and endeavored to tow her to New York. The towing lines parted from time to time, but the towing operations continued with occasional interruptions from the morning of January 1st until about midnight between January 3d and 4th. On January 2d the Thessaloniki sought the assistance of the Dutch seamer Procion, asking her if she would tow the Thessaloniki in case the Patris failed, but the Procion declined.

Shortly after midnight, between January 3d and 4th, the tow line having broken, the Patris was lost to view in a blizzard. Some water having been found in the engine room, the Thessaloniki again sent out urgent distress signals, to which a number of steamers responded, including the Danish steamer United States, and the British steamer Perugia. By this time the distress signals from the Thessaloniki seem to have become a habit, and the Thessaloniki was wallowing in the sea, while other vessels such as the Stampalia, were going to and coming from New York.

Finally, on January 5th, the Perugia came up and the crew of the Thessaloniki abandoned her and came to New York on the Perugia.

To recapitulate: There was really no bad weather until December 21st. That storm lasted less than 24 hours, and the next severe storm did not occur until December 26th.

(2) The Leak.—Shortly after the arrival of the crew of the Thessaloniki in New York, a libel was filed in this court on behalf of a passenger named Williams. Several witnesses were examined de bene esse on behalf of libellant. Such testimony is usually important and useful. Ordinarily it is given at a time when witnesses do not fully see the purpose of the examiner's questions, and when memory is not affected by lapse of time nor partisan leaning.

First Officer Orloff testified that he first thought the steamer was in danger, on the occasion of the first storm (December 21st), "because of the appearance of water which the pump could not pump out quickly." This water appeared in the coal bunker and also in the boiler room. The engineers told Orloff about the water, and when he first heard it he "went downstairs to see," and found "there was much water also in the coal bunkers and in the boiler rooms." An investigation was therefore made, apparently of a thorough character. "We looked," testified Orloff, "at all the port holes to see if any of them were broken; very little water used to come through the port holes, but not so much as to fill up the quantity of water that was in the boat; then we looked at the cargo holds, particularly No. 1 and 2, fearing that water was coming in from that section; because the water was so much in that region we made a special investigation of that section. Q. Could you find out how water came into the ship? A. No."

Bernardos, a fireman or coal passer, testified that he did not see any hole where the water could come in. Piankos, the second officer, testified that there was no water in the cargo holds, and he accounted for the water on grounds other than entry from the exterior of the ship. Hatjoglou, oiler, and Caristinos, donkeyman, both witnesses at the trial, and Peremenis and Kortes, firemen, examined in New York by deposition, all testified, in effect, that the accumulation of water in the engine room was due to the fact that the pumps would not work, and not due to any water coming in from the outside of the vessel. On the other hand, Styliadias, second engineer, testified that the vessel became unmanageable on account of rough weather after the time that the towing lines of the Patris broke. The exact date to which Styliadias refers is not clear, but this incident seems to have occurred on January 1st. Styliadias said that, "after the lapse of three or four hours, waters appeared in the cross bunker" and "ran down to the boiler room

and the engine room." But he failed to state how the water got into the bunker.

Constanditis testified that the Patris towline broke three times, and after the last break "large quantities of water got into the boiler room, bunker and engine room"; but he does not satisfactorily account for the presence of the water. Captain Goulandris testified that, after the chain broke, he and the carpenter sounded to see if there was water in the holds, and found all the holds dry, but saw water in the boiler room and coal bunker and engine room, and surmised "that the waters were coming from the bunker, because they appeared there before." He stated: "I went into the coal bunkers and inspected the empty space of the coal bunkers; I looked up on the roof to see if there was any hole. I did not discover any, but the water was coming, and I saw the water was coming in from the coal; as the coal was in there, I could not see where the water was coming from." He was then asked whether the water was coming from below, and he answered: "Yes; my explanation of this was, as I could not discover any other place, that the water was coming from below, and I surmised that the hold must have gotten loose down below; that a rivet or rivets got loose."

Economides, third officer, testified that he went on watch at midnight on January 3d; that the towline broke and the ship became unmanageable; that at about 3 o'clock in the morning the engineer came up and notified him that there was water in the engine room, and that, although they kept pumping the waters all the time, the waters were increasing; but it is impossible to find in his testimony any clear statement as to how the water got into the vessel.

The testimony of the witnesses for claimants is much more satisfactory upon this point than that of the witnesses for petitioner; but, in any event, it may be said that petitioner has failed to demonstrate with satisfactory proof that waters came in through a broken port hole or any other manner from the exterior of the ship, so as to cause damage to the engine and boiler equipment from any inrush from outside the ship. If any water did come in, it may fairly be assumed from the testimony that such water played no part, or, in any event, a very minor part, in disabling the vessel. The theory of loosened rivets, and other theories more or less contradictory, advanced by the testimony on behalf of petitioner, seem to be entitled to little consideration; whereas, the testimony reasonably supports the contention of claimants that the accumulation of water in the engine room was due to the failure of the pumps to do their work. There seems to be no doubt that the ordinary water circulating in an engine room of this character will accumulate in substantial quantities if not continuously pumped out, and obviously, when boilers are leaking continuously, the amount of water would be increased. The considerable amount of water which was in the engine room of the Thessaloniki when she was abandoned is easily explained by the leaking of the boilers and the failure to pump out the accumulated water.

(3) The Boilers.—The testimony having excluded the hypothesis as to a leak of some kind as the proximate cause of the condition of the ship, and all agreeing that the damage done by the storms had no effect on the hull so far as the locomotion or progress of the vessel was concerned, there is no escape from the conclusion that the situation in which the vessel found itself was due to some defect of the boilers. Contradictory, and in some instances rather absurd, explanations are attempted by some of the officers of the vessel to account for the disaster; but one cannot perform the task of reading these many pages of testimony without concluding that the proximate cause of the loss of the vessel was some boiler condition. The question, then, is whether that condition existed when the Thessaloniki left Piræus or occurred during the voyage. Ordinarily, the testimony first, and expert testimony second; but, in this case, it will be helpful to examine first the theories and explanations of the experts, and then see how the testimony fits these theories and explanations.

Each side had two experts, all men of high character and acknowledged equipment. Messrs. McNaught and Haight, experts for the claimants, had,

however, the advantage over Messrs. Martin and Ross, experts for petitioner, in that both Mr. McNaught and Mr. Haight had had actual sea experience. It is no reflection upon the ability of Messrs. Haight, Martin, and Ross, who are well and favorably known to the court, to state that Mr. McNaught, for the purposes of this case, was one of the most impressive and convincing experts to whom I have ever listened. In addition to a clear understanding of the subject-matter, and a trained technical appreciation of the questions involved, Mr. McNaught has had the great advantage of a long and varied active experience in the engine room, having served as chief engineer on ships for many years, and having been practically all over the world in that capacity. Such an experience, when an expert is both upright and intelligent, is of great service in resolving any questions of doubt, because it is well known, and especially at sea, that theory and practice do not always accord. The theory of Mr. Martin, briefly stated, was that a boiler could be seriously damaged merely through the entrance of cold air into the furnaces during bad firing incident to rough weather, and that this result might occur, though firemen did their duty as best they could in the circumstances. This theory was theory pure and simple, unsupported by even the hearsay talk as to vessels which had thus suffered.

Mr. Ross expressed the view, in substance, that unequal expansion in the boiler tends to cause leaky tubes, and that such inequality of expansion is much more likely to occur where there is a deposit of scale on the outside of the tubes. He referred, as a precedent, to a paper read by Mr. Howden in 1886; but nothing in this paper is inconsistent with the contention of claimants, or the theory of their experts, for the paper concludes as follows: "This conclusion is indeed not left to mere inference—it is a fact within the experience of most sea-going engineers working with chimney drafts that, when considerable scale accumulates on a back tube plate of an ordinary marine boiler, if a furnace door is suddenly opened under certain conditions of draft, the rush of cold air causes the tubes to leak."

It is not contended that, when tubes are covered with scale, they will not be likely to begin to leak, and that this tendency will be increased by inequality of firing. The leaking of tubes was the grave problem in the early days of marine boilers, and the constant effort has been to eliminate this difficulty, and that effort has been fairly attained. Rough weather is to be expected during many periods of the year, and may occur at any time, and, with rough weather, inequality of firing may be expected; but, if the theory of petitioner's experts is to be accepted, then Scotch boilers (as were those on the *Thessaloniki*) must be regarded as a failure, and as yet marine engineers do not thus unhappily classify this widely used standard equipment. Both Mr. McNaught and Mr. Haight, in answer to the hypothetical question, stated that the condition of the boilers as they existed on December 27th and 28th (upon the assumption of the fact stated in the question) could not have been brought about by the events of the voyage. In other words, their testimony comes down to the proposition that the boilers could not have been completely and properly cleaned when the vessel started on its voyage.

It is impracticable to discuss in detail the testimony of the experts and the numerous possible conditions which necessarily were discussed in seeking for an adequate explanation of the boiler condition, and the details as to the condenser, the thinning out of the tubes, and the plugging, must be ascertained by a perusal of the testimony; but the following extract from Mr. McNaught's testimony sets forth, in simple language, what very well may happen if this important part of a ship's equipment is not jealously watched and dealt with.

"By the Court: Q. Right on that subject, just give me briefly the kind of conduct of an engineer which would tend to impair or perhaps destroy the efficiency of the tubes. A. Well, picture, your honor, a ship brand new, an average ship, with a careless engineer, going to sea in her. He allows his boilers to become salt through negligence in not working his evaporator, which is frequently done; in turn, his boilers become extremely dirty and foul, due to the deposit of salt water which he has allowed to go into his boilers. He makes a voyage, and when he empties his boilers, instead of examining them

carefully, having all the heated surfaces cleaned of the scale which has been deposited, the scale is allowed to remain, except in palpable places, such as the top of the furnace, or the tube plate, or tube sheet, which is a very vital part and should be carefully attended to. If allowed to gather its accumulation of scale, after a period possibly of 12 months, he will immediately begin to have trouble with his tube ends, where they go through the back tube ends, due to the overheating of the tube sheet itself and the unequal expansion in the tubes; the tubes become coated with so much scale that when the fires are bright and clean, and the boilers working well, the conduction of the tubes is such as to allow the tubes to become overheated, because the scale prevents the heat from being conducted through the tubes to the water. The tubes expand more than the rest of the boilers, which causes, of course, a slight shifting of the tube where it is expanded in the back tube sheet, due to the expansion, and unfortunately causes serious leaks. These leaks continue, and the engineer or the shore people, as the case may be, go into the boilers and put in the tube expander and again expand the tube. The process of expanding the tube is a thinning of the tube or an expansion of the tube; so that each time—I have seen a tube expanded in the back connection and cut through just by expanding—that is the resistance of the tube plate to the expanding of the tube; so that this scale remains on the tube sheet, and these leaks occur several times, and the tube is several times expanded, until you reach a condition where it is practically impossible to continue working the boilers."

There is much in the testimony which tends to expose the facts upon the assumption of which Mr. McNaught and Mr. Haight expressed their opinions and based their conclusions (Koufos, Raftopoulos, Vourloumis, Hatjoglou, Peremenis, Carlstinos, and Kortesis). Some of this testimony comes from humble men, and some of it is marked by inaccuracies and contradictions. But nevertheless the impression is left that something was wrong with the boilers. The picture is one of testimony adduced by both sides, each at times disclosing details which are inconsistent and occasionally grotesque. It is impracticable to analyze this testimony, witness by witness; but, when it is all done with, it is difficult to eliminate the impression, *supra*, that the boilers were not in proper condition when the vessel left Piræus, and it certainly is very hard to account for the tardy progress of the voyage prior to December 21st on any other theory.

Thus against considerable fact testimony, and against the clear and logical explanation of claimants' experts, there is opposed really only the direct testimony of the chief engineer, Constanditis, and of the marine surveyor, Alexander Kairis. Styliadidas, second engineer, and Demeterios Kairis and Andrieoplous, third engineers, merely gave general testimony to the effect that the boilers were in good condition when the vessel left Piræus. Ceconomopoulos, the contractor who was employed to clean the boilers at Piræus, testified merely to having cleaned the boilers in the same way that he always cleaned boilers. Direct testimony, involving visual inspection, comes down to that given by Constanditis and Alexander Kairis.

As affecting the testimony of Constanditis, the case presents two rather unusual circumstances. The deck officers kept a scrap log, as well as the official deck log, while an engine room log was kept under the supervision of the chief engineer. Of these three logs only the official deck log (from which quotations have been extracted, *supra*), was produced. In the Williams Case, almost at the commencement of the examination of Cap. Goulondris, counsel for claimants called for the log book, which was not then produced, because said to be in possession of the Greek consul. On the subsequent examination of Goulondris, at a later date, he produced the log. When Orloff, the first officer, was examined, he said, "My scrap book (meaning scrap log) the captain has, and the log book shows the exact position." Counsel then called for the production of the scrap log book, whereupon counsel for petitioner stated, "If the captain has it, I will produce it; I can't say whether he has it or not."

In the course of the examination of Orloff, he was asked when he first had trouble with the boilers, and he answered, "I don't remember exactly, but, if you wish me, I can refer to the log book, because I know we stopped one day to clean up certain tubes of a boiler." He then looked at the log book and answered, "There is no entry in the log book; I remember very well, as we stopped to clean up the tubes of the boiler." Later he was asked whether there was an entry in the ship's scrap log book showing the date when the vessel stopped to clean up the boiler, and he answered, "Yes; I made an entry, as well as the other mates; the captain has it; I had all my entries there." Counsel for claimants again called for production of the scrap book, and a little later repeated his request. According to Orloff, the captain took the scrap book, and had it on the Perugia, and when Orloff was further questioned, he answered: "Because the scrap log book contains every movement of the ship, we cannot do otherwise than make every entry in that scrap log book; I don't know if that entry appears in the present log book." At a later date, when Orloff was further examined, counsel for petitioner insisted that there was only one log book kept on board the ship. As he put it: "That is the captain's version; * * * the captain says there is no scrap log book."

Undoubtedly counsel was stating what had been told to him, but the evidence is convincing that there was a scrap log book, and the excuse for its nonproduction is that it was so wet that the captain did not think it worth taking off the vessel. Some of the witnesses testified that they saw the scrap log on the Perugia, where it was being used in writing up the official deck log.

It is well known, as Orloff indicated, that the scrap log often contains a considerable amount of detail, which, sometimes, is not fully transcribed into the official log, and therefore, when important questions of fact arise, as in the case at bar, there is no assurance, necessarily, that the official log contains all that was written in the scrap log, and, if Orloff is to be believed, at least one instance has been quoted where there was the failure to enter in the official log an important experience in connection with the boilers which, according to Orloff's recollection, had been entered in the scrap log. In addition, the chief engineer's log disappeared in a manner which is inherently peculiar. The one record which a seafaring man holds onto is the log. If he has truly recorded the events of a voyage, he knows that the log may be of vital importance in acquitting him of blame, and, if the testimony heard in many litigations is any guide, it may safely be asserted that a conscientious officer will do everything in his power to preserve the log, even though it be water-soaked.

The chief engineer Constanditis, admitted that he took the log with him aboard the Perugia; that it was stolen from him, but later found in such a mutilated condition that he did not consider it worth preserving. It is hard to assign any reason which any one could have for stealing or mutilating the engineer's log book, and it is interesting to note that the officers took good care to preserve their certificates and other documents, as well as the mails and bags containing their personal effects.

The conclusion is irresistible that there was something in one or both of these log books, and particularly in the log book of the chief engineer, which made their loss desirable from the point of view of those who kept these books and were charged with their custody. It is not too much to say that it may fairly be assumed that an officer will preserve even the most mutilated record of this kind in the hope that, perhaps, some of its entries may be restored, or, in any event, that the officer may be able to exhibit what he has, and thus satisfy the inquiry as to his good faith. This serious circumstance, together with other testimony of Constanditis, in which he attempts to explain the actions of and results in the boiler and engine rooms, combine to destroy, or in any event seriously impair, his testimony as to the condition of the boilers when the vessel left Piræus. It must not be forgotten that, if the boilers were not in good condition, such a situation would lay a heavy burden upon the chief engineer, and might readily affect his future as a re-

sponsible man, even though the bad condition of the boilers was due to the haste of his employers or to some other reason.

In respect of Kairis, the situation is one of exceeding delicacy. He is undoubtedly a capable man, and has been in the employ of responsible concerns, and there has been confided to him the performance of highly important duties. To say positively that either he or Constanditis have not told the truth upon a vital point might, if the court is wrong, do a lasting injustice to men who have led industrious and honorable lives. Therefore I shall content myself by stating that the testimony of Kairis was not convincing. He was greatly confused as to dates and events when asked about a collateral matter, in an examination designed to test his credibility.

It is urged that his memory as to the drydocking of the Thessaloniki was searched upon a point immaterial to the issues. This contention is sound so far as affects the question of fact as to the condition of the boilers, but it is unsound so far as affects credibility. A lay witness is not always keen to realize the purpose and effect of an examination or cross-examination, and very often what seems to be a collateral inquiry proves highly useful in determining the credence which is to be given to testimony. A witness may think that the inquiry is important and material, and may seek to escape what he conjures in his mind may be the consequence of answers along a given line, and, when a witness is as confused and mistaken as Kairis was upon this point, it is difficult for the court to be satisfied or convinced that his recollection in respect of important occurrences may be relied upon.

Perhaps, therefore, the most agreeable way of putting the matter is to say that the testimony adduced by petitioner as to the condition of the boilers when the vessel left Piræus is so seriously contradicted by other direct testimony as to the condition of the boilers during the voyage, by the slow progress of the vessel up to December 21st, by the detailed history of the conduct and movements of the vessel and the actions of the boilers from the time difficulty was discovered until the end of the voyage, and, finally, and by the reasonable and logical opinions of the experts for claimants, that the result must be reached that the boilers were dirty and in bad condition and unfit for the voyage when the Thessaloniki left Piræus.

In reaching this conclusion, I have not overlooked the previous experiences of the vessel, such as that at Bermuda, and the hydrostatic test made by the United States local inspectors. The only one of these previous experiences which needs comment is that of the inspection by the United States officials. That such a test does not destroy claimants' contention is, I think, distinctly disposed of by the statement of Mr. McNaught, as follows:

"The hydrostatic test is a means of preventing serious accidents, but is not by any means reliable as proving the machine, or the boiler, rather, to be efficient under steam. I have known of a hydrostatic test, in which a series of stays broke under the additional pressure, and the men in charge were not careful enough to examine the boilers after the test, and the boilers had gone under steam, and that part had lost its stay, through the nine stays bulging out six inches from the flat plate, proving that, although the nine stays remained externally tight, when the heat came onto it, it bulged under the strain with a less pressure." (See also Haight's testimony.)

Concluding, therefore, that negligence must be imputed to the petitioner, the final and exceedingly difficult question is that of petitioner's privity or knowledge. The solution of this question rests in great measure upon the duties imposed upon or practiced by Alexander Kairis and Maris Embericos and their relation to petitioner. Embericos was the managing director of petitioner, and had the supervision of its ships, and, generally, of all its naval matters. Kairis was a consulting marine engineer in general practice at Athens. He was also employed to perform certain services in connection with petitioner's ships. On this point Kairis testified, when examined in Greece, as follows:

"A. When the ship arrives in Piræus, at the National Steam Navigation Company, the captain and engineers report to the company, and then Capt. Maris Embiricos will call me and give me the list to go on board and in-

spect all these repairs, inspect if there is any more repairs required on the ship, and I call the shop man on the ship, and we arrange the repairs there.

* * *

"Q. You were prepared to hear from the engineers, or be notified by the engineers, of any specific conditions on the ship, were you? A. The engineers; when anything happens, they tell me.

"Q. That is, if there is any specific condition? A. What do you mean, specific?

"Q. Any special condition of the ship that they want to invite your attention to, they do so? It may be the chief engineer or one of the subordinates? A. You know the engineers of the ship notify the company. Then Capt. Embiricos, manager, he calls me and sends me on the ship to examine this.

"Q. And when you are on the ship, it may be that you from time to time see reason to discuss with the engineers the condition of the ship? A. Yes.

"Q. The engine department? A. Yes.

"Q. The boiler department? A. Yes.

"Q. Everything? A. Yes.

"Q. As the result of the inspection that you made at this particular time, just a few days previous to her departure from Piræus, you saw the chief engineer of the ship, and some of the engineers of the ship, did you not? A. The chief engineer. I have nothing to do with the other engineers. I call always the chief engineer. I have nothing to do with the other engineers.

"Q. They are present, are they not? A. Yes.

"Q. But you discussed it with the chief engineer? A. Yes. * * *

"Q. Now, then, what repairs did you do to the ship before she sailed from Piræus to Salonica and Kavalla? A. I will bring you to-morrow the list.

"Q. Will you tell me now, from the best of your recollection? A. In Piræus my work is very large, and here I cannot remember all the particulars—so many I can't remember; but to-morrow, if you like, we will send somebody and take from the office. * * *

"Q. I ask you now, sir, as chief engineer of this line, and consulting engineer of this line, to tell me what repairs were made on the ship at the time you just referred to, at the time she sailed from Piræus to Salonica and Kavalla? A. I will bring you to-morrow the paper. That is all about it.

"Q. Give us an idea? A. I don't remember, you know.

"Q. Have you no idea? A. I can't remember.

"Q. Nothing about it? A. I can't remember the repairs. I will give you to-morrow the list. * * *

"Q. What repairs did you recommend at that time? Not what repairs were made, but what repairs you recommended at that time? A. The chief engineer makes a list of what repairs are required, and when the ship is here Capt. Embiricos sends me on board the ship to examine the repairs. After I decide if these repairs are necessary, I call the engine maker, and we arrange it to be done. If you like, this time, now we can go in the office. The papers are ready there. * * *

"Q. Of your independent recollection, now, you can testify to nothing concerning any repairs that you recommended to this ship the last day preceding the voyage on which she was lost? A. Haven't I already stated once; no?

"Q. Do you keep a copy of all your surveys and other statements and recommendations regarding repairs in your own office? * * * A. For the big work only; for the big service only; not for the small service.

"Q. Did you keep in your own private files a copy of any survey or recommendation that you made with reference to repairs on this ship at the time that you referred to just now? A. No; only the list mentioned it. The list mentioned it, which is given to the repairer who returned it with the account, and it is put in the files of the company.

"Q. Who prepares the list? A. The list is prepared by the first engineer, and I go and sanction it.

"Q. Did you sign it? A. No.

"Q. Did the chief engineer sign it? A. No; he doesn't either sign it. It only mentions the names of the things required and which we give to the works.

"Q. This recommendation for repairs, which is recommended by you is not signed by either yourself or the chief engineer of the ship? A. No.

"Q. On whose billhead or paper is the list made? A. This list is made in the ship by the engineer and I go and sanction it, and afterwards, when the work has been done, I sign the list, and Mr. Maris Embiricos afterwards signs it, and it goes to the cashier and is paid."

Later, when asked as to the condition of the condenser, Kairis answered: "A. The engineer did not report anything to me. He told me everything was in order; * * * as the engineer did not tell me anything, I did not make any" test of the condenser. The steam valve, he said, "was in good order because it was never reported from the chief engineer."

From this and other testimony it is plain that, in the early stages of the examination of Kairis, he had little, if any, independent recollection of the repairs reported as necessary to be done, and this weak recollection was probably due to the procedure. That procedure was for the chief engineer to submit his list of repairs to Embiricos, and then for Kairis to go to the ship and approve or disapprove the items on the list. The next step was to report to the company.

"Q. It was your duty to report to the company, was it not, any condition that you found about the vessel that needed attention? A. Certainly. When I used to inspect, and find anything, I used to tell the company.

"Q. By 'company' you mean the National Steam Navigation Company of Greece, do you? A. Yes; the owners of the steamer which I inspect.

"Q. And anything that came to your attention regarding the condition of the ship, by what you saw, or by what some one may have told you—you always made a report of it to the company, or in some way told them about it? * * * A. When I am sent to inspect a ship and find anything, I tell them of it. When I find it in order, I tell them it is in order.

"Q. But when you found things not in order, whether you saw them yourself or it is called to your attention, you always report to the company? A. I report to the company."

Embiricos was an experienced master of steamers. He testified that he had "not a great experience" as a marine engineer, "but by the many years I was at sea, what any experienced captain may have, I have got it." The company "receives notes of what is required to be done, and we always give instructions that it should be done." "We had Kairis who gives his opinion in the different matters arising and who bears the rank of superintending engineer to a lot of Greek ships."

In regard to inspection, the following is sufficiently important to extract in extenso.

"Q. As I understand it, the only inspection made of the ship—that is, the only inspection made at Piræus—is the one that is made by Mr. Kairis? A. Yes, to the machinery. I and Avgoustis go on board and inspect the ship.

"Q. That is, you inspect the hull generally? A. Yes, generally; and, if I don't go, some one else goes.

"Q. If you don't go, who is the some one who does go? A. Avgoustis gives the captain and the first and second mates a report.

"Q. Are these inspections made at all times with some director of the line present, you or some other director? A. No; it is always I. No other one. I am—never absent from Piræus.

"Q. Did you go on board and inspect the Thessaloniki at Piræus on her arrival from New York and Bermuda, on the voyage previous to the one on which she was lost? A. I don't remember exactly if I went, but generally I go myself on board and inspect them.

"Q. Then you cannot swear positively that you or another director made an inspection at the time I have just referred to? A. Other directors don't go on board. I am the only director who goes on board.

"Q. If you did not go on board, then Mr. Embiricos, no director of the company made inspection at that time. A. There don't exist any other directors that go on board. I am the only one. The other directors of the company don't examine the ships.

"Q. And if you did not go on board on this occasion, then that inspection by you as a director of the company was not made? A. If I don't go on board the inspection is made by the people we have specially for inspecting. For instance, if I am absent from my house it does not mean that it falls in. * * *

"Q. Mr. Embiricos, I wish you would please tell us completely and fully just what inspection the corporation itself made, if any, at the time that the vessel arrived at Piræus from New York and Bermuda on the previous voyage to the one on which she was lost? A. How should I remember that. Every voyage we make the ships undergo repairs.

"Q. You don't recall, then, whether any inspection was made, whatever, at this time I have just referred to? A. The inspection took place. What repairs were taken in hand I don't remember. The ships are always inspected when they arrive at Piræus.

"Q. Mr. Embiricos, I haven't asked anything about repairs. I have not asked now about what is usually done when ships arrive in Piræus. I have confined my question to the nature of the inspection made, or the inspection made, if any, of the steamship Thessaloniki by the National Steam Navigation Company of Greece, the owners of that ship, at the time the ship arrived at Piræus from New York and Bermuda on or about the 30th day of October, 1915? A. That is exactly what I don't remember. I don't even remember the date, but Kairis, Avgoustis, and the captain are always regular in their inspection.

"Q. Did you see any inspection made, yourself, at this particular time? A. Of course. Meanwhile I have been three or four times into that steamer, but what was done I can't remember.

"Q. Do you of your own personal knowledge know whether or not any inspection was made at Piræus, on or about the 30th day of October, 1915 (Greek calendar), of the boilers, engines, pumps, and hull of the steamship Thessaloniki? A. Of course it is done. Whenever a ship arrives, an inspection is made. I have said this about thirty times already.

"Q. I am asking the question, not about what happened on other times. I am asking your personal knowledge at this particular time I am speaking of? A. Of course I am certain that on this voyage it was made minutely from stem to stern, from the bottom to the top, of the machinery, etc.

"Q. Do you know that personally? A. Of course, as the company, I am sure that the ship left in order.

"Q. I renew my question. A. An inspection was made perfectly on that voyage.

"Q. (to the interpreter). Is he testifying of his own knowledge of that? Did he see it made? A. Of course, I went three and four times on board that steamer, and saw that it was done, and I also follow everything that is done.

"Q. Well, as you follow everything that is done, please just tell us just what was done on that inspection you have just spoke of. Don't you make your inspection by the same general method every time? A. Yes, always; but the ships are a lot, and I don't know exactly what happened on that ship.

"Q. Please tell us the method of making that inspection—the general method that you go about making inspection of all your ships? A. I go on board with Avgoustis and Kairis, accompanied by the captain, and we make a general inspection, from stem to stern, of the hull.

"Q. Is there anything else to that inspection? A. And Kairis generally goes down to inspect the machinery, but I often go with him and inspect the ship.

"Q. Do you go down to the engine room sometimes? A. Always.

"Q. Do you enter the boiler room sometimes? A. Often; but this voyage I did not go down.

"Q. On this voyage you did not personally go into the boiler room? A. I do not remember if on that voyage I had gone down into the boiler room.

"Q. You cannot swear positively whether you did or did not? A. No; I can't remember.

"Q. What is your best recollection about it? A. I don't recollect if I went or not. I don't give great care to such matters, as I am not a specialist, a technical specialist; but there is Kairis.

"Q. You mentioned the name of a man named Avgoustis, who accompanied you on certain of these inspections of the ship, at the time referred to here. What was his official title with the company? A. I have mentioned it. He is caterer, and also chief of the stewards. I mean inspector of the stewards. And he also looks and sees that the third class should be in order, the cabins, etc. He helps me. He has great experience; he is 25 years at sea, and he assists me by letting me know what requires being done.

"Q. In other words, you were thoroughly familiar with the condition of the ship Thessaloniki in every respect at the time she sailed from Piræus for New York on her last voyage, on the voyage at which time she was lost? A. Of course. That which was done to all the other transatlantic liners for the last nine years was also done to that. We gave it our greatest care.

"Q. Mr. Embiricos, is your answer to my last question yes or no? A. Which is the last answer?

"Q. (to the interpreter): In which I asked him if he was familiar with the condition of the ship when she sailed? A. Yes.

"Q. And you were familiar with her condition before she sailed on that voyage? A. Yes; I have said so. Yes. * * *

"Q. Do you ever take any interest in examining the log books of your vessels from time to time as general manager, to ascertain the speed or condition of the vessels? A. Yes.

"Q. That is, you keep posted as to the general speed and condition of the vessels, from time to time? A. Yes. * * *

"Q. And it is through that channel, is it, that you get any knowledge that you may have of the technical condition of the vessels—through Mr. Kairis? A. Yes; the channel is through Mr. Kairis and the chief engineer of the ship.

"Q. Am I correct in observing the other day that Mr. Kairis has an office in the building, in your suite here in the building? A. He passes from here often.

"Q. Has he got an office here, a room for his work? A. We have an office here, just for the purpose of interviewing the engineers in general here.

"Q. This is the head office of the company, is it? The main office? A. Yes."

It is interesting to note that Embiricos was endeavoring to make plain beyond question that his familiarity with the ship justified him in stating that it was, in all respects, in good order. It is not unfair to conclude, however, that when he realized the effect of his answers that he always went down to the engine room, and often to the boiler room, he thought he would safeguard himself by stating that on this occasion he did not; but, not being quite sure as to whether such an answer would do, he immediately sought refuge in the equivocal "I can't remember"—a striking inconsistency within the space of three succeeding questions.

In addition, the list of repairs to be done was thrown away by the repair man Perrakis. This may have been entirely innocent so far as Perrakis is concerned, but the result is that a contemporaneous record of great importance is not available. The question is not merely what repairs were done, but what repairs were thought necessary to be done, and this list becomes of substantial interest, because Embiricos must have known its contents. Indeed, it is seldom that a serious case is characterized by the disappearance of three records (this list and the two logs) which might throw must light on vital facts.

The inspection of the Greek authorities at Piræus must be dismissed as of no value. The examination of the Classification Society made by Kairis forms no basis for reliance by petitioner, because it cannot be regarded as an

independent examination, in view of the employment of Kairis by petitioner. Indeed, such service to two masters is inconsistent, and such practice is inferentially disapproved by Mr. Barnes, the Lloyd's surveyor at Piræus. The work done at Middlesbrough in 1913 was, no doubt, satisfactory as far as it went, but in no way negatives the conclusion that the boilers needed further careful attention at Piræus.

Without further analysis of many pages of testimony, it must be concluded on the facts, as a fact, that Embiricos knew the condition of the boilers when the ship left Piræus. If such is too strong a statement, it may be said, in any event, that the petitioner has failed to prove want of knowledge or privity. *Matter of Reichert Towing Line*, 251 Fed. 214, 163 C. C. A. 370; *The John H. Starin*, 191 Fed. 800, 112 C. C. A. 286; *In re P. Sandford Ross*, 204 Fed. 249, 122 C. C. A. 516.

Finally, it may be asked what motive could Embiricos have had in letting the ship sail in an unfit condition? He was heavily interested financially; that he supposed for one moment that the ship would get into difficulties is unthinkable. But time was important. The war was making bottoms great earners, and delays were unprofitable. To clean these boilers thoroughly was a tedious job, which, to one who did not apprehend any real danger, could just as well be done in New York, rather than delay the voyage of a vessel carrying a large and profitable cargo. It was doubtless as much of a shock to Embiricos, as to every one else in interest, when he learned that a ship was lost in a part of the Atlantic in which many other vessels had successfully weathered the storms and had found their way safely to and from ports of destination.

The petition must be denied, with costs.

I have not deemed it necessary to discuss the contention as to the racing of the propeller.

Settle decree on five days' notice.

NEE v. UNITED STATES. JACOBS v. SAME. SCHRADER v. SAME.

(Circuit Court of Appeals, Third Circuit. July 13, 1920.)

Nos. 2553-2555.

1. Criminal law §780(3)—Refusal to instruct on accomplice testimony not error.

While it is proper to caution the jury to scrutinize the testimony of an accomplice, refusal of an instruction that they should not rely on such testimony, unless it produces in their minds the most positive conviction of its truth, was not error.

2. Indictment and information §166—Names of unknown conspirators need not be proved.

Under an indictment charging conspiracy between defendants and with others unknown, where the conspiracy between defendants and the overt acts alleged are proved, and that they must have been aided by others, it is not essential to conviction that the names of such others be shown.

3. Conspiracy §45—Large discretion in admission of evidence.

In a prosecution for conspiracy to deal illegally in narcotic drugs, a check made by one of defendants, payable to one of the same name as a proved agent of an importer of such drugs, supplemented by evidence of identity of the indorsement on the check with a proved signature of such agent, held admissible, under the rule that in conspiracy cases the court has a wide discretion on the admission of evidence.

4. Conspiracy §45—Evidence admissible to show illegal purpose.

In a prosecution for conspiracy to deal illegally in narcotic drugs, evidence that a person to whom one defendant gave a check received drugs

of such kind from a Canadian custom house as agent for a firm which was a dealer in drugs *held* admissible.

5. Criminal law ⚡956(1)—Denial of leave to take newly discovered evidence discretionary.

Refusal of leave to defendants to take alleged newly discovered evidence in support of a motion for new trial, on the ground that such evidence, if as alleged, would not avail defendants, *held* within the discretion of the court.

6. Criminal law ⚡369(2)—Evidence of other offense admissible to prove overt act.

Where narcotic drugs charged in the indictment to have been concealed by defendants pursuant to a conspiracy to sell the same in violation of law were found in a safe, where they had been placed by one of defendants, and evidence that defendants were engaged in a business in violation of the state law, as shown by their own evidence, was also found in the safe, such fact might be considered on the question of concealment of the drugs.

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Criminal prosecution by the United States against Patrick Nee, Henry Jacobs, and John Schrader. Judgment of conviction and defendants separately bring error. Affirmed.

Oliver K. Eaton, of Pittsburgh, Pa., for plaintiffs in error.

John M. Henry, of Pittsburgh, Pa., for the United States.

Before BUFFINGTON, WOOLLEY, and HAIGHT, Circuit Judges.

WOOLLEY, Circuit Judge. The three plaintiffs-in-error were tried with one Goodwin for conspiring to violate laws of the United States. Criminal Code, § 37 (Comp. St. § 10201). The indictment contained two counts. The first charged the defendants with combining and conspiring together and with persons unknown to receive, conceal, sell and facilitate the transportation, concealment and sale of smoking opium as prohibited by the Act of February 9, 1909, amended by the Act of January 17, 1914 (Comp. St. §§ 8800-8801f); the second count charged them with conspiring together and with persons unknown to deal in and sell morphine sulphate, a derivative of opium, in violation of the registration and tax provisions of the Act of December 17, 1914, known as the Harrison Act (Comp. St. §§ 6287g-6287q).

The overt act charged in the first count was, that Nee, in furtherance of the conspiracy, concealed in a safe at a certain place 101 cans of smoking opium; and the overt acts charged in the second count were that Nee concealed in a safe 45 ounces of morphine sulphate; that Schrader sold thirty grains of morphine sulphate to Williams and thirty grains of smoking opium to Acker; and that Jacobs sold one ounce of morphine sulphate to Smith and one ounce to Gamble, without having registered, etc. The testimony further showed association of certain of the defendants in the business of bookmaking and association in the occupancy of premises in which were found evidences of traffic in opium.

All were convicted. Goodwin submitted to his sentence. The remaining three sued out this writ of error, charging error in the court's rulings on evidence and instructions to the jury.

The assignments of error are classified by the defendants (below) in their several contentions; the first and principal one being:

[1] (a) The failure of the court to charge the jury as to the value of the testimony of an accomplice, and its failure adequately to draw the attention of the jury to the danger of placing too much reliance upon such testimony, and to their rights to require corroborating testimony before giving credence to such evidence.

The point made by the defendants and refused by the court was as follows:

"The testimony of an accomplice should be received with caution and scrutinized with great care by the jury, who should not rely upon it, unless it produces in their minds the most positive conviction of its truth."

In support of this point the defendants relied on *Caminetti v. United States*, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B. We are not familiar with any rule warranting an instruction in this form. While the Supreme Court said in the case cited, that

"It is the better practice of a trial judge in instructing a jury to caution them to scrutinize the testimony of an accomplice,"

that court expressly ruled in the same case that mere failure so to do is not reversible error. Nor do we see the pertinency of the defendants' contention that the jury should have been cautioned not to credit the testimony of an accomplice unless sustained by corroborating evidence, in view of the proof of the overt acts averred. *Gretsch v. United States* (C. C. A. 3d) 242 Fed. 897, 898, 155 C. C. A. 485; *Knoell v. United States* (C. C. A. 3d) 239 Fed. 16, 152 C. C. A. 66.

This we think disposes of this assignment. If, however, there was sufficient substance in the contention to embody it in an assignment of error, it disappears from the case on the evidence that Gamble, Smith and Acker, who purchased drugs from one or the other of the defendants, were not, under authority of *Wallace v. United States*, 243 Fed. 300, 156 C. C. A. 80, accomplices. They were purchasers, and as such were not amendable to the Act. In consequence, any rule of caution with respect to the testimony of accomplices does not apply to their testimony.

[2] (b) Error in the court's charge relating to conviction of conspiracy with a person not named in the indictment, on the theory that there being no evidence in the case of any association on the part of the defendants with any person not named in the indictment, there cannot be a conviction.

The indictment charged conspiracy between the defendants and between them and divers persons to the grand jurors unknown to do the forbidden acts. The evidence of transactions between the parties was quite sufficient to sustain a finding by the jury of conspiracy between themselves. The transactions covered drugs in such quantity that the aid of others was necessary in procuring and distributing them, and were in themselves of such a nature as to make it certain

that others unknown to the grand jurors were involved in the conspiracy. If the names of these persons did not later appear (which is far from certain), yet, if the conspiracy among the defendants charged and the overt acts alleged were proven, conviction must follow. The court very carefully protected the defendants in this situation by pointing out repeatedly that before any one of them could be convicted, the jury would have to find conspiracy and the overt act set forth in the first count and at least one of the overt acts set forth in the second. We discover no error here.

[3] (c) Assignments of error under this classification refer to the identity of one Lortie, payee of a certain check, with one Lortie, receiver of morphine sulphate, and charge error to the court in admitting the check in evidence in proof of the fact that defendants were dealing in drugs and in proof of the source from which they secured their supply. The check in question was dated July 30, 1917, drawn by Goodwin, one of the defendants, to the order of A. C. Lortie, endorsed by Antonie C. Lortie and later by Montreal City and District Savings Bank. Together with this piece of evidence was admitted a Collectors Landing Wharf Receipt signed by A. C. Lortie for 300 ounces of morphine sulphate imported by Robins and Company. Supplementing these exhibits was the testimony of Arthur Lang, a witness for the Government. The check was found by Narcotic Inspectors of the United States in a desk on the premises used by Jacobs and Goodwin in the bookmaking business. That the check was drawn by Goodwin was not questioned. Lang testified that he was a Canadian Customs Officer residing at Montreal, Canada, and that A. C. Lortie appeared at the Custom House in Montreal in December, 1917, and received the morphine sulphate named in his receipt. Lang further testified that Robins and Company had received large shipments of narcotic drugs every month for a year prior to December, 1917, and that Lortie was their authorized agent. The chain of evidence established that Lortie, the payee and endorser of the check, had it cashed in Montreal. No explanation of the check was offered by Goodwin except that it might have been in settlement of a bet where a man making a wager directed payment to another person. There was no record of a bet by A. C. Lortie.

The defendants contend that this evidence was not incriminating because it did not identify Lortie, the payee of the check, with Lortie, the dealer in drugs.

It must be remembered that the defendants were being tried for conspiracy, a crime rarely susceptible of proof by direct evidence. Being provable, however, by circumstantial evidence, much discretion is left to the trial court and its views "will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact." *Clune v. United States*, 159 U. S. 590, 593, 16 Sup. Ct. 125, 126 (40 L. Ed. 269). In this issue of identity there was unmistakable identity of name and place. Added to this there was evidence of identity of signatures by comparison of the one in question appearing by endorsement on the check with one proven to be Lortie's. Comparison of a questioned signature with an authentic signature is

authorized by Act of Congress approved February 26, 1913, c. 79; U. S. Comp. Stat. § 1471, commented on in *Maxey v. United States*, 207 Fed. 327, 330, 125 C. C. A. 77, extending the rule of the common law in regard to comparisons of handwriting as reviewed in *Withaup v. United States*, 127 Fed. 530, 62 C. C. A. 328. This evidence was probative of the fact that the check was given by Goodwin to Lortie, and, taken in connection with other evidence, it tended to prove that it was accepted by Lortie from Goodwin in payment for drugs. It was not conclusive to be sure, but it was evidence. Though the argument is insistently made that the check denotes payment of an antecedent debt because the date of the check is anterior to the date of Lortie's receipt for one consignment of opium, yet the character of the debt, namely, for the sale of opium, may be inferred from the business in which Lortie was engaged, as established by proof to which the next assignment of error is addressed.

[4] (d) It appears from Lang's testimony that the business of Robins and Company was drugs and that Lortie was their authorized agent in lifting the same in the Customs Department of the Canadian Government at Montreal. This proof, with respect to the business of Robins and Company and the business of Lortie, was relevant to the issues. Whatever construction may be placed upon it, that is, if the jury should think that Lortie was not the agent of Robins and Company in drug imports, then, manifestly, the only other inference open to the jury was that Lortie was engaged in that business as principal. This would not help the defendants, because the evidence establishes, we think conclusively, that Lortie was in some character a dealer in drugs, and being such, evidence of his transactions at the Customs Department at Montreal, as testified to by Lang, and of his transaction with Goodwin, as shown by the check in question, was admissible and was sufficient to sustain a finding on the probable inferences.

[5] (e) A contention is made that the court erred in refusing the prayer of the petition of the defendants asking for the appointment of a commissioner to go to the City of Montreal to take testimony in support of certain reasons pressed for a new trial on the ground of after discovered evidence, which, it was represented, would show that Lortie had never been the agent for Robins and Company.

This application was addressed to the discretion of the court. The court denied the application because of its opinion, if the evidence proposed to be adduced could be produced upon another trial, there could be no different result upon the merits than that of the verdict rendered. We cannot say that the court abused its discretion. Manifestly, it mattered nothing at all whether Lortie was acting as agent or principal in taking drugs from the Customs Department. Being a drug dealer and receiving a check from one of the defendants charged with and found guilty of conspiring to deal in drugs in violation of the statutes, we think no error was committed by the court in its ruling.

[6] (f) The remaining contention is that the court erred and seriously prejudiced the defendants' case by using in its charge an expression with reference to the business of some of them. What the court said was this:

"Now it appears from the evidence on the part of the defendants that some of them are engaged in, or have been engaged in bookmaking, taking bets upon races. Now, gentlemen, you are not trying the defendants for their violation of the laws of Pennsylvania; they are being tried here solely for the alleged violation of the laws of the United States. But it is proper for me to say to you that the making of books, or taking of bets in horse racing is an offense against the laws of Pennsylvania, and if you find that the evidence of such offenses, or some of them, were kept with some of the matter before you as having been taken from the safe—or from the vault at 431 Fourth Avenue—it is proper that that should cause you perhaps to think as to whether there was an object in concealing evidence of crime against the laws of the State with evidence of crime against the laws of the United States. But we are not trying these defendants for any offense against the laws of Pennsylvania."

By this instruction the defendants maintain the court distinctly told the jury they might find from the concealing of these papers relating to bets on horse races that it was probable the defendants were guilty of the crime of conspiracy to conceal and sell opium and morphine. It is pertinent to note in the first place that testimony of the business of certain of these defendants, namely; that of bookmaking, was introduced into the case by the defendants. In other words, evidence of this business violative of a State law got into the case through a witness for the defendants and the court thereafter very carefully distinguished the State offense from the Federal offense and made it clear to the jury that the defendants were being tried not for the former but for the latter. This is one reason for the instruction quoted, of which, manifestly, the defendants cannot complain. Aside from this caution, it is evident that the trial judge had constantly in mind the overt act charged by one count of the indictment and necessary to be proved before the defendants could be convicted. This overt act was the concealment of drugs in a safe. Such concealment was evidence of the offense against the Federal law. Evidence of an offense against the State law, concealed in the same way and in the same place that evidence of the offense against the Federal law was charged to be concealed had a bearing upon the manner in which the accused were in the habit of concealing their different species of unlawful conduct. Moreover, concealment of opium in the safe was the overt act charged. That one of the defendants put the opium in the safe was proved by direct evidence. But more was required; it had to be proved that the opium so placed in the safe was concealed there. Testimony that certain of the defendants, admittedly engaged in violating a State law, concealed the evidence of that crime in the safe is persuasive evidence that when they put opium in the same safe, they put it there for the same purpose of concealment.

If, however, error can be found in the manner in which the court framed the instruction, it clearly was not prejudicial error.

In view of its gravity to the defendants, we have given this case very careful and deliberate consideration. After a thorough study of the record we discover no errors. We therefore direct that the judgment below be affirmed.

AMERICAN ENGINEERING CO. v. METROPOLITAN BY-PRODUCTS CO., Inc.

(Circuit Court of Appeals, Second Circuit. June 28, 1920. On Petition for Rehearing, July 27, 1920.)

No. 238.

1. Limitation of actions ⚡111—Action on bond suspended by acquiescence in receivership and injunction suit.

The provision of a bond given by lessee to secure performance of the covenants of the lease, limiting actions on the bond to three months, is suspended where the lessee acquiesced in the appointment of receivers and the enjoining of all actions against it.

2. Landlord and tenant ⚡194(1)—Refusal of tenant's receivers to take possession held not surrender, but re-entry by lessor.

Where a lease authorized surrender of the premises by the lessee on certain terms, and also authorized re-entry by the lessor for breach of covenant by the lessee, and receivers of lessee refused to take possession under the lease or to pay rent, whereupon lessor re-entered, there was no surrender of the lease by the lessee, which took no action whatever, and the lessor cannot recover under the terms relating to surrender.

3. Receivers ⚡147—Tenant's receivers liable for quarter's rent in advance, accrued the day before re-entry.

Where, under the terms of the lease, the rent was payable quarterly in advance on April 1st, the lessee is liable for a full quarter's rent after the lessor took possession for breach of covenant on April 2d, though Code Civ. Proc. N. Y. § 2674, makes the rent apportionable between persons claiming through the landlord.

4. Receivers ⚡147—Clause requiring payment for maintenance not applicable as against lessee's receiver after lessor's re-entry.

A clause requiring lessee to pay a stipulated sum for maintenance of the property after it discontinued the use thereof does not entitle lessor to recover that sum from the lessee after the lessor has re-entered for breach of covenant to pay rent.

5. Limitation of actions ⚡167(1)—Bar of action on bond available against enforcement of claim to collateral to secure bond.

Where a lessee gave bond to secure performance of its covenant, and also deposited a fund as collateral to secure any amounts due on the bond, a cause of action cannot be enforced against the collateral fund after recovery therefor on the bond is barred.

6. Receivers ⚡163—Interest properly allowable out of fund specially appropriated to pay claims.

Though interest is not allowable against property in the hands of receivers, it may be allowed out of a fund specially appropriated, before the receiver was appointed, to pay the claims with interest.

7. Landlord and tenant ⚡160(2)—Lessee held not required to return property in good working condition.

Where the lease required the return of the property on termination of the lease in as good condition as when received, the lessor is not entitled to damages for failure to return the property in good working condition.

On Petition for Rehearing.

8. Landlord and tenant ⚡277(½)—Provision regulating ejectment not applicable to peaceable re-entry by landlord.

The provisions of Code Civ. Proc. N. Y. §§ 1504-1510, regulating ejectment for nonpayment of rent are not applicable to a case of peaceable re-entry by the landlord in accordance with the lease.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit by the American Engineering Company against the Metropolitan By-Products Company, Incorporated, asking for the appointment of receivers. From an order of the special master, disallowing in part the claim of the New York Sanitary Utilization Company, that claimant and others appeal. Decree reversed, with directions.

Lewis & Kelsey, of New York City (Frederick T. Kelsey and Wallace T. Stock, both of New York City, of counsel), for receiver of Metropolitan By-Products Co., Inc.

Oscar A. Lewis, of Brooklyn, N. Y. (A. B. Reed, of Brooklyn, N. Y., of counsel), for Title Guarantee & Trust Co.

Cullen & Dykman, of Brooklyn, N. Y. (Edgar M. Cullen and Arthur E. Goddard, both of Brooklyn, N. Y., of counsel), for Bailey and others.

Davison & Underhill, of Brooklyn, N. Y. (Harold C. McCollom and Alfred T. Davison, both of New York City, of counsel), for Columbia Trust Co.

Gilbert & Wessel, of New York City (Harry N. Wessel and Carl J. Austrian, both of New York City, of counsel), for R. S. Kuh & Valk Co.

Nicoll, Anable, Fuller & Sullivan, of New York City (Outerbridge Horsey, of New York City, of counsel), for Sanitary Co.

Before WARD, HOUGH and MANTON, Circuit Judges.

WARD, Circuit Judge. November 28, 1916, the Sanitary Company entered into a lease of its garbage plant and equipment of boats, tools, horses, mules, wagons, etc., at Barron Island, Kings county, N. Y., to the Metropolitan By-Products Company, Incorporated, for a term of two years from January 1, 1917, for an aggregate rent of \$500,000; \$62,500 payable quarterly in advance on the 1st days of January, April, July, and October. The material provisions are:

"Third. The lessee agrees to keep all buildings, machinery, boats, and other appliances, including all personal property leased hereunder, in good and proper condition during the continuance of this lease, and further to properly feed, care for, and protect the animals covered by this lease. All to the end that at the termination of this lease, whether by expiration of the term thereof or otherwise, the plant, its equipment, and all other personal property herein referred to shall be returned to the lessor in good efficient working condition, considering the general character of the plant and the work to be carried on therein under said contract, reasonable wear and tear excepted.

* * * * *

"Seventh. The lessee further agrees that, if default be made in any of the covenants and agreements herein contained, this said hiring and relation of landlord and tenant, shall wholly cease and determine; and the lessor shall and may, by summary proceedings or otherwise, re-enter said premises and remove all persons therefrom, and retake possession of any and all personal property leased hereunder, and the lessee hereby waives any notice in writing of intention to re-enter or to institute summary proceedings: Provided, however, that such termination and re-entering or institution and carrying on to completion of summary proceedings for the recovery of the possession of the property shall not absolve the lessee from liability for damages resulting from

such default nor from liability for payments to be made under this lease to the date of termination thereof, nor from liabilities then accrued and whether then payable or payable in the future, with the same effect as if the said lease had not been terminated: And provided, further, that anything herein to the contrary notwithstanding, the lessor shall not be entitled to enter said premises for any breach of covenant or condition nor to institute summary proceedings for the recovery of the said property, except the covenant to pay rent, water rates, and taxes, without first having given the lessee 60 days' notice of the alleged breach of covenant or condition and an opportunity of making good such breach within said period of 60 days: And provided, further, that in case the lessee shall be advised that any rule, order, ordinance, or regulation in respect of the leased plant and equipment or the management thereof shall be invalid or unenforceable and shall contest the same in the courts, the lessee shall not be in default hereunder for its failure to comply with the contested rule, order, ordinance, or regulation until a final determination of the courts upholding the same and after the expiration of a reasonable time thereafter for compliance therewith: And provided, further, that the said lessee shall duly notify in writing the lessor of its intention to contest such rule, order, ordinance or regulation.

* * * * *

"Twelfth. If in the discretion of the lessee it sees fit to discontinue at any time prior to the 31st day of December, 1916, the use of the property leased hereunder, or any substantial portion thereof, in the reduction and final disposition of the said garbage of the boroughs of Manhattan, the Bronx, and Brooklyn, the lessee shall have the option either of maintaining, protecting and keeping in good and proper condition at its own expense the property leased hereunder in accordance with the provisions herein, or of paying to the lessor, when the rental installment payments provided for herein are paid, sums pro rata to the aggregate sum of ten thousand dollars (\$10,000) for the unexpired term of the lease and thereafter be relieved and discharged from any further obligations to maintain, protect, and keep in good and proper condition the said property pursuant to the requirements herein, or such portion thereof as to which the said use may have been discontinued; it being understood and agreed, however, that nothing in this paragraph herein contained shall relieve the lessee from any of its obligations as set forth in paragraph third hereof up to and until such time as there shall be any discontinuance of the use of the property leased hereunder as provided for in this paragraph.

"Thirteenth. Inasmuch as it is contemplated that the leased property hereinabove described will be taken over at midnight on the 31st day of December, 1916, as a going concern and as the said plant is now being operated by the New York Disposal Company, a New York corporation, under an agreement with the city of New York to dispose of the garbage of the boroughs of Manhattan, the Bronx, and Brooklyn, an adjustment will be made between the lessor or the New York Disposal Company and the lessee in respect of all supplies on hand, such as coal, oil, naptha, and other supplies, which are consumed in the operation of said plant. The lessee is to pay the lessor or the New York Disposal Company the value of such materials at the time they are taken over, and the said New York Disposal Company is also to be given a reasonable opportunity to store and dispose of all finished products which may be on hand at said plant when this lease shall go into effect; but in any event the lessor shall cause all storage products to be removed fast enough to make room for the lessee's products as manufactured. The lessee is to have a similar privilege and there is to be a similar adjustment between the lessor and the lessee upon the expiration of this lease."

On the same day the Metropolitan Company executed a bond to the Sanitary Company in the sum of \$200,000 for the faithful performance by it of the covenants of the lease, and also an agreement reciting that it had deposited with the Central Trust Company the sum of \$200,000 to be invested in securities as collateral for collection by the Sanitary

Company of any sums adjudged or conceded by the Metropolitan Company to be due to the Sanitary Company under the bond. November 15, 1917, the Sanitary Company brought suit in the United States District Court for the Southern District of New York to recover \$56,556.81, the value of supplies taken over by the Metropolitan Company when it entered into possession of the Barron Island plant January 1, 1917.

November 19, the American Engineering Company filed a creditors' bill alleging that the Metropolitan Company, though solvent, was unable to meet current obligations, and praying for the appointment of receivers. The Metropolitan Company filed an answer, admitting all the allegations of the bill, and was put into the hands of receivers in order to keep it a going concern until its debts were paid; the decree enjoining all persons from bringing any proceedings at law or in equity, or from continuing any pending suits against the company, until after application to the court. The same day the receivers took possession of the plant and continued in possession, paying rent to March 31, 1918, when they were ordered by the court to return the premises to the Sanitary Company. The Sanitary Company re-entered thereafter. February 10, 1919, the Sanitary Company filed proofs of claim with the special master as follows:

First. The sum of \$187,500 for rent, payable in advance in three several installments, of \$62,500, on the 1st day of April, 1918, on the 1st day of July, 1918, and on the 1st day of October, 1918, together with interest at the rate of 6 per cent. per annum on said several installments from the dates when they respectively became due.

Second. The sum of \$10,000, in three installments of \$3,333.37 each on April 1, 1918, July 1, 1918, and October 1, 1918, with interest at the rate of 6 per cent. per annum, pursuant to article 12 of the lease.

Third. The sum of \$56,556.81 as the purchase price of materials and supplies left on hand on December 31, 1916, by the outgoing tenant, and purchased by the Metropolitan Company under article 13.

Fourth. The sum of \$200,000 as damages for the breach of the covenant to return the property in "good, efficient, working condition" under article 3 of the lease.

The District Judge confirmed the report of the special master without opinion.

It is important to discriminate throughout between the rights of the Metropolitan Company and of the receivers of the Metropolitan Company, respectively. The special master held that the Sanitary Company's first claim against the \$200,000 fund for rent was good up to October 5, 1918, because, though in possession of the property at least on April 2, it was not using the same for its own benefit until it entered into negotiations with the city of New York for use of the plant. The bond contained the following condition:

"Provided, however, that this obligation is executed upon the express condition that no suit, action, or proceeding at law or in equity shall be had or maintained hereunder or hereon, unless the same be commenced and process served within three months after any claim or cause of action arises to the obligee hereunder or hereon, and in no event later than three months after the termination or other expiration of this lease."

[1] The special master held that the claim for rent due April 1 and July 1 and for five days after October 1 (which quarter he apportioned between the Metropolitan Company and receivers) was not barred by the three months limitation in the bond, because the Metropolitan Company in its answer admitted all the allegations of the bill and was enjoined from bringing suit upon the bond. We concur with him that this suspended the three months limitation, but are of opinion that the Sanitary Company is entitled to prove only the quarter's rent due in advance April 1, 1918, against the Metropolitan Company payable out of the \$200,000 fund.

[2] It is not a question of surrender of the lease by the receivers or by the Metropolitan Company and acceptance by the Sanitary Company. The receivers simply refused to adopt the lease, and, not being tenants, could not surrender it, and the Metropolitan Company neither said nor did anything on the subject. The case is one of peaceable re-entry by the landlord for failure of the Metropolitan Company to pay the quarter's rent due April 1, which by its express terms terminated the lease, as the special master held, at the option of the landlord, the Sanitary Company. *McCready v. Lindenborn*, 172 N. Y. 400, 65 N. E. 208; *Cohen v. Carpenter*, 128 App. Div. 862, 113 N. Y. Supp. 168.

The only inference we can draw from the conduct of the parties is that the Sanitary Company availed itself of its option to re-enter and exclude the tenant for nonpayment of rent and thereby terminated the lease. This must also have been the understanding of the Metropolitan Company, the tenant, because it made no objection whatever to the Sanitary Company's re-entry, nor any demand for possession of the premises, nor any tender of rent. Thereafter no rent was due, but only a right upon the part of the Sanitary Company to recover damages as provided in article 7. No damages have been proved. If the abandonment of the premises by the Metropolitan Company and the re-entry by the Sanitary Company are to be regarded as a surrender and acceptance, the legal consequences are exactly the same.

[3] The record does not make it very clear whether the Sanitary Company re-entered before or after April 2. As the receivers notified the company April 1 that they returned the premises and would have no further use of them, except to remove property belonging to them or to the Metropolitan Company within a few days, and to take care of the horses and mules, we find that the Sanitary Company did not re-enter before April 2. In such case the company would be entitled to recover the whole quarter's rent due April 1 in advance without apportionment. *Manning v. Ferrier*, 27 Misc. Rep. 522, 58 N. Y. Supp. 332; *Sheehan v. Coyle*, 36 Misc. Rep. 766, 74 N. Y. Supp. 847; *Lamson Co. v. Bowland*, 114 Fed. 639, 52 C. C. A. 335.

Rents have been made apportionable between several persons claiming through the landlord (section 2674, New York Code of Civil Procedure), but the tenant remains liable for the whole of it. Moreover, there is ground for saying that the quarter's rent due April 1 in advance falls within the provision of article 7:

"Provided, however, that such termination and re-entry * * * shall not absolve the lessee * * * from liabilities then accrued and whether then payable or payable in the future."

[4] The foregoing considerations also dispose of the second claim of \$10,000 for maintenance because the lease was terminated by the Sanitary Company, landlord, and the Metropolitan Company, the tenant, exercised no discretion whatever under article 12, and was thereafter under no obligation to keep the premises in good order and condition.

[4] The special master held that the Sanitary Company's third claim for supplies was barred against the \$200,000 fund by the provision in the bond that no suit could be maintained after three months from the date the cause of action accrued. The cause of action accrued January 1, 1917, when the Metropolitan Company took over the premises, and suit was not brought until August 27, 1917, some eight months thereafter. But it was contended at the hearing for the first time that, though the Metropolitan Company could not maintain an action on the bond, it could enforce in equity its lien upon the \$200,000 fund; it being collateral. *Spears v. Hartley*, 3 Esp. 381. But, as the special master held, the \$200,000 fund is not collateral for the performance by the Metropolitan Company of its covenants in the lease, but is "collateral security for the collection by second party of any sums adjudged or conceded by first party to be due second party under or on said bond." The collateral is applicable only to sums adjudged or conceded to be due. There has been no adjudication, nor any concession, and therefore the claim was properly disallowed.

[6] While interest does not run on claims against property in the hands of a receiver (*Thomas v. Western Car Co.*, 149 U. S. 95, 116, 13 Sup. Ct. 824, 37 L. Ed. 663), we think the special master properly allowed it on claims payable out of the \$200,000 fund specially appropriated to cover them (*Pennsylvania Steel Co. v. New York City Railway Co.*, 216 Fed. 471, 132 C. C. A. 518).

[7] The special master disallowed the fourth claim for failure to return the property in good efficient working condition because the Metropolitan Company had not complied with the arbitration clause. *Silver v. Western Assurance Co.*, 164 N. Y. 381, 58 N. E. 284. Apart from this objection, he construed the lease as requiring the Metropolitan Company to do no more than to restore the premises in the same order and condition as it received them, reasonable wear and tear excepted. It is true that the first paragraph of article 3 required the Metropolitan Company to return the premises "in good efficient working condition, considering the general character of the plant and the work to be carried on there under said contract, reasonable wear and tear excepted." But the outgoing tenant was bound under its lease to return the premises "in good working condition, considering the general character of the plant and the work to be carried on there under said contract." It was further provided that two named appraisers, one to be appointed by the Sanitary Company and the other by the Metropolitan Company, should determine the condition of the property when the Metropolitan Company took possession, when the repairs and replacements had been completed, and when the lease terminated.

A controversy between the Sanitary Company and the outgoing tenant as to what repairs and replacements should be made by it having

been submitted to an arbitrator, the Metropolitan Company was given the privilege of bringing up the premises to the condition in which they should have been surrendered by the outgoing tenant, in which case the Sanitary Company would turn over to it such sums as it should have received from the outgoing tenant. But all doubt about the extent of the Metropolitan Company's obligation is set at rest by the concluding words of article 4 of the lease:

"On the termination of this lease, whether by expiration of the term or otherwise, the lessee shall return to the lessor all the property leased hereunder as the same may be altered or improved in as good condition as when the same was received by the lessee, reasonable wear and tear excepted."

The Special Master was right in disallowing this claim.

The only assignment of error as to priority argued before us is that of the Title Guarantee & Trust Company, trustee of the first mortgage of the Metropolitan Company, that its lien is superior to the lien of the second mortgage to the Columbia Trust Company, as trustee upon the interest of the Metropolitan Company in the \$200,000 fund after payment of the Sanitary Company's claim. The special master so held, but as these mortgages do not appear in the record we do not dispose of the question, but simply direct that any claim of the Sanitary Company that has been allowed be first paid out of the fund, making no disposition of the balance.

The decree is reversed, and the court below directed to enter a decree in conformity with this opinion.

On Petition for Rehearing

PER CURIAM. The special master held that the provisions of article 7 were intended for the benefit of the landlord and might be waived, and that the Sanitary Company had not availed themselves of it. He found that the company had accepted a surrender of the lease by entering into negotiations with the city of New York for a lease of the property in October, 1918. We have held, on the contrary, that there never was any surrender and acceptance of the lease, and that the only inference from the conduct of the parties was that the Sanitary Company re-entered peaceably, in accordance with the provisions of article 7, for nonpayment of rent April 2, 1918, and so terminated the lease and all obligation to pay rent thereunder.

[8] We are now referred to provisions of the New York Code of Civil Procedure regulating ejectment for nonpayment of rent, which in our judgment are not applicable. This is not the case of an action of ejectment, but of a peaceable re-entry in accordance with the contract of the parties.

The petition is denied.

HARRINGTON et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 7, 1920.)

No. 5391.

1. Criminal law ⚡970(9)—Charging date of conspiracy as within five-month period sufficient against motion in arrest.

An information charging a conspiracy as occurring within a stated five-month period is sufficient as against a motion in arrest of judgment, where no motion to quash nor demurrer had been filed, and no bill of particulars asked for, in view of Rev. St. § 1025 (Comp. St. § 1691), curing defects of form in indictments, and Judicial Code, § 269, as amended by Act Feb. 26, 1919 (Comp. St. Ann. Supp. 1919, § 1246), requiring the court on writ of error to give judgment, without regard to technical errors not affecting substantial rights of the parties.

2. Indictment and information ⚡21, 86(7)—“Caption” defined; commission of conspiracy within division of district held sufficiently alleged.

The caption is not a part of the indictment, but is the formal history of its finding, and it is to be distinguished from the introductory portion of the indictment, and where the indictment in its introductory part recited that the grand jurors at a term within a certain division presented that defendants in that division and district entered into the conspiracy in one count, and in another count that they conspired at one place to the grand jurors unknown, and alleged an overt act in that division, the place of conspiracy was sufficiently alleged.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Caption.]

3. Criminal law ⚡113—All conspirators may be prosecuted in division where overt act was committed.

A prosecution for conspiracy to impede administration of justice, under Penal Code, § 37 (Comp. St. § 10201), is properly brought against all conspirators in the division and district where the overt act is performed, regardless of the place where the conspiracy was formed.

4. Conspiracy ⚡34—Endeavor to obtain from prosecuting witness statement contrary to testimony not conspiracy to obstruct justice.

A request by an attorney for defendant to obtain from a witness for the prosecution a sworn statement contradicting her testimony before the grand jury, if the attorney believed such testimony to be false, is not an attempt to obstruct the administration of justice.

5. Criminal law ⚡423(6)—Admissions by conspirator not connected with conspiracy not binding on others.

In a prosecution for conspiracy to prevent a witness from testifying for the government, a declaration by one of the defendants to the defendant in the original prosecution that he had advanced money to the witness to come to the city, where the other defendants were was not a declaration in furtherance of the conspiracy, being mere admission as to a past act, and therefore not admissible against the other conspirators.

6. Criminal law ⚡878(2)—General verdict, with penalty permissible under either count, sustainable.

A general verdict of guilty under two counts of an indictment, with a penalty which might be imposed under either count, is sustainable under either count.

7. Criminal law ⚡510—Conviction may be based on uncorroborated testimony of accomplice.

It is not a rule of law in the United States courts that convictions cannot be based on the testimony of accomplices alone, if the jury believes such accomplices.

8. Criminal law ⚡1129 (4)—Assignment to refusal of group of instructions not sustainable where one erroneous.

A general assignment of error to the refusal to give a group of requested instructions cannot be sustained, where one of the instructions in the group was erroneous.

9. Criminal law ⚡1059 (2)—General exceptions to group of instructions insufficient.

An exception to instructions as a group is too general to present any question for review.

10. Conspiracy ⚡45—Evidence that action was induced by other motive than act of conspirators held proper.

In a prosecution for conspiracy to induce a witness for the government to leave the country, evidence that the wife of the one accused of the offense against the witness urged him to induce the witness to leave the country was admissible to aid the jury in determining whether his testimony that he was induced by the conspiracy was true.

11. Witnesses ⚡268 (16)—Cross-examination to show additional motive of witness is proper.

Where the testimony of a witness in a prosecution for conspiracy indicated that the advice of defendants was his sole motive in inducing a witness against him to leave the country, a question whether his wife did not urge him to get the witness out of the country was proper cross-examination.

Stone, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

M. F. Harrington and others were convicted of conspiracy to obstruct and impede the administration of justice, and they bring error. Reversed and new trial ordered.

W. E. Mitchell, of Sidney, Iowa, and Arthur F. Mullen, of Omaha, Neb. (Tinley, Mitchell, Pryor & Ross, of Council Bluffs, Iowa, and P. C. Winters, of Creston, Iowa, on the brief) for plaintiffs in error.

F. A. O'Connor, U. S. Atty., of Dubuque, Iowa (Seth Thomas, Asst. U. S. Atty., of Ft. Dodge, Iowa, on the brief), for the United States.

Before SANBORN and STONE, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. The plaintiffs in error were found guilty of conspiracy and have prosecuted a writ of error. The indictment contained four counts, but the verdicts are under the third and fourth counts. The substance of the charge is that there was pending for trial at Sioux City, Iowa, in the United States District Court for the Northern District of Iowa, an indictment against Charles T. Anderson, in which he was charged with transporting Mary Pittman in interstate commerce, for purposes of prostitution and debauchery, and that Mary Pittman was a necessary witness for the government on the trial under the indictment; that the plaintiffs in error and others conspired to obstruct and impede the administration of justice, in violation of section 135 of the Penal Code (Comp. St. § 10305), in planning to cause Mary Pittman to make some written statements which would be contradictory of her testimony before the

grand jury, and in planning to cause her to be concealed, so that she could not be subpoenaed as a witness, and in planning to have her sent out of the United States and into Canada, so that she would not testify as a witness upon the trial of the case against Anderson. A number of acts are alleged to have been done to effect the object of the conspiracy. Anderson pleaded guilty. A verdict of acquittal was rendered in favor of Gerald Harrington. The defendants Michael F. Harrington, Arthur W. Scattergood, Mrs. Frances Murphy, and Leonard Camp were found guilty, and sentence was pronounced.

[1] The defendants claim that it was erroneous to overrule their motion in arrest of judgment, because the indictment did not allege the date or the place of commission of the offense charged against them. No motion to quash nor demurrer to the indictment was presented. Section 1025 of the Revised Statutes (Comp. St. § 1691) forbids the holding of any indictment insufficient for any defect or imperfection of form, if it does not tend to the prejudice of the defendant, and section 269 of the Judicial Code (Comp. St. Ann. Supp. 1919, § 1246) provides that in the hearing of any writ of error in any case, civil or criminal, the court shall give judgment after an examination of the whole record "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

In the third count the defendants are charged with conspiring subsequently to October 22, 1915, and prior to May 27, 1916, and in the fourth count the conspiracy is charged as occurring some time within the first five months of the year 1916. As the defendants were entitled to ask for a bill of particulars (*Rosen v. United States*, 161 U. S. 29, 35, 16 Sup. Ct. 434, 480, 40 L. Ed. 606), the failure to do so must be taken as an indication of their satisfaction with the definiteness of the date alleged. The allegation of the date of the offense is ordinarily formal, inasmuch as any other date before the finding of the indictment and within the statute of limitations may be proved, unless a particular day is made material by the statute creating the offense. *Hardy v. United States*, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. Ed. 1137; *Bryant v. United States*, 257 Fed. 378, 168 C. C. A. 418; *Hume v. United States*, 118 Fed. 689, 55 C. C. A. 407. In *Ledbetter v. United States*, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162, the offense was alleged to have been committed on the _____ day of April, 1896, and it was held to be sufficient against a motion in arrest of judgment, because the defendant could not have been misled, and because of the right of the prosecution to prove any date within the scope of the statute of limitations, even if a particular day had been stated. No claim is made by the defendants in this case that they were prejudiced by the general date alleged, or that they were unable to properly make their defense, or that they could not protect themselves after judgment against another prosecution for the same offense, and in view of the statutes cited it must appear that the substantial rights of the parties were invaded before a new trial may be granted.

[2] It is claimed that the indictment does not allege the division of the district where the offense was committed, except by reference to the caption, and that the caption is no part of the indictment. The caption is the formal history of the finding of the indictment (*Ex parte Bain*, 121 U. S. 1, 7, 7 Sup. Ct. 781, 30 L. Ed. 849; 1 Bish. Cr. Proc. 653, 657), and hence is no part of it; but the caption is to be distinguished from the indictment itself. In this case it appears from the body of the indictment, in the introductory portion thereof, that the grand jurors impaneled and sworn at a term of the United States court held at Creston, in the Southern district of Iowa, and Southern division, did find and present, in the third count, that the defendants in that division and district entered into the conspiracy charged.

[3] The fourth count of the indictment charged that the defendants conspired at some place to the grand jurors unknown, and alleged an overt act as occurring at Creston, Iowa, in the Southern division of the Southern district. A prosecution for conspiracy under section 37 of the Penal Code (Comp. St. § 10201) is properly brought against all of the conspirators in the division where the overt act is performed, regardless of the place where the conspiracy was formed. *Hyde v. United States*, 225 U. S. 347, 367, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614; *Brown v. Elliott*, 225 U. S. 392, 400, 401, 32 Sup. Ct. 812, 56 L. Ed. 1136. There was no error in overruling the motion in arrest of judgment because of these objections.

The sufficiency of the evidence to show that an offense was committed in the jurisdiction of the trial court was challenged by a request for an instruction directing an acquittal of the defendants. Section 53 of the Judicial Code (Comp. St. § 1035) provides that "all prosecutions for crimes or offenses shall be had within the division of such district where the same were committed" (unless the defendant requests and the judge orders a transfer of the place of trial), and section 81 (section 1066) provides for one division of the Southern district of Iowa, called the "Southern division," which was the place of prosecution of this offense.

The third count of the indictment charges a conspiracy in the Southern division of the district, while the fourth count charges a conspiracy at some place unknown to the grand jurors, and undertakes to allege overt acts in that division to carry it into effect. As Gerald Harrington was acquitted by the verdict, the first question is whether two or more of the remaining defendants entered into a conspiracy in the Southern division as charged in the third count. A careful review of the evidence convinces that there is no testimony that Anderson, Michael F. Harrington, or Mrs. Murphy entered into any conspiracy in that division, either with each other or with Scattergood or Camp. It is not shown that either of these three defendants was in that division, or had any communications in that division with any of the other defendants. A verdict of acquittal should have been directed in their favor upon the third count. This count of the indictment, so far as it relates to Scattergood and Camp and is supported by any evidence, charges (1) a conspiracy to weaken and de-

stroy the testimony of Mary Pittman, which she had given before the grand jury, by causing her to make an affidavit that that testimony was false; (2) a conspiracy to cause her to be concealed, so that the proper officers would be unable to serve a subpoena upon her and secure her attendance as a witness on the trial of the case against Anderson; and (3) a conspiracy to prevent her from attending at that trial and giving testimony, by persuading her to go and to remain in Canada, with the intent of preventing her attending on the court and giving her testimony.

[4] There was evidence to show that Scattergood called on Mrs. Pittman at Creston, Iowa, and endeavored to have her make a statement in writing, before a notary public, which would contradict what she had said before the grand jury; but there was no evidence tending to show that Scattergood was consciously attempting to obtain a statement of a falsehood. The contents or substance of the statement which Scattergood solicited Mrs. Pittman to make and sign are not disclosed, except that it was to be contradictory of her testimony given before the grand jury. Even though Mrs. Pittman had testified before the grand jury to facts that would have shown Anderson guilty of a crime under the White Slave Act, it was Scattergood's privilege to disbelieve her, and to believe the version of the facts told him by his client, Anderson, and to so believe, although she maintained that she had told the truth. It is not an unlawful attempt to influence or impede a witness, or the due administration of justice, for one to seek to obtain from a witness a statement of the facts as he believes them to be, without the exercise of undue influence, even though such a statement may conflict with prior testimony given by the one making the statement. Such an effort is not regarded with favor, because of the temptation to influence the witness unduly; but the mere request for a statement believed to be true does not offend against the statute under which this indictment was drawn, because it is not corrupt conduct.

In support of the charge of the conspiracy to conceal Mrs. Pittman and to send her to Canada for that purpose, there was testimony that, when Scattergood was endeavoring to obtain this statement from Mrs. Pittman, Camp was appealed to by Mrs. Pittman for advice, and he demanded that some money should be paid to her for making such a statement; that thereupon Scattergood gave Camp a wink, and they went outside of the room for a conference; that Scattergood told Mrs. Pittman in this interview that, if she testified against Anderson, Mrs. Anderson would prosecute her; that while Camp and Scattergood were talking with her there was talk of her going to Canada; that Camp came back after going out with Scattergood, and said to Mrs. Pittman that he was to take her to Council Bluffs the next morning and had \$10 for car fare to take both of them, and that Mrs. Pittman was going to Canada, and that they were to give her money with which to go to Canada. Anderson testified that Scattergood told him at Omaha, on the day following his trip to Creston, that he believed they could get Camp to get this girl out of the country; that while Camp had been in jail a good many times, and had a sort of crooked career, he believed he was all right, and just the fellow for

that kind of a trip, and asked Anderson to see Camp and learn what he would take to get this girl into Canada, and, when Anderson reported to Scattergood that it would cost \$500, Scattergood said he hardly knew what to do, but after a conference with Johnson, Scattergood said he believed the best thing to do was to send her across the country, but advised that Camp be not given much of the money until they were at the depot ready for the train. Camp had made quite a full confession of his part in these transactions, and it was read in evidence against him. In view of the other testimony of the relations of the parties and of Scattergood's connection with them, this testimony, while denied generally by Scattergood, was sufficient to show an unlawful conspiracy with Camp in the Southern division, and there was evidence of an overt act, in that Scattergood and Camp admitted that they persuaded and induced her to leave Creston, Iowa, and go to the home of Mrs. Murphy in Omaha, where she was persuaded to go to Canada.

A portion of the fourth count of the indictment charges a conspiracy between Anderson, Scattergood, and Michael F. Harrington (1) to cause Mrs. Pittman to go from Creston, Iowa, to Omaha, and there to threaten her with prosecution for adultery in Nebraska if she should testify in favor of the government in the case pending against Anderson; and (2) "having so threatened" her, they further "conspired to cause her to make a statement" and "to mail it to the United States attorney for the Northern district of Iowa," which would state that she "had failed to tell the truth" before the grand jury, and "would have to so testify" when she was called as a witness. In the second portion of this count Anderson, Scattergood, Michael F. Harrington, and Mrs. Murphy are alleged as conspirators combining (3) to cause Mrs. Pittman to make a sworn written statement that her testimony before the grand jury was untrue, "and for the purpose of obtaining" the statement the defendants would cause Mrs. Pittman to go from Omaha to Creston, where Scattergood was to proceed and obtain the statement; also (4) these four defendants conspired, "in the event the other plan should fail," to cause Mrs. Pittman to be concealed without the jurisdiction of the District Court of the Northern District of Iowa, so that her location would be unknown and the government deprived of her presence as a witness, and while thus concealed Anderson, Scattergood, and Michael F. Harrington would appear in the court and demand an immediate trial, knowing that Mrs. Pittman was a necessary witness for the government and that she could not be produced.

There was much evidence from which a jury might infer an unlawful conspiracy in Nebraska, but there was no evidence of any such conspiracy between these four defendants in the Southern division of the Southern district of Iowa, so that the government's case under this count depends upon proof of an act in that division by one of the conspirators to effect the object of the conspiracy. Many acts are alleged to have been done to effect the conspiracy, but those alleged to have occurred outside of the division and in Nebraska, or in Sioux City, Iowa, must be disregarded. The act of Scattergood in endeavor-

ing to obtain a written statement from Mrs. Pittman, at Creston, Iowa, must also be disregarded, for reasons heretofore stated. There remains only the alleged act of Scattergood in causing Mrs. Pittman to go from Creston to Omaha. There was no direct testimony that Scattergood asked or persuaded Mrs. Pittman to leave Creston, or that he furnished the money for that purpose, or procured Camp to act for him. There was testimony by Anderson of Scattergood's admissions, made after he had returned to Omaha, that he engaged Camp to bring her to Omaha.

[5] The rule is that, where parties conspire to do an unlawful act, the acts or declarations of one of them is the act or declaration of all, when it is done in the furtherance of the common design and is one of the natural and probable consequences of the conspiracy. *United States v. Gooding*, 12 Wheat. 461, 469, 6 L. Ed. 693; *Logan v. United States*, 144 U. S. 263, 309, 12 Sup. Ct. 617, 36 L. Ed. 429; *Brown v. United States*, 150 U. S. 93, 98, 14 Sup. Ct. 37, 37 L. Ed. 1010; 1 *Greenleaf on Ev.* § 111. This statement of Scattergood to Anderson was not a statement in furtherance of the conspiracy, and had nothing to do with its continued execution, but was a mere narration of a past fact, an ordinary admission against interest. There was also in evidence a statement by Camp, made almost a year afterwards, in which he claimed that Scattergood asked him to bring Mrs. Pittman to Omaha on this occasion and paid him money to do so. Such statements were properly limited as evidence by the court's instructions that they were admissible only against the maker, except as they were made in the actual carrying out of the object of the conspiracy; but, when thus limited in effect, there was no evidence against the defendants Michael F. Harrington and Mrs. Murphy of the fact that Mrs. Pittman was caused to leave Creston by Scattergood, the overt act which had to be proved before a conviction could be had in the division where the case was tried. A verdict should therefore have been directed for these two defendants.

[6] The evidence was sufficient as against Scattergood and Camp under this count; but as there was only a general verdict of guilty, and the penalty imposed was not more than could have been imposed under one count of the indictment, the verdicts against them are sustainable under either count.

Complaint is made of the refusal of requested instructions to the jury; but these instructions contain a number of distinct propositions of law, and the record shows exception taken en bloc in this form:

"These instructions, 1 to 10, inclusive, asked by defendants before beginning of arguments, and refused, except as given. Defendants and each of them excepts."

[7] The assignment of error is directed to the refusal of instructions numbered 5, 6, 7, 8, 9, and 10 as a group. No. 10 of the refused instructions told the jury that no defendant could be convicted on the testimony of an accomplice, unless he was corroborated in all material facts. There is no rule of law in the courts of the United States that prevents convictions on the testimony of accomplices alone, if the jury believes them. *Caminetti v. United States*, 242 U. S. 470, 495,

37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168; Ahearn v. United States, 158 Fed. 606, 607, 85 C. C. A. 428; Knoell v. United States, 239 Fed. 16, 20, 152 C. C. A. 66; Wallace v. United States, 243 Fed. 300, 307, 156 C. C. A. 80; Reeder v. United States (C. C. A.) 262 Fed. 36, 42. The court instructed the jury that the fact that one was an accomplice would naturally weaken the credence that should be given to his testimony.

[8] When a number of instructions are requested, containing distinct propositions of law, a general assignment of error to the refusal to give them all cannot be sustained, if any one of the instructions is properly refused. Cass County v. Gibson, 107 Fed. 363, 366, 46 C. C. A. 341; St. Louis Brewing Ass'n v. Hayes, 107 Fed. 395, 401, 46 C. C. A. 370; Hodge v. Chicago & A. Ry. Co., 121 Fed. 48, 52, 57 C. C. A. 388; H. D. Williams Cooperage Co. v. Scofield, 125 Fed. 916, 917, 60 C. C. A. 564; Erie R. Co. v. Littell, 128 Fed. 546, 548, 63 C. C. A. 44; Southern Pac. Co. v. Hetzer, 135 Fed. 272, 285, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288; Sutherland v. Brace, 71 Fed. 469, 472, 18 C. C. A. 199; Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., 147 Fed. 457, 461, 77 C. C. A. 601.

[9] The exception taken to the instructions as a group was also too general to present any question for review. McCabe & Steen Co. v. Wilson, 209 U. S. 275, 279, 28 Sup. Ct. 558, 52 L. Ed. 788; Baggs v. Martin, 108 Fed. 33, 34, 47 C. C. A. 175; Southern Pac. Co. v. Hetzer, supra.

[10, 11] Error is assigned as to a number of rulings upon the evidence, but it is necessary to notice only one assignment. Anderson was one of the principal witnesses for the government, and in his direct examination he testified that both Harrington and Scattergood advised him that Mrs. Pittman should be sent to Canada. On cross-examination he was asked if his wife was not insistent, and did not urge him to get Mrs. Pittman out of the country. An objection was sustained, on the ground that this testimony was immaterial and not cross-examination. This ruling was erroneous. It was the contention of the defendants that no such conversation occurred between Anderson and his attorneys, and they so testified as witnesses for the defense. The truth of Anderson's statements that he was acting under advice of his counsel was a vital issue, and if his wife was urging him to furnish money and to send Mrs. Pittman away to Canada, on the chance that the cause of their domestic troubles would be thereby removed, it was a proper matter for the jury to consider in deciding whether a conspiracy existed to remove this witness or whether Anderson acted on his own judgment and from another strong and natural motive when he furnished the money that carried her away. It was proper cross-examination, because the effect of his direct testimony was that the only motive that caused him to take this woman to Canada was the advice he received from these attorneys, and the existence of another motive impelling him to this act was both contradictory and explanatory of his direct testimony. The refusal to allow this question to be answered affected a substantial right of the par-

ties, and may have been the determining factor with the jury in solving the dispute in the evidence.

The judgment will be reversed, and a new trial ordered as to all of the plaintiffs in error.

STONE, Circuit Judge, dissents.

HINES, Director General of Railroads, v. DAHN.*

(Circuit Court of Appeals, Eighth Circuit. August 2, 1920.)

No. 5514.

1. Railroads \S 5½, New, vol. 6A Key-No. Series—Federal control extends to only physical properties; "carriers;" "systems of transportation."

Within Act Aug. 29, 1916 (Comp. St. \S 1974a), Federal Control Act March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¼a-3115¼p), Act Feb. 28, 1920, \S 206g, and the proclamation of the President of Dec. 26, 1917, taking control of the railroads, the "systems of transportation" and the "carriers" mentioned therein, control of which was taken by the United States, are the physical properties of the various railroads, not the corporation owning or operating them.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Carriers.]

2. Railroads \S 5½, New, vol. 6A Key-No. Series—Suits arising from federal control are against government.

Under Federal Control Act March 21, 1918, \S 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, \S 3115¼j), authorizing actions and suits against carriers under federal control, and the orders of the Director General requiring such suits to be brought against him, a suit against the Director General is against him in his capacity as agent of the United States, not against the corporations which own the railroads.

3. Statutes \S 219—Interpretation by official charged with execution entitled to respect.

General Order No. 50 of the Director General of Railroads, requiring suits growing out of federal control of railroads to be brought against the Director General and not otherwise, is an interpretation of the laws regulating federal control of railroads by the department of the government charged with execution thereof, which is regarded by the courts with great respect.

4. Master and servant \S 389—Compensated federal employé can derive no personal benefit from recovery from wrongdoer.

Under the federal Employés' Compensation Act (Comp. St. §§ 8932a-8932uu), requiring an employé receiving compensation thereunder to assign to the government his claim against another person for injuries, or requiring the application of any sums acquired by him to the payment of compensation, the employé who recovers compensation can receive no personal benefit from a recovery against another person who caused the injury.

5. Master and servant \S 351—Federal employé electing to receive compensation cannot recover for negligence of Director General.

A mail clerk employed by the United States, electing to receive compensation under the federal Employés' Compensation Act (Comp. St. §§ 8932a-8932uu) for injuries caused by the negligence of the Director General of Railroads, cannot thereafter recover against the Director General,

*For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari granted 254 U. S. —, 41 Sup. Ct. 147, 65 L. Ed. —.

though he might have elected to recover from the Director General instead of applying for compensation.

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action by Arthur J. Dahn against Walker D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions to dismiss the complaint.

See, also, 256 Fed. 549.

F. H. Helsell, of Ft. Dodge, Iowa (C. A. Helsell, of Ft. Dodge, Iowa, W. S. Horton, of Chicago, Ill., and Nelson & Duffy, of Dubuque, Iowa, on the brief), for plaintiff in error.

W. A. Smith, of Dubuque, Iowa (D. J. Lenehan and L. G. Hurd, both of Dubuque, Iowa, on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

CARLAND, Circuit Judge. Defendant in error, hereafter plaintiff, brought this action against Illinois Central Railroad Company and the Director General of Railroads, hereafter defendant, to recover damages for personal injuries alleged to have been caused by the negligent operation of said railroad. Plaintiff recovered a verdict against the defendant, the action having been dismissed as to the railroad company. Defendant brings error.

The first contention made by counsel for defendant is that the plaintiff cannot maintain this action, for the reason that it is in legal effect an action against the United States, and the plaintiff as an employé of the United States had prior to the commencement of the action applied for and received the benefits of an act to provide compensation for employes of the United States suffering injuries while in the performance of their duties. 39 Stat. 742 (Comp. St. §§ 8932a-8932uu). The facts material to this contention as they appear in the record are as follows: On May 29, 1918, plaintiff was a railroad mail clerk engaged in the performance of his duties as such while riding in a mail car composing a part of train No. 11, of the Illinois Central Railroad Company, then running over the track of said company, under the management and control of defendant. On said date and while he was so engaged said train was derailed and wrecked by plunging through a bridge composing a part of the roadbed of said Illinois Central Railroad Company, near Aplington, Iowa, and by reason thereof he was seriously and permanently injured. Division V of defendant's answer contains the following allegation:

"That under the act for compensation for the employes of the United States aforesaid, this plaintiff has made application in the manner provided by said act for compensation under said act, and this defendant is informed and believes and charges that such application has been affirmatively acted upon and said employé has the benefit of all the provisions of said Compensation Act."

This allegation of the answer was admitted by paragraph 3 of plaintiff's demurrer to said answer, the demurrer being sustained. In

subdivision 2 of said paragraph 3 in addition to the formal demurrer plaintiff also stated:

"That even if it be true that plaintiff has been paid compensation under the act to provide compensation for employes of the United States, such fact does not constitute any defense to this action, said act not purporting to furnish an exclusive remedy to plaintiff, but, on the contrary, expressly providing for the maintenance of an action of this character."

On the record as it stands, and in view of the fact that at the trial the case was treated by court and counsel as if the plaintiff had applied for and accepted the benefits of the Compensation Act above referred to, the case must be treated here in the same way. The first question therefore to be considered is: Was plaintiff's action in legal effect one against the United States?

[1] By chapter 418, 1st Sess. 64 Cong., approved August 29, 1916, 39 Stat. 645 (Comp. St. § 1974a), it is provided:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Pursuant to the authority thus given, the President on December 26, 1917 (40 Stat. 1733), issued a proclamation containing the following language:

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, do hereby, through Newton D. Baker, Secretary of War, take possession and assume control at 12 o'clock noon on the twenty-eighth day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail and water systems of transportation, to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion so far as may be necessary of all other traffic thereon, and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers.

"It is hereby directed that the possession, control, operation and utilization of such transportation systems hereby by me undertaken shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. * * *

"Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine."

On March 21, 1918, Congress passed an act generally known as the Federal Control Act, being chapter 25, 2d Sess. 65th Cong. 40 Stat. 451 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115 $\frac{3}{4}$ a-3115 $\frac{3}{4}$ p). Among other provisions of said act are the following:

Section 1 (section 3115 $\frac{3}{4}$ a): "That the President, having in time of war taken over the possession, use, control, and operation * * * of certain railroads and systems of transportation (called herein carriers)." "That any railway operating income accruing during the period of federal control in excess of such just compensation shall remain the property of the United States."

Section 6 (section 3115 $\frac{3}{4}$ f): "That the sum of \$500,000,000 is hereby appropriated, out of any moneys in the treasury not otherwise appropriated, which, together with any funds available from any operating income of said carriers, may be used by the President as a revolving fund for the purpose of paying the expenses of the federal control."

Section 10 (section 3115 $\frac{3}{4}$ j): "That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of such federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such federal control."

Section 12 (section 3115 $\frac{3}{4}$ l): "That moneys and other property derived from the operation of the carriers during federal control are hereby declared to be the property of the United States. Unless otherwise directed by the President, such moneys shall not be covered into the treasury, but such moneys and property shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner and form as before federal control."

Act Feb. 28, 1920, § 206g, 262 Fed. 340, reads as follows:

"No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under federal control."

The first provision quoted above from the Federal Control Act recites that the President, having in time of war taken over the possession, use control and operation of certain railroads and systems of transportation, called herein carriers, and thus makes it plain in our opinion that Congress correctly interpreted the original authority given the President, and also his proclamation to the effect that it was the physical railroads and systems that the President took possession of, and the Federal Control Act declares that these physical railroads and systems shall be called in said act "carriers." The original authority of the President authorized him to take possession and assume control

of any system or systems of transportation. In his proclamation the President declared that he did take possession of each and every system of transportation and the appurtenances thereof. In view of the language conferring the original authority of the President and the language of the proclamation, the word "railroads," in the Federal Control Act, must be construed to mean the same thing as systems of transportation.

We do not think there can be any doubt about the meaning of the words "railroads and systems of transportation" as used in the several acts of Congress and the proclamation of the President. In our judgment they refer only to the physical properties which constituted the system or systems. The system is composed of the roadbed, tracks, engines, cars, and other appurtenances which are used in the transportation of passengers and freight from one place to another. The system is entirely distinct from the corporate entity which may own or manage the system. The President had no authority, nor did he pretend by the language of his proclamation, to take over the railroad corporation or corporations, which owned the several systems. The whole Federal Control Act is opposed to any such interpretation, because it provides for the payment to the different corporations of a compensation for the use of the several systems and elaborate provisions are made for the protection of the rights of both parties. The United States owned no railroad stock and did not seek to obtain control of the railroad corporations. The fundamental idea underlying the decision of the United States to take control of the systems was that it was necessary so to do in order that the great task of transporting troops, munitions, and supplies might be carried on by the different systems to the exclusion of all other traffic if necessary. Any further control than to accomplish this object was not needed, sought, or obtained. The excerpt above quoted from the proclamation of the President, to the effect that no attachment by mesne process or execution should be levied on or against the property used by any of said transportation systems in the conduct of their business as common carriers, but that suits might be brought by and against such carriers and judgment rendered as hitherto until and except so far as said Director General might by general or special orders otherwise determine, clearly uses the word "carriers" as meaning the same as transportation systems, because it was only such systems whose property could not be levied on without the written assent of the Director General. Whoever has the management, control, and operation of a transportation system which is engaged as a common carrier in the transportation of passengers and freight from one place to another is the carrier, so far as liability is concerned for negligent operation.

[2] When we come to section 10 of the Federal Control Act, we think that there ought not to be the confusion and want of harmony in the decisions in regard to its meaning, which seems to exist as to the question now being considered. The Federal Control Act starts out by plainly declaring that the railroads and systems of transportation which the President had taken possession of should in said act be called "carriers." According to section 10, the "carriers"—that is, the physical

railroad systems—shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of the act, or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgment rendered as now provided by law, and in such suits no defense shall be made upon the ground that the carrier transportation system is an instrumentality or agency of the federal government. To decide that the words "carrier" and "carriers," in section 10, mean the corporate entity, in the present case the Illinois Central Railroad Company, is not only to go in opposition to the plain provision of law conferring authority upon the President and the plain words of his proclamation, but also to what Congress has decided to be the true meaning of the words. It seems plain to us that the President had authority and did, through Newton D. Baker, Secretary of War, take possession and assume control of each and every system of transportation and the operation thereof; that the possession, control, operation, and utilization of such transportation systems undertaken by the President was directed by him to be exercised by and through the Director General. It would be unconstitutional and contrary to the law of the land to hold that the railroad corporation, in this case the Illinois Central Railroad Company, as a corporate entity should be liable for an act done or omitted to be done in the operation of the transportation system by another party over which it had no authority or control. *Zeigler v. S. & N. A. R. R. Co.*, 58 Ala. 594; *Mobile Light & R. R. Co. v. Copeland & Sons*, 15 Ala. App. 235, 73 South. 131; *Bank of Columbia v. Okley*, 4 Wheat. 235, 4 L. Ed. 559; *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232; *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; *Leeper v. Texas*, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225; *Giozza v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599; *Jones v. Brim*, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677; *Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 448, 44 L. Ed. 597; 6 Rul. Cas. Law, pp. 433, 446, embracing paragraphs 430 to 442 on Constitutional Law.

Moreover section 206g, *supra*, Act Feb. 28, 1920, specially provides that no execution shall issue against the property of the carrier (corporation), when the cause of action on account of which the judgment was obtained grew out of federal control. We think the effect of section 10, so far as the bringing of suits is concerned, was to waive the sovereignty of the United States so far as any suits that were authorized to be brought were concerned and to allow persons injured through negligence of the carrier which in the present and similar cases would be the Director General, to bring suits against the carrier the same as if the transportation systems were not under federal control. If it was the corporate entity, in this case, the Illinois Central Railroad Company, which was to be liable for the negligence of the Director General, why did Congress provide in the Federal Control Act and the President in his proclamation that no execution should issue on the judgment? This is a provision not found in legislation in regard to litiga-

ton between private parties, but in litigation between private parties and the sovereignty, extending also to cities and other corporations exercising governmental functions. We are of the opinion that the present action was one in effect against the United States and that they will be obliged to pay the judgment below if sustained. The Director General is sued the same as a receiver. He is not personally liable, but the government is.

[3] General Order No. 50, promulgated by the Director General, October 28, 1918, directing that actions at law, suits in equity and other proceedings thereafter brought in any court based on contract binding upon the Director General, claim for death or injury to person, or for loss and damage to property arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General, which action, suit or proceeding but for federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General, and not otherwise, is an interpretation of the laws regulating Federal Control of Railroads by that department of the government charged with the duty of executing the same, and such interpretation has always been regarded by the courts with great respect. *U. S. v. Cerecedo Hermanos y Compania*, 209 U. S. 338, 28 Sup. Ct. 532, 52 L. Ed. 821. There are well-reasoned cases in the federal courts sustaining the views herein expressed. They are *Rutherford v. Union Pac.* (D. C.) 254 Fed. 880; *U. S. v. Kambeitz* (D. C.) 256 Fed. 247; *Mardis v. Hines* (D. C.) 258 Fed. 945; *Haubert v. Baltimore & O. R. Co.* (D. C.) 259 Fed. 361; *Nash v. Southern Pacific Co.* (D. C.) 260 Fed. 280; *Westbrook et al. v. Director General of Railroads* (D. C.) 263 Fed. 211; *Hatcher & Snyder v. A., T. & S. F. Ry. Co.* (D. C.) 258 Fed. 952; *Southern Cotton Oil Co. v. Atlantic Coast Line Ry. Co. and Wade v. Sea Board Air Line Co.* (D. C.) 257 Fed. 138; *Sagona v. Pullman Co.* (Sup.) 174 N. Y. Supp. 536; *Oyler v. C., C. & St. L. Ry.*, 17 Ohio Law Rep. 356; *Public Service Commission v. New England Telephone & Telegraph Co.*, 232 Mass. 465, 122 N. E. 567, 4 A. L. R. 1662; *Macleod v. New England Telephone & Telegraph Co.*, 250 U. S. 195, 39 Sup. Ct. 511, 63 L. Ed. 934; *N. P. Railroad Co. v. State of North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897. There are other decisions construing section 10 as providing for the bringing of actions against the carrier corporation just the same as if no federal control had taken place. The cases cited as deciding that it is the carrier corporation that must be sued are *Postal Tel. Co. v. Call*, 255 Fed. 850, 167 C. C. A. 178; *Jensen v. L. V. R. Co.* (D. C.) 255 Fed. 795; *Johnson v. McAdoo* (D. C.) 257 Fed. 757; *Witherspoon v. Postal, etc., Co.* (D. C.) 257 Fed. 758; *The Catawissa* (D. C.) 257 Fed. 863; *Dampskibs v. Hustis* (D. C.) 257 Fed. 862; *Lavalle v. N. P. R. Co.*, 143 Minn. 74, 172 N. W. 918, 4 A. L. R. 1659; *Gowan v. McAdoo*, 143 Minn. 227, 481, 173 N. W. 440, 443; *Palyo v. N. P. R. Co.* (Minn.) 175 N. W. 687; *Ringquist v. D., M. & N. R. Co.* (Minn.) 176 N. W. 344; *McGregor v. G. N. R. Co.* (N. D.) 172 N. W. 841, 4 A. L. R. 1635; *Franke v. C. & N. W. R. Co.* (Wis.) 173 N. W. 701; *M. P. R. Co. v. Ault* (Ark.) 216 S. W. 3; *Lancaster v.*

Keebler (Tex. Civ. App.) 217 S. W. 1117; Clapp v. Am. Ex. Co, 234 Mass. 174, 125 N. E. 162; Owens v. Hines (N. C.) 100 S. E. 617.

It would serve no useful purpose to review these cases. It is conceded that most of them declare the law contrary to the conclusion reached in this case, but the reasoning upon which the decisions are based is not persuasive.

[4] The next question for consideration is as to whether the plaintiff having applied for and received the benefits of the act to provide compensation for employes of the United States suffering injuries while in the performance of their duties is barred from maintaining this suit. Section 1, c. 458, 1st Sess. 64th Cong., 39 Stat. 742 (Comp. St. § 8932a), in part reads as follows:

"That the United States shall pay compensation as hereinafter specified for the disability or death of an employe resulting from a personal injury sustained while in the performance of his duty."

Section 15 (section 8932h) provides:

"That every employe injured in the performance of his duty, or some one on his behalf, shall, within forty-eight hours after the injury, give written notice thereof to the immediate superior of the employe. Such notice shall be given by delivering it personally or by depositing it properly stamped and addressed in the mail."

Section 16 (section 8932hh) specifies what the notice above mentioned shall contain. Section 17 (section 8932i) provides that unless the notice is given, or unless the immediate superior has actual knowledge of the injury, no compensation shall be allowed, but for any reasonable cause shown the United States Employe's Compensation Commission may allow compensation if the notice is filed within one year after the injury. Section 18 (section 8932ii) provides that no compensation shall be allowed to any person, except as provided in section thirty-eight, unless he or some one on his behalf shall within the time specified in section twenty make a written claim therefor, and such claim shall be made by delivering it at the office of the commission, or to any commissioner, or to any person whom the commission may designate, or by depositing it in the mail properly stamped and addressed to the commission, or to any person whom the commission may by regulation designate. Section 20 (section 8932jj) provides that all original claims for compensation for disability shall be made within 60 days after the injury, provided that the commission may allow original claims for compensation for disability to be made at any time within one year. Section 26 (section 8932mm) provides that, if an injury or death for which compensation is payable is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the commission may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right he may have to share in any money or other property received in satisfaction of such liability of such other person or the commission may require said beneficiary to prosecute said action in his own name. If the beneficiary shall refuse to make such assignment, or to prosecute said action in his own name when required

by the commission, he shall not be entitled to any compensation under the act. The section last referred to then provides as follows:

"The cause of action when assigned to the United States may be prosecuted or compromised by the commission, and if the commission realizes upon such cause of action, it shall apply the money or other property so received in the following manner: After deducting the amount of any compensation already paid to the beneficiary and the expense of such realization or collection, which sum shall be placed to the credit of the employes' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury."

Section 27 (section 8932n) reads as follows:

"That if an injury or death for which compensation is payable under this act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

"(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employes' compensation fund.

"(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury."

We have called attention to those provisions of the act which relate to injuries caused by other persons than the United States, for the reason that the plaintiff claims in this case that the Director General was the agent of the Illinois Central Railroad Company, and therefore the injury received by the plaintiff was caused by a person other than the United States. It plainly appears from the statute above quoted that whether the employé assigns his cause of action against a person other than the United States to the United States, and the same is prosecuted by said commission, or whether the employé prosecutes the cause of action himself, the employé gains nothing, but the whole recovery after deduction of the expense of litigation either goes into the compensation fund out of which employes are paid, or is retained by the employé and the amount thereof is credited to the United States on future payments. So that in any event the employé realizes nothing from the liability of a person other than the United States. In this very case the plaintiff would receive nothing, if he should collect his judgment other than his compensation under the Compensation Act.

[5] This discussion, however, is wholly futile, as a mere inspection of the law conferring power upon the President to take possession of the systems of transportation and his proclamation in acting under said law makes it so clear that the Director General was an agent of the United States and not of the railroad company that there is no basis for the contention of counsel for plaintiff. As we have before stated,

the Director General was the agent of the United States, and this action is in legal effect against the United States.

The only question left is as to the right of the plaintiff to not only receive compensation under the Compensation Act, but also to sue the United States for the negligence causing his injuries. In other words, must the United States pay both compensation and damages for negligence to the same person for the same injury? Workmen's Compensation Acts are all alike as to the object sought to be attained, but they are so numerous and so varied as to details of administration that each act must be construed by itself. We are of the opinion that as to the United States the act in question is compulsory, if the employé gives the notice and files the claim in proper form according to the terms of the statute and the regulations of the commission. It is optional with the employé as to whether he will make a claim under the act or not. If he does not, in our opinion he would have a right to maintain the present action and prosecute the same to judgment, as we think that the United States as to this particular case by the Federal Control Act consented to be sued. But if the employé elects to receive the benefits of the Compensation Act and his claim is allowed, then he is barred from prosecuting his action for negligence against the United States. In other words, he must elect which of the two remedies he desires to pursue, and, having elected to pursue one, he may not pursue the other. The United States under the statute being bound to pay the plaintiff after the latter has elected to claim the benefits of the Compensation Act, the remedy afforded by the act is exclusive. *Mitchell v. Louisville, etc., R. Co.*, 194 Ill. App. 77; *McRoberts v. National Zinc Co.*, 93 Kan. 364, 144 Pac. 247; *Shade v. Ash Grove Lime, etc., Co.*, 92 Kan. 146, 139 Pac. 1193; *Piatt v. Swift*, 188 Mo. App. 584, 176 S. W. 434 (Kansas Act); *Middleton v. Texas Power, etc., Co.*, 108 Tex. 96, 185 S. W. 556. That the employé cannot recover both damages and compensation is sustained by the following cases: *Barry v. Bay State St. Ry. Co.*, 222 Mass. 366, 110 N. E. 1031, 1032; *Turnquist v. Hannon*, 219 Mass. 560, 107 N. E. 443; *Cripp's Case*, 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B, 828; *Pawlak v. Hayes*, 162 Wis. 503, 156 N. W. 464, L. R. A. 1917A, 392; *McGarvey v. Independent Oil, etc., Co.*, 156 Wis. 580, 146 N. W. 895; *Woodcock v. London, etc., R. Co.*, [1913] 3 K. B. 139, 6 Butterworth's Workmen's Compensation Cases, 471; *Page v. Burtwell*, [1908] 2 K. B. 758, 1 Butterworth's Workmen's Compensation Cases, 267; *Oliver v. Nautilus Steam Shipping Co.*, [1903] 2 K. B. 639, 5 Minton-Senhouse's Workmen's Compensation Cases, 65; *Huckle v. Council*, 4 Butterworth's Workmen's Compensation Cases, 113 (affirmed 3 Butterworth's Workmen's Compensation Cases, 536, 26 T. L. R. 580); *Mahomed v. Maunsell*, 1 Butterworth's Workmen's Compensation Cases, 269; *Murry v. North British R. Co.*, 41 Scottish Law Rep. 383; *Mulligan v. Dick*, 41 Scottish Law Rep. 77; *Tong v. Great Northern R. Co.*, 4 Minton-Senhouse's Workmen's Compensation Cases, 40, 86 L. T. Rep. (N. S.) 802; Workmen's Compensation Acts; Corpus Juris Treatise.

We are of the opinion that upon principle and authority the plaintiff is barred from maintaining this action for negligence against the United States which makes it unnecessary to consider assignments of error relating to the trial of the case. Judgment below is reversed, and the case remanded, with directions to dismiss the complaint of the plaintiff. Leave is given to substitute the name of John Barton Payne in place of Walker D. Hines, Director General, if defendant is so advised. Act Feb. 28, 1920, § 206.

THE NEWA.
THE DJERISSA.

(Circuit Court of Appeals, Fourth Circuit. April 26, 1920.)

No. 1768.

1. Collision ⚡71(3)—Dragging anchor; failure to drop second anchor, on approach of storm, a fault.

A collision between a vessel, which dragged her anchor in a severe windstorm, and another vessel, anchored a quarter of a mile distant, held due solely to the fault of the drifting vessel in neglecting to put out a second anchor until too near the other vessel to be of any avail, although the storm had been threatening for several hours.

2. Collision ⚡22—Inevitable accident available as defense only to vessel without fault.

To avoid liability for a collision on the ground of inevitable accident, a vessel must show that she was without fault.

3. Collision ⚡69—Anchored vessel not bound to assume extraordinary risks.

A vessel at anchor is not required to assume extraordinary risks to avoid the consequences of impending danger occasioned by the fault of another vessel.

4. Collision ⚡73—Burden on moving vessel in collision with one at anchor.

Where an anchored vessel has been run into by another, which dragged her anchor, the burden rests upon the latter to show that she had a proper watch, and that she discovered the dragging as soon as it commenced, and took proper measures to stop it.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Suit in admiralty for collision by W. Paramor, Master of the British steamship Djerissa, against the steamship Nawa; the Danish-Russian Steamship Company, claimant. Decree for libellant, and claimant appeals. Affirmed.

For opinion below, see 258 Fed. 949.

Leon T. Seawell, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for appellant.

Braden Vandeventer, of Norfolk, Va. (Hughes, Vandeventer & Eggleston, of Norfolk, Va., on the brief), for appellee.

Before PRITCHARD and WOODS, Circuit Judges, and WATKINS, District Judge.

PRITCHARD, Circuit Judge. [1] The learned judge who heard this case in the court below made the following clear and concise statement of the facts:

"About midday of the 11th of June, 1918, the Djerissa, a large ocean-going steamship, 350 feet long, 50 feet beam, 25 feet deep, was anchored in the waters of James river, Newport News harbor, about half a mile west of the Chesapeake & Ohio Railway passenger pier, and the Newa, also a large ocean steamship, 305 feet long, 43 feet beam, 23 feet deep, was anchored about 2 o'clock on the evening of the 12th of June, about a quarter of a mile to the westward of the Djerissa. While lying at anchor, about 9:30 on the night of the 12th of June, the Newa, in a sudden and violent storm, dragged into and collided with the Djerissa, causing serious injury to both vessels. The Djerissa relies on the negligence and failure of the officers of the Newa to exercise good seamanship in anchoring and handling their vessel; whereas, the Newa insists that she was without fault and that the accident was inevitable as a result of the violence of the storm, the dangers of which they could not reasonably have anticipated or provided against.

"Prior to and until a few minutes before the impact, the Djerissa had out her port anchor on 30 fathoms of chain, and the Newa her starboard anchor on 50 fathoms. Shortly before the storm, the Djerissa paid out 30 fathoms additional chain, and 15 or 20 minutes before the collision, and as the storm approached, dropped her starboard anchor on 45 fathoms of chain. The Newa, preceding the storm, had 50 fathoms on her starboard anchor, and paid out 35 fathoms additional, and about the time of the collision, but too late to be of service, dropped her port anchor on 45 fathoms. The harbor was comparatively free from conditions and obstructions likely to affect this collision. The tide had been running flood for about an hour, but that is not material here.

"Evidence of an approaching storm was apparent as early as 6 p. m. and the weather, accompanied by thunder and lightning, was threatening for two hours prior to the collision, although the wind did not reach high velocity until immediately preceding it. The Weather Bureau record at Norfolk shows that from 8:59 to 9:09 the wind blew from the southwest 18 miles an hour; from 9:09 to 9:15 at 20; at 9:27 it dropped to 19; from 9:27 to 9:29 it increased to 44 miles; from 9:29 to 9:30 to 68 miles; at 9:37 it dropped to 60 miles; at 9:38 to 58 miles; at 9:39 to 48 miles; at 9:41 to 35 miles; and gradually declined until 9:59, when it had dropped to 15 miles. Doubtless the velocity out in the harbor of Newport News was something higher than shown by these figures, one witness describing it at its height, for short periods, at 75 miles an hour.

"No question is made of the failure of the Newa to allow ample room to swing; nor is any denial made of the fact that she dragged into the Djerissa, and that the latter ship did not drag her anchor, nor do anything tending to bring about the collision, further than it is claimed she should have paid out anchor chain upon observing the Newa drifting into her, and thereby have lessened the violence of the impact; and the Newa relies solely upon this suggestion, and the fact that the collision could not have been avoided on her part by reason of the suddenness of the storm, as absolving her from responsibility for the accident."

The court below entered a decree in favor of the libelant in the sum of \$17,205.97, from which decree the case comes here on appeal.

[2] The vital question involved herein is as to whether the Newa, the burdened vessel, has met the obligation upon her to show that she is entitled to the defense of inevitable accident. As the basis to this defense she must show that she is without fault, in order to escape liability. The *Severn* (D. C.) 113 Fed. 578; The *Juniata* (D. C.) 124 Fed. 861; The *Fullerton*, 211 Fed. 833, 128 C. C. A. 359; The *Bertha* (D. C.) 244 Fed. 319; The *Barge No. 123* (D. C.) 250 Fed. 476.

The chief officer of the Djerissa, and a witness for the libellant, testified that he observed evidences of a storm about 6 o'clock. At 8 o'clock that night the captain gave his instructions for the anchor to be ready to let go. It further appears that the chief officer in turn gave that order to the carpenter. The chief officer, in referring to the condition of the weather that evening, said:

"I think she was lying a little northwest of us when our vessel was heading up stream and probably 1,500 feet off. We were still lying there on the night of June 12th at the same anchorage. We had just marked evidence of a storm brewing about 6 o'clock. I was on watch that evening from 4 until 8. The captain came on board that night about 8 o'clock. At that time there was not much wind. It was light atmosphere around at dark, and stormy looking sky. The captain gave me instructions for the second anchor to be ready to let go. That was at 8 o'clock. He gave me these instructions when he came on board. I gave that order to the carpenter. That precaution was taken on account of the storm; I saw it coming, and the barometer was very low. About 8:30 it seemed to be getting nearer all the time, but still had not come to us. At 9 o'clock it just started; the wind still higher at 9 o'clock.

"Q. How about at 9:10? A. It just probably at 9:10 to 9:20, just started.

"Q. You mean started hard at 9:10? A. Not the full force; it was gradually coming."

"It was gradually coming from 8 o'clock on. At 9:20 the velocity of the wind was about 60 miles an hour; that was the time of the collision. The wind was coming from west, about west-southwest, I make it. Our vessel was light, and the other vessel was light."

The boatswain of the Djerissa said:

"The chief officer said to me to get the anchor ready; he said, 'You might be called on, and be ready.' He said, 'Stand by, you might be called;' and I was standing by the anchor—had it ready to drop."

The witness said this was about a quarter past 8. The boatswain also testified that he anticipated the storm was coming "between an hour and an hour and a quarter, or a half, to be exact."

The instructions of the master of the Djerissa to the chief officer were given about 8 o'clock, that the second anchor should be ready to let go, and, as we have stated, that order was given to the carpenter and the boatswain; the boatswain having received the order between 10 minutes and a quarter after 8 o'clock, just after the captain came aboard. It appears that these precautions were taken because of the appearances indicating a storm. At 8:30 the storm seemed to be getting nearer all the time, but had not reached the harbor.

The second anchor, with 45 fathoms of chain, was put out from the Djerissa between 10 and 20 minutes before the collision, and the ship came up on her anchor then. It appears that, when the second or starboard anchor was let out by the carpenter, the boatswain paid out additional chain on the port anchor, and the ship had come up on both anchors between 10 and 15 minutes before the collision. The boatswain, in referring to the conditions at that time, testified:

"I was called about 9:15, as near as I can judge, and the orders I got were, 'Stand by,' and 'Let go the second anchor.' I mean the starboard anchor. Then I went out and stood by the starboard anchor. The carpenter actually put out the second anchor between 10 and 20 minutes before the collision. He put out 45 fathoms of chain on the starboard, and the ship came up to the anchor then. When we let out the starboard anchor, we paid out on the port

anchor; it took 5 to 10 minutes to do that. Our ship had come up on both anchors between 10 and 15 minutes before the collision. I saw the other ship, and drew the attention of the mate, and said, 'It looks as if that ship was dragging.' There was a flash of lightning, and I could see everything. I could not see anything unless the lightning would flash up, and when the lightning would flash up I could catch a glimpse of everything. She was to our starboard then, her stern exposed to our starboard, between three to four ship's lengths away. I could see she was coming much closer than in the afternoon. We brought her up then. It was after we paid out 60 on the port and 45 on the starboard she came down. Her mainmast on our starboard side like that, and we went to the anchors again, and I stood by the starboard, and the carpenter by the port, and slacked away, according to what the captain and mate told us to do. The captain was there then. I first saw her several ship's lengths away. She looked to us then as though dragging, from the distance in the afternoon. I could not say what the other ship did then; I could see nothing. The next I saw of her she was on top of us. like that, on the port side, with her port beam here, and her port quarter. Her port quarter hit the port stem of our ship. She did not do anything then. We had to pay out cable. We slacked away the cable, and she veered up on the port side, and when she got immediately abreast she went astern, and then went ahead, and then seemed to be coming abreast, hit on top of us, and the captain shouted to him to look out for himself, and he went ahead, and she was cleared. When I started to slack the chain the second time, he was a quarter away across us."

While these precautions were taken by those in charge of the Djerissa, it appears, on the other hand, that the officers in charge of the Newa failed to take any precautions whatever. Indeed, their conduct indicates that they did not pay the slightest attention to any of the threatening signs and apparent indications of the approaching storm. It nowhere appears that the master of the Newa had any conversation with the mate about dropping the second anchor. The captain of the Newa, among other things, testified as follows:

"I was ashore that afternoon, and got back on the ship a little after 6. I had my supper on the ship, and from that time on I had a talk with the engineer, and gave the mate his orders. I ordered the engineer to have the engine ready at short notice, expecting to go alongside and commence loading at any time. When I went aboard it was windy, but no more than it had been all day long, and I did not expect it to be any worse. I did not observe any special phenomena at 8 o'clock. I can't say exactly the time the storm broke, but I think something about 9:15 or 9:20. At that time I was up in my room on the lower bridge, but I had both doors open. I always give the order to drop the second anchor to the second mate when we go into port, to have both anchors ready."

The chief officer admitted that that evening it looked like probably there was going to be a squall later on. It appears that he remained on his sofa until he was called by the watchman shortly after 9 o'clock, and it was blowing 60 to 70 miles an hour then. When he reached the deck, he found that the carpenter was ahead of him stationed at the port anchor, but had not let it out, and after the squall had struck an order was given by the chief officer to let the anchor go, inasmuch as the ship was taking an unusual sheer to port, which continued until she hit the other vessel. It is also in evidence that the carpenter had gone on deck because of the rate of the wind and the rain falling down the forecastle. The carpenter, among other things, testified as follows:

"Before I went out on deck, I was in the fore-castle playing cards. I came out on deck because it was blowing so hard and raining down the fore-castle; I went out to shut off the ventilator. I met the watchman on deck; he came from the chief officer's room, half way up to the fore-castle head. I did not see the watchman coming out of the chief officer's room. I asked the watchman if he had called him, and he said, 'Yes.' The watchman had been to call the chief officer; I do not know where he was before that. This hurricane was on when I got out on deck. I cannot give the direction of the wind. It was raining hard; not so dark, but you could hardly see on account of the heavy rain. After I came out, I could see the ship swinging to port. The wind had caught the starboard side, and was shifting her to port quite fast. I cannot tell exactly how far she moved that way before we got the second anchor out; not very much; not a full ship's length; probably half, or a little over. When we got the second anchor out, it did not hold before we had out 45 fathoms of chain, and at that moment the Djerissa swung hard over against our ship. I do not know exactly when we stopped. The ship kept on going to port, but drifting at the stern; I could not tell. She did not stop until she got by the Djerissa. When I let down the second anchor, the watchman was attending to the anchor light. It was blowing out. After I came out, I estimate it was 5 or 6 minutes, probably a little more, before the collision. I am just estimating that."

The evidence clearly shows that, while the boatswain was not examined as to his diligence, the watchman was. Among other things, he testified that the lightning and thunder began about 7 o'clock, and that it was more or less lightning and thundering until after 8 o'clock. It does not appear that the watchman did anything until after he saw the wind hit the starboard side of the ship, at which time he notified the chief officer. The court below held that the putting out of the anchor at or just before the time of the collision was too late to be of any service.

[3] It appears that after the second anchor had been put out by the Djerissa, and the chain paid out on both anchors, and at the time the Newa was seen dragging down on the Djerissa, the chain was again slackened out in an effort to avoid the Newa. The vessel at anchor being the favored vessel, it is not required to assume extraordinary risks to avoid the consequences of impending danger occasioned by the other vessel's fault. In the case of *The Juniata* (D. C.) 124 Fed. 861, Judge Waddill, among other things, said:

"And besides the Sovereign of the Seas was not in a position—having herself made an improper anchorage—to call upon the Juniata to incur extraordinary risks in order for the Sovereign of the Seas to avoid the collision."

The lower court, in its opinion, referring to this point, said:

"The Newa cannot escape responsibility for her action by insisting that the other vessel should have pursued a different course looking to her own protection from the storm in which the vessels were caught. The latter vessel put out her second anchor, and the two held the ship. While it may be true that, if she had not done this, and had continued to swing on the single chain, she might have lessened the chances of the Newa dragging into her, still she might have been set adrift, and we would have two vessels running loose, instead of one. She selected the course that her navigators thought wisest for her safety, and she should not be held liable for not adopting a course conformable to the ideas of those navigating the other vessel."

According to the finding of facts of the court below, the threatening character of the weather was sufficient to have caused the Newa

to anticipate the coming storm, at least to the extent that it could have lowered the anchor and avoided the trouble that ensued. In other words, it was negligence for the *Newa* to fail to put out the second anchor, and pay out the proper amount of chain on both anchors, before the storm commenced. This is especially true, as in this instance, where indications of the storm had been apparent for some time before it commenced.

In the case of *Barge 123*, 250 Fed. 476, District Judge Morton, of the District Court of Massachusetts, said:

"Weather conditions were something the *Llanberis* was bound to notice and to take proper precautions against. The possibility that, if the wind should increase, she might drag a single anchor was evident. * * * When the gale came on, everything suggested the necessity of keeping a sharp lookout against dragging; yet her anchor watch entirely failed to observe that the steamer was doing so until too late for her to avoid fouling the barge. If they had noticed the danger in time, and had dropped the second anchor, the accident would have been prevented. Their negligence stands unexplained and unexcused. * * *

Also in the case of *The Terje Viken* and *The Baravia* (D. C.) 212 Fed. 1020, Judge Waddill said:

"* * * Because of omissions on the part of the steamship to properly and timely perform her duty, as well in the manner of her original anchorage, as her neglect to take extra precautions in the face of the impending storm, * * * she should have anticipated the effect of the wind when she came to anchor, and have put out both anchors, * * * and as a matter of fact her port anchor was in the act of being turned loose when the collision happened. * * * Sight is not lost of the fact that the ship claims that the squall was so sudden that it was impracticable for her to cast the additional anchor in time to have been of use, had it been thought necessary; but the court thinks the evidence establishes the contrary to be the fact, and that ample warning of the approach of the storm was afforded, and additional precautions should have been taken to secure her safety, as was done by other shipping in the vicinity."

The court below found the facts, which, under the rule, should not be disturbed, unless clearly against the weight of the evidence. This rule is so well established that we do not deem it necessary to incur this opinion with citations of authorities in support thereof.

[4] It is universally held that, when a vessel at anchor is run into by a moving vessel, the burden rests on the moving vessel. This rule is based on reason and is adhered to by all the courts. Where it appears, as in this instance, that the vessel at anchor has been run into, the burden is on the moving vessel to show that it had a proper watch on the deck, and that she discovered the dragging as soon as it commenced; that she took proper measures to prevent it, and that her ground tackle was sufficient. This rule is announced in *Marsden on Collisions*, p. 506.

It being found in this instance that the *Newa* is at fault, such fault is sufficient to account for the disaster, and it is not enough for her to raise a doubt as respects the management of the other vessel. An examination of the record discloses the fact that no fault was urged against the *Djerissa* in the lower court, and such contention has not been made in this court. In view of the facts as found by the court

below, and in the light of the law, such contention if made would be untenable.

From what we have said, it necessarily follows that the decree of the lower court should be affirmed.

SPITZER et al. v. BOARD OF TRUSTEES FOR REGINA PUBLIC SCHOOL DIST. NO. 4 OF SASKATCHEWAN.*

(Circuit Court of Appeals, Sixth Circuit. July 19, 1920.)

No. 3397.

1. Schools and school districts ⇨97(5)—Purchaser of bonds bound to know statute.

One making an offer for bonds to be issued by a school district, in response to a public advertisement, is bound to know the law under which the bonds are to be issued, and cannot avoid the resulting contract on the ground that he was misled by statements made by the district officers, which were literally true and readily understandable by one having knowledge of the statute.

2. Schools and school districts ⇨97(5)—Contract for purchase of bonds not invalid for mutual mistake of law.

A contract for purchase of school district bonds *held* not invalid for mutual mistake, because neither of the parties had actual knowledge of court decisions affecting the property which was subject to taxation for payment of the bonds.

3. Schools and school districts ⇨97(5)—Acts of purchaser evidence of approval of bond issue.

A contract for purchase of bonds of a school district, subject to approval of the proceedings leading to their issuance by purchaser's attorneys, cannot be avoided on the ground that such approval was not given, where after examination by the attorneys of a transcript of the proceedings, and asking for and obtaining the passage of an additional resolution by the district board, the purchasers, without further objection, caused the bonds to be prepared and printed at their expense, and obtained the issuance and delivery of a substantial part of the same, which they advertised and sold.

4. Schools and school districts ⇨97(5)—Grounds for refusal to perform contract for purchase of bonds cannot be shifted after suit.

Where defendants, who had contracted for the purchase of \$500,000 of bonds of plaintiff school district, after accepting and paying for \$100,000 of bonds and after plaintiff had entered into contracts for property and buildings to be paid for from the proceeds, refused to take more, except at a reduced price, on the ground that not all the property within the district was subject to taxation for their payment, as they had supposed, defendants cannot justify such refusal, when sued for breach of contract, on other grounds, which, if made known at the time, might have been obviated.

5. Words and phrases—"Law"; "knowledge of law."

"Knowledge of law" includes knowledge of the decisions of the courts, which are part of the law."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series; Knowledge of the Law; Law.]

In Error to the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 149, 65 L. Ed. —.

Action by the Board of Trustees for the Regina Public School District No. 4 of Saskatchewan against Adelbert L. Spitzer and others, doing business as Spitzer, Rorick & Co. Judgment for plaintiff, and defendants bring error. Affirmed.

For opinion below, see 255 Fed. 136.

George D. Welles and Charles F. Chapman, both of Toledo, Ohio (Tracy, Chapman & Welles, of Toledo, Ohio, on the brief), for plaintiffs in error.

E. J. Marshall, of Toledo, Ohio (Marshall & Fraser, of Toledo, Ohio, on the brief), for defendants in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. This writ is to review a judgment in favor of the defendant in error, hereinafter called the plaintiff, against the plaintiffs in error, whom we shall call the defendants, for damages on account of defendant's refusal to receive and pay for a block of school debentures issued by plaintiff pursuant to alleged contract with defendants for their purchase. The case was tried to the court under written waiver of jury, and judgment rendered upon findings of fact. The legal conclusions based thereon are contained in a written opinion, reported in 255 Fed. 136. The substance of the case is this:

Plaintiff is a body corporate organized under the School Act of the province of Saskatchewan, Dominion of Canada, which act empowers any school district of plaintiff's class to issue, upon the security of the district, debentures running not more than 20 years and at a rate of interest not exceeding 8 per cent. per annum, for obtaining school sites and the erection and furnishing of school buildings thereon. The required preliminary steps include a declaration by the board of the advisability of such borrowing, expressed through a by-law under the corporate seal of the district and in form and effect as prescribed by the minister of education, and a notice of the board's intention to apply to the minister of education for authority to so borrow to be given to the taxpayers of the district, in a form prescribed by the minister, and to be posted in five or six conspicuous places in the district, to enable a demand—which in the instant case could be made by 20 taxpayers—for a public vote upon the by-law; if no vote is demanded, the board is to transmit to the minister of education a certified copy of the by-law, as well as of the notice to the taxpayers, with proof of its posting, together with a declaration of the assessed value of the real property in the district as shown by the last revised assessment roll, "upon receipt of which" (the act provides), "and upon being satisfied that the several conditions required by this act have been substantially complied with, the minister may in writing authorize the board of trustees to borrow the sum or sums of money mentioned in the by-law, or a less sum, and issue public notice of authorization in the Saskatchewan Gazette." The act permits the use of either of three forms of debentures, two of which provide for payment "in lawful money of Canada"; the third, in such money or "pounds sterling." The act further provides that every debenture, before its issue, shall be sent for registration to the minister of education, who, if satisfied that the

requirements of the act have been substantially complied with, is required to register and countersign the debenture, keeping proper record of the same. It is also provided that such—

“countersigning by the minister shall be conclusive evidence that the district has been legally constituted and that all the formalities in respect to such loan and the issue of such debenture have been complied with, and the legality of the issue of such debenture shall be thereby conclusively established, and its validity shall not be questionable in any court in Saskatchewan, but the same shall, to the extent of the revenues of the district issuing the same, be a good and indefeasible security in the hands of any bona fide holder thereof.”

On February 14, 1913, plaintiff regularly passed, adopted and sealed what is known as “by-law No. 16,” which, after reciting the necessity and desirability of borrowing \$500,000 on the security of the district for the purpose of building, furnishing, and equipping a new school on each of two named locations, as well as purchasing sites, improving grounds, and making other improvements, including a heating and ventilating system in a third school; and that the sum so borrowed should be repayable to the bearer at the end of 20 years, with interest at the rate of not more than 8 per cent. per annum, enacted (a) that the necessary proceedings be taken under the school act to obtain the sanction of the minister of education to the loan, and (b) that, if the minister should empower the board to borrow the sum mentioned under the act, the debentures of the district (to be issued and executed by the chairman and treasurer of the board) be issued payable to bearer at the time and with not more than the interest above stated. Due notice of this by-law and its purpose was given the public. No poll was demanded, and the board duly transmitted to the minister of education certified copy of the by-law and notice, with proof of posting and declaration of assessed value of real property, whereupon the minister in writing authorized the board to borrow the sum stated, publication of which was duly made in the official gazette. Plaintiff thereupon advertised for tenders.

On April 12, 1913, defendants, who are dealers in bonds at Toledo, Ohio, submitted to plaintiff, in writing, an offer of \$475,000 for \$500,000 of 5 per cent. debentures of the district, maturing in 20 years, principal and interest payable in lawful money of the United States at the Bank of Montreal, in either New York or Toronto, Canada, at holder's option. The offer contained this further provision:

“We will print and deliver to you at Regina at our expense lithographed blank debentures ready for execution. Prior to our taking up and paying for said debentures, you are to furnish us complete transcripts of all proceedings leading up to and culminating in the issuance of said debentures evidencing their legality to the satisfaction of our attorney. Should our attorneys deem an additional by-law necessary, you are to pass the same.”

On April 16, 1913, at a duly called meeting of the board, defendant's tender was formally accepted by resolution, which, however, was not under seal. This was plaintiff's only acceptance through resolution or writing. At the request and instigation of defendants' agent, who also represented them in making the original tender, the board passed, apparently on the same 16th day of April, a new by-law, numbered 17, prepared by or under the suggestion of this agent, which by-

law differed from No. 16 only in that the interest (not to exceed 8 per cent.) was expressly made payable semiannually, and both principal and interest made payable in lawful money of the United States, and at the places and with the option stated in defendant's tender.¹ No public notice of this by-law No. 17 was given, but a copy of it was sent by plaintiff to the minister of education, who on April 17th, in writing, acknowledged its receipt and advised plaintiff of his approval. Later a transcript of all plaintiff's proceedings and of the acts of the minister of education already mentioned was sent to defendants at Toledo, who, in acknowledging receipt, said:

"We will turn same over to our attorneys, and promptly advise you as to the result of their examination."

Defendants asked plaintiff for no further or other legislation, nor for further or other transcripts of plaintiff's proceedings, nor did they request further or other proceedings by the minister. The records and transcripts so submitted by plaintiff to defendants were by the latter turned over for purposes of approval to their counsel, who thereafter prepared blank forms of debentures, which defendants on May 21, 1913, sent plaintiff for execution, with detailed instructions (apparently prepared by defendants' counsel) as to the formalities thereof. The debentures were accordingly executed by plaintiff and countersigned by the minister of education. The debentures so prepared and executed differed from the terms contained in defendants' written tender of April 12th only in that they were made payable in lawful money of Canada, instead of lawful money of the United States.

On July 5, 1913, defendants requested plaintiff to forward immediately \$100,000 of the debentures to New York for delivery. On July 8th (three days later) defendants first suggested a possible criticism upon the debentures growing out of this situation: The school act of Saskatchewan provided for two kinds of school districts, viz. "public," to which class plaintiff belongs, and "separate," which latter may be established by a minority of the taxpayers in the district, whether Protestant or Roman Catholic, and which, when established, are governed by the same laws as are public schools. Regina also had a "separate" school district. The suggestion of July 8th above mentioned was by way of telegram from defendants to plaintiff, inquiring whether lands liable to assessment for indebtedness on debentures when issued remained liable therefor until the whole of the indebtedness has been paid, or whether it would be released from liability for such indebtedness if thereafter transferred from the present owners to Catholics. To this plaintiff made reply, so far as presently material, that the question raised had not been dealt with "by our courts here"; that the lands were "believed to remain liable," but that the case was "extremely hypothetical," inasmuch as the assessments of the public school district had for the past 10 years been ten times that of the separate district. It appears from defendants' reply of July 22d that they had previously been advised by their Canadian counsel that lands

¹In the recital of necessity, etc., in the preamble to by-law 16, the interest was given at 8 per cent. per annum, payable annually. The words "payable annually" were omitted from the enacting portion.

liable to assessment on account of debentures when issued would remain so liable until the entire thereof was paid, but that on the question being raised by a prospective purchaser of part of the \$100,000 block in question defendants' counsel had reached the opposite conclusion.

Defendants' offer to take up the \$100,000 of debentures then in New York, without waiving their rights under the contract and without approving the entire issue, was accepted, and the bonds to the extent stated taken and paid for by defendants at the contract rate of 95 cents on the dollar. On August 15th following defendants declined to approve the remaining \$400,000 of debentures solely for the reason stated in their letter of July 22d before referred to. Plaintiff thereupon sold the remaining \$400,000 of debentures at 90 cents on the dollar. This suit is to recover the 5 per cent. below the price at which defendants were to take them.

The defenses presented below, so far as relied upon here, are: (1) That defendants had the right to rescind for the asserted reason that defendants were induced to make the contract of purchase by representations on plaintiff's part that the area of the plaintiff district was coextensive with the area of the city of Regina, and that such representations were untrue, in that real estate owned by persons of the Roman Catholic faith, aggregating from 10 to 15 per cent. of the entire area of the city, was not included in plaintiff's district by reason of which fact the debentures were worth less than 95 cents on the dollar; (2) that defendants' attorneys did not in fact approve the debentures, and that defendants were thereby relieved from liability under the contract of purchase; (3) that the contract of purchase and sale was void, because plaintiff's resolution accepting defendants' tender was not under seal; (4) that the contract was void, because contemplating that the debentures should be payable in lawful money of the United States, which it is asserted was beyond the power of plaintiff board; (5) that by-law No. 17 was invalid, in that no notice for a poll was published.

[1] 1. Was defendant's contract of purchase induced by false representations on plaintiff's part that the Regina public school district included all the lands within the city of Regina? The trial judge, on careful consideration of the evidence, found as a fact that the alleged misrepresentations were not made, and this conclusion we are bound to accept, if supported by substantial evidence. We think the finding is so supported. The claim of misrepresentation is based upon alleged statements by the plaintiff board that the limits of the district were those of the city, and that all of the lands within the district were subject to taxation for school purposes. We think the trial judge justified in concluding that such statements as were made by the board members, when interpreted in the light of the law relating to public and separate school districts, were literally true; that in a very proper sense the district had the same limits as the city, notwithstanding the law contemplated the existence of two separate districts having the same outside limits; and that if there was any misunderstanding between defendants and the board—

"It was due to the fact that the school officers spoke with a knowledge of the law of the province on these matters and [defendants' agent] was in actual, probably, but certainly not in legal, ignorance thereof."

We agree with the trial judge that—

"The school officers had the right to assume that one there for the purpose of buying debentures understood the laws pertaining to such obligations."

Defendants' tender was in legal contemplation made with knowledge of the applicable law of the province. Under well-settled law, they were bound at their peril to inquire into the power of the plaintiff school district to make the contract in question. *State v. Minnesota Transfer Railway Co.*, 80 Minn. 108, 116, 117, 83 N. W. 32, 50 L. R. A. 656.

It is true that under a heading "Information re District," in a statement prepared by the secretary of the plaintiff board, occur the words, "Area, 7,850 acres; same as city of Regina;" but the statement clearly showed that the "net assessment" of the city was \$54,966,142, while the assessed valuation of the property in plaintiff's school district liable to assessment was \$50,711,054. We think the trial judge rightly found that this statement, read in the light of the applicable statutes of the province, was susceptible of but one reasonable construction, viz. that the assessed valuation of the public school district was the amount last stated above, and that the "net assessment" above the assessed valuation of the school district, viz. \$4,255,088, was the valuation of the "separate" school district. Clearly the information disclosed by this statement reasonably put defendant upon inquiry, and there is nothing to indicate that such inquiry would not have disclosed the actual situation to be as just stated.

[2, 5] We see no merit in the contention that there was mutual mistake of fact on the part both of plaintiff district (as distinguished from misrepresentation of fact by the former) and of defendants, in that neither knew that the courts of the province had already authoritatively held (as was the case) that lands included for taxation purposes within a public school district would cease to be so liable when passed into the ownership of a taxpayer of the Catholic faith. This was merely a mistake of law. Knowledge of the law includes knowledge of the decisions of the courts, which are part of the law. Of course, defendants do not contend that a mere mistake of law would justify rescission.

In fact, defendants' refusal to take the remaining \$400,000 of debentures was not based on any asserted misrepresentation of fact, but only upon the existence of a state of law on account of which defendants assumed they had the right to decline to approve the debentures. The conclusion of the trial judge that no misrepresentations of fact were made by plaintiff is sustained.

[3] 2. Did defendants' counsel approve the legality of the debentures? The trial judge answered this question in the affirmative, and we think this conclusion is supported by substantial evidence. It was the legality of the debentures, not their market value, which was subject to the approval of defendants' attorneys; and while

defendants did not in terms advise plaintiff that their attorneys had declared the issue of debentures legal, defendants' conduct tended most cogently to show such actual approval. As already stated, by-law No. 17 was passed at the instance of defendants' counsel. No request was ever made for any further or other legislation by plaintiff, or for further records or transcripts; the debentures themselves were prepared by defendants' Canadian counsel, and were forwarded by defendants to plaintiff with explicit instructions as to the details of execution, citing the opinion of Canadian counsel as to one feature thereof. Defendants not only paid for the original printing of the entire \$500,000 of debentures, furnishing the money to pay the Canadian customs tax, but had the entire issue reprinted, so as to include in the name of the district the word "public," which had been omitted from the previous draft; they proceeded to advertise the issue for sale, caused the actual execution of \$100,000 of the bonds by plaintiff board, their countersigning by the minister of education, and their forwarding to New York for actual delivery to defendants, negotiated a sale of one-half of that installment, and directed that other blocks of debentures be forwarded at stated periods; and the debentures themselves, as well as the coupons, were in terms made to conform completely to the requirements of the provincial statute.

Surely these facts substantially tend to show actual approval of the legality of the issue by defendants and their counsel (with whom defendants seem to have been in frequent consultation), if, indeed, any other conclusion is reasonably permissible. It would be difficult, if not impossible, to reconcile defendants' course of dealing in this respect with anything short of an actual approval of the legality of the issue. Words of express approval were not essential; necessary implication was enough. Words could not speak more plainly than did these actions. Whether the ultimate approval was by Canadian or American counsel is not important. Moreover, the only dissatisfaction with the issue expressed by defendants before suit was begun was its lessened market value on account of the provision of the Canadian school law before mentioned. The trial judge's finding of actual approval of the legality of the debentures must be sustained.

[4] 3. The remaining objections to the validity of the contract of purchase may be considered together. The trial judge was of opinion that the common law of England, which is applicable to the instant case, did not require that the resolution of the plaintiff corporation, entered upon its record, should be attested by the corporate seal; that, while it was beyond the power of the board to contract for repayment of the loan in money of the United States, such agreement did not make the contract of purchase invalid, and this for a number of reasons stated in the court's opinion; also that by-law No. 17 was, in view of all the other action had, mere surplusage.

The ultimate conclusion of defendants' liability was, however, rested largely upon the doctrine of *Railroad Co. v. McCarthy*, 96 U. S. 267, 24 L. Ed. 693, viz. that neither of the defenses referred to was asserted at the time the contract was repudiated, nor until the filing of answer in the instant suit more than a year later. Apart from the doc-

trine of the McCarthy Case, we recognize much force in the conclusions of the trial judge. Were it necessary to a decision of the case, we should probably reach the same conclusion as to the lack of necessity that the plaintiff's resolution of acceptance be under seal. The objection that the debentures were to have been payable in United States currency is at the best highly technical, as distinguished from meritorious, for the reason that the stipulation for such payment was without authority of law and was brought about by defendants. The provision for payment contained in the debentures conformed precisely to the Canadian statute, and the change in this detail in the interest of the validity of the bonds was made, to say the least, with defendants' entire approval. It is also to be said that, although the debentures recited that they were issued under the authority of both by-laws 16 and 17, yet the latter (apart from the specification of repayment in United States currency), so far as it differed from the former, related only to details which would seem fairly within the discretion vested in the plaintiff board, and which indeed must have been recognized by the minister of education as a substantial compliance with the statute. But in the view we take of the case it is unnecessary to decide these technical questions, for we think it clear that defendants are effectually estopped to assert these defenses through their failure to seasonably present them. As said in *Railroad Co. v. McCarthy*, *supra*:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

If, as is contended, and as we assume, the stated doctrine of the McCarthy Case is qualified by the requirement that the party urging the estoppel must have been prejudiced by the failure to seasonably assert the defense subsequently made,² its principle clearly applies here. As already said, the defenses we are now considering were purely technical; defendants had the power under their contract to call for such further action as was necessary to the effectiveness of the securities. Unquestionably the plaintiff corporation had the power to remedy these defects, and under its contract it was obligated to do so, and had at least the equitable right to be so permitted. Presumably it would have been entirely willing to take such action, had request been made; but no such request was made. On the contrary, without a suggestion of invalidity otherwise in the debentures, their repudiation was based solely upon the state of the "separate" school law before referred to. Defendants' conduct necessarily prejudiced plaintiff board. On the strength of defendants' contract of purchase, expenses and liability had been incurred in commencing the improvements. Defendants' offer to take and pay for the \$100,000 of debentures already issued in terms recognized that plaintiff was being seriously embarrassed by defendants' abandonment of

²*Life Ins. Co. v. Drake* (C. C. A. 8) 214 Fed. 536, 547-548, 131 C. C. A. 82; *Galle v. Hamburg, etc.* (C. C. A. 2) 233 Fed. 424, 425-426, 147 C. C. A. 360.

their agreement. Plaintiff was naturally obliged to sell the remainder of the issue on the best terms it could get, hampered by the delay and urgency of the situation.

The application of the doctrine of the McCarthy Case is clearly in the interest of justice. As found by the minister of education, the debentures substantially complied with the Canadian law. By virtue of their approval by that officer, and under the express provision of the statute, the debentures themselves were enforceable and marketable, and these qualities were in substance what the defendants contracted for. Defendants seem not to have regarded them as illegal, as shown by their acceptance to the extent of \$100,000, and their willingness to take the entire issue at a reduction based upon the existence of the separate school district law—a law whose existence, we have already seen, defendants were bound to recognize. This is not a suit upon the bonds, but upon defendants' contract of purchase.

We think these conclusions not in conflict with *Davis v. Wakelee*, 156 U. S. 680, 690, et seq., 15 Sup. Ct. 555, 39 L. Ed. 578, nor with decisions of this court in *Taenzer v. Railway Co.*, 191 Fed. 543, 551, 552, 112 C. C. A. 153, and *Oakland Co. v. Wolf*, 118 Fed. 239, 247, 248, 55 C. C. A. 93. We may add that in view of the history of this case, and without regard to what might otherwise be the situation, we think it not now open to defendants successfully to contend that, because of the provision of the school law which requires all valid action by the board to be adopted at a regular meeting, plaintiff has not become liable on the original contract of purchase and sale, and that defendants may, because of such lack of mutuality of obligation, escape the estoppel otherwise operating against them.

4. It results, from the conclusions we have reached, that there is no force in the proposition urged on oral argument that plaintiff's petition is insufficient to support a recovery. The petition was not demurred to, and the point in question does not seem to have been raised until after the close of the trial. Moreover, in view of the facts which appeared upon the trial, it would have been not only the right, but the duty, of the court to have permitted amendment, if necessary, to meet the proofs. *Pennsylvania Co. v. Whitney* (C. C. A. 6) 169 Fed. 572, 577, 578, 95 C. C. A. 70. But we think no necessity for such amendment existed.

5. Before suit was begun, defendants offered plaintiff 92 cents on the dollar for the remaining \$400,000 of debentures, on the proposition that their market value was a few cents less on account of the Canadian law referred to. It is perhaps not clear from the correspondence whether this offer was absolute, or whether it was conditioned on defendants' discharge from their contract obligations. If so conditioned, the measure of plaintiff's damage was not thereby affected. The amount of the award would indicate that the trial judge regarded the offer as conditional. No error is assigned upon this feature of the case, nor is it argued in defendants' brief. We accordingly disregard it.

A discussion in detail of the numerous propositions presented by brief and oral argument would unduly extend this opinion. We have,

however, considered them all, with the result that we find no error in the proceedings below, and the judgment of the District Court is accordingly affirmed.

DAKOTA COAL CO. et al. v. FRASER, Adjutant General, et al.

(Circuit Court of Appeals, Eighth Circuit. August 27, 1920.)

No. 5560.

1. Appeal and error ⇐781(4)—Possession of complainants' mine by state not reviewable after possession restored.

An appeal from an order denying a temporary injunction to restrain the adjutant general of the state, acting under the orders of the Governor, from taking possession and operating plaintiffs' coal mine, should be dismissed as moot, where possession of the mine had been surrendered by defendant, and control thereof resumed by plaintiffs, since the direction to grant the temporary injunction would be fruitless.

2. Appeal and error ⇐781(1)—Importance of legal questions does not prevent dismissal of moot appeal.

The fact that an appeal from an order which has become moot by change of conditions since the order was rendered involves questions of public importance, which might arise again in the future, does not prevent the dismissal of the appeal as moot.

3. Appeal and error ⇐1178(8)—Though appeal from denial of injunction was moot, order reversed, with leave to amend petition.

Where an appeal from an order denying a temporary injunction has become moot by changed conditions, but the main case is pending on a motion to dismiss the complaint, the order will not be permitted to stand, but will be reversed, with direction to permit plaintiffs to amend their complaint, if they so desire.

Appeal from the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Suit by the Dakota Coal Company and others against G. A. Fraser, individually and as Adjutant General of the state of North Dakota, and others. From an order denying the motion of plaintiffs for a temporary injunction, plaintiffs appeal. Order reversed, and case remanded, with directions to vacate the order and permit plaintiffs to amend their complaint.

John E. Greene, of Minot, N. D. (A. W. Cupler, of Fargo, N. D., and Fowler, Schmitt, Carlson & Furber, of Minneapolis, Minn., on the brief), for appellants.

Seth W. Richardson, of Fargo, N. D., for appellees.

Before SANBORN and STONE, Circuit Judges, and JOHNSON, District Judge.

JOHNSON, District Judge. During the strike of the coal miners in November, 1919, the Governor of North Dakota, claiming to act by virtue of the authority vested in him as Governor of the state and commander in chief of the state militia, directed the adjutant general of the state to take charge of and operate the coal or lignite mine of the plaintiffs in this action, together with the mines of 31 other companies engaged in operating coal or lignite mines in said state.

The Governor in his proclamations declared that a crisis had arisen as a result of the strike, threatening severe suffering to many in the state because of the lack of fuel. He ordered the adjutant general to see that the public was supplied with fuel, and to carry out the said order of the Governor the adjutant general was authorized to call to his assistance such male persons between the ages of 18 and 45 years as he might deem necessary, and he directed the adjutant general to prevent any interference with the operation of said mines, and to arrest any person or persons engaged in acts of violence, intimidation, or interference with the operation of said mines, and to hold such persons under guard until their release would not endanger the public safety. The Governor's directions to the adjutant general provided that, whenever the operators and miners should come to an agreement and demonstrate their willingness and ability to operate the said mines, or any of them, in such manner as to protect the public, control of such mines should be relinquished to the owners.

Thereupon plaintiffs filed their complaint in the court below against the adjutant general and others, setting up the jurisdictional facts and alleging that the plaintiff McClure Coal Company was the owner, and the plaintiff Dakota Coal Company was the lessee and operator, of the coal lands described in the complaint, and that the lessee was in possession of and operating the coal mines located on said lands. The complaint set out the proclamations of the Governor and alleged that the defendant Fraser, the adjutant general, and his codefendants intended to take possession of plaintiffs' mine and to operate the same. Plaintiffs plead great and irreparable injury in sufficient particularity, and also allege:

"That it is the desire and intention on the part of these plaintiffs, and especially of the plaintiff lessee, to continue the operation of said coal mines, as they have been and now are being and to produce therefrom the maximum amount of coal at all times, and to use such means as are within its command to successfully and continuously operate said mine for its own profit and the public convenience and service; that the threatened interference by and on the part of the defendants in this action will deprive the plaintiffs of that right and privilege, and will result in the violation of those guarantees contained in the Fourteenth Amendment to the Constitution of the United States, which declares that no state shall 'deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,' and would also be a denial and infringement of that further right guaranteed to these plaintiffs by the Fifth Amendment to the Constitution of the United States which declared that 'private property shall not be taken for public use without just compensation'; that such action on the part of these defendants would also constitute an infringement upon and denial of the rights of these plaintiffs as guaranteed to them by the provisions of the Constitution of the state of North Dakota."

Upon the filing of the complaint the trial court issued a restraining order, and an order requiring the defendants to show cause why a temporary injunction should not issue. A hearing was had upon the order to show cause, and on November 26th the court made its order denying the motion of the plaintiffs for a temporary injunction. On December 9th plaintiffs filed their petition for appeal and assignments of error in the lower court, and on January 29, 1920,

filed the record on appeal in this court. The error assigned by them in this court is as follows:

"The court erred in denying the application of the plaintiffs for a preliminary injunction, and in making its order refusing to grant a preliminary injunction, as prayed for in the bill of complaint. Wherefore plaintiffs and appellants pray that said order be reversed, and said district court be ordered to grant a preliminary injunction as prayed for by the plaintiffs."

The appellees have filed a motion to dismiss the appeal on the ground that the subject-matter of said appeal is now moot. The appellants resist the motion to dismiss the appeal on the grounds that:

(1) "If the order appealed from be reversed, the appellants have the right to a judgment for the damages sustained by them resulting from appellees' possession and operation of the properties in question. Substantial and valuable rights therefore remain to be determined between the parties in this suit, if the order be reversed on this appeal."

(2) "The matter actually involved is the power and authority of the agencies of state government with respect to the private property of the citizen—a question of great public concern, the decision of which will serve as a guide in case of future similar attempts by such agencies."

The motion to dismiss is supported by the affidavit of the defendant Fraser and opposed by the affidavit of B. A. Pratt, manager of the plaintiff Dakota Coal Company. There is some conflict in the statements contained in said affidavits. The court finds the facts to be that, after the denial by the trial court of plaintiffs' motion for a temporary injunction on November 26, 1919, the defendant Fraser and his codefendants, acting under him and as his subordinates, took possession of plaintiffs' mine and control of the operation thereof until some time in the month of December, 1919, when they withdrew from said mine and ceased to exercise any further control over the operations thereof.

The affiants in their affidavits are in verbal conflict in respect to just what was done by the defendants when they withdrew from said mine and ceased to exercise further control over the operation thereof. We deem it unimportant, however, whether their action be denominated as a surrender, abandonment, relinquishment, or other term of a generally similar import.

There is also a conflict with respect to the action taken by the plaintiff lessee after the withdrawal of the defendants from said mine; but, in view of the direct and affirmative allegations contained in the affidavit of the defendant Fraser to the effect that agreements were entered into between plaintiffs and their employes, under which plaintiffs were able to operate their mine, and that for many months last past plaintiffs have had sole and exclusive and uninterrupted control of their properties, which allegations are not denied, except by indirection, by B. A. Pratt in his affidavit in behalf of the plaintiffs, the court finds that plaintiffs did by their own act resume possession of said mine prior to the date of the filing of their appeal to this court, and have ever since been in control of its operation.

[1] The only relief asked for by the plaintiffs on this appeal—the only relief this court could give—is to reverse the order of the trial court denying plaintiffs' motion for a temporary injunction, and

granting, or directing the trial court to grant, a preliminary injunction. What purpose would such relief serve at this time? The defendants are not now in possession of or exercising any control over plaintiffs' mine. The crisis described by the Governor, and made the basis of his action, has passed, and the defendants disclaim any intention of again taking possession of the mine of the plaintiffs. Such relief is not necessary to prevent injury to plaintiffs, because the injury, if any, threatened at the hearing before the trial court has been done. It is not necessary in order to prevent a threatened wrong—that, is a wrong about to be done—in the taking of plaintiffs' property without just compensation, or due process of law, because the defendants now disclaim any intention or purpose of taking possession or control of said property.

It is the judgment of the court that the controversy with respect to a temporary injunction came to an end when the defendants abandoned or surrendered the possession and control of plaintiffs' mine, and the plaintiffs re-entered into possession of said mine and resumed the control and operation thereof, and that under the authorities cited below the case became moot, and should be treated accordingly. *California v. San Pablo, etc., Railroad*, 149 U. S. 308, 13 Sup. Ct. 876, 37 L. Ed. 747; *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293; *Richardson v. McChesney*, 218 U. S. 487, 31 Sup. Ct. 43, 54 L. Ed. 1121; *Lewis Publishing Co. v. Wyman*, 228 U. S. 610, 33 Sup. Ct. 599, 57 L. Ed. 989; *Id.*, 182 Fed. 13, 104 C. C. A. 453; *United States v. Hamburg-American Co.*, 239 U. S. 466, 36 Sup. Ct. 212, 60 L. Ed. 387; *Berry v. Davis*, 242 U. S. 468, 37 Sup. Ct. 208, 61 L. Ed. 441; *Board of Public Utility, etc., v. Compania General, etc.*, 249 U. S. 425, 39 Sup. Ct. 332, 63 L. Ed. 687; *United States v. Alaska Steamship Co., etc.*, 253 U. S. 113, 40 Sup. Ct. 448, 64 L. Ed. — (No. 541, Oct. Term, 1919, filed May 17, 1920); *Meccano, Limited, v. John Wanamaker*, 253 U. S. 136, 40 Sup. Ct. 463, 64 L. Ed. — (No. 187, Oct. Term, 1919, filed May 17, 1920); *Commercial Cable Co. v. Burleson*, 250 U. S. 360, 39 Sup. Ct. 512, 63 L. Ed. 1030. The objections of the appellants above quoted are fully answered in the cases cited.

[2] The second objection urged against the dismissal of the appeal has been commented upon so frequently by the Supreme Court of the United States that it requires no consideration or comment other than that contained in the cases above cited. In *California v. San Pablo*, supra, the Supreme Court of the United States said:

"The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

In *Mills v. Green*, supra, the court said:

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare

principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

And after further discussion the court said:

"But, if the intervening event is owing either to the plaintiff's own act, or to a power beyond the control of either party, the court will stay its hand."

In *Richardson v. McChesney*, *supra*, the court said:

"The thing sought to be prevented has been done, and cannot be undone by any judicial action. Under such circumstances there is nothing but a moot case"—citing *Mills v. Green* and *Jones v. Montague*, 194 U. S. 147, 24 Sup. Ct. 611, 43 L. Ed. 913. The duty of the court is limited to the decision of actual pending controversies and it should not pronounce judgment upon abstract questions, however such opinion might influence future action in like circumstances."

In *United States v. Hamburg*, *supra*, the court said:

"While this mere outline shows the questions which are at issue, and which would require to be considered if we had the right to decide the controversy, it at once further demonstrates that we may not, without disregarding our duty, pass upon them because of their absolute want of present actuality; that is, because of their now moot character as an inevitable legal consequence springing from the European war, which is now flagrant—a matter of which we take judicial notice [citing cases]. The legal proposition is not in substance controverted, but it is urged, in view of the character of the questions and the possibility or probability that on the cessation of war the parties will resume or recreate their asserted illegal combination, we should now decide the controversies in order that by operation of the rule to be established any attempt at renewal of or creation of the combination in the future will be rendered impossible. But this merely upon a prophecy as to future conditions invokes the exercise of judicial power not to decide an existing controversy, but to establish a rule for controlling predicted future conduct, contrary to the elementary principle which was thus stated in *California v. San Pablo, etc.*, R. R., 149 U. S. 308, 314: 'The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it.'"

At this point in the discussion it may be apropos to refer to the *Trans-Missouri Case*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and the *Southern Pacific Case*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310, which are relied upon by the appellants in opposition to the motion to dismiss. Chief Justice White, in the *Hamburg-American Company Case*, above referred to, takes up, discusses, and distinguishes these two cases from the *Hamburg Case*, which we think disposes of these two cases as authority in the case at bar. In the *Burleson Case*, *supra*, the court says:

"As the result of submitting an inquiry to counsel as to whether the cases had become moot, that result is admitted by the United States, but in a measure is disputed by the appellants, for the following reasons: First, it is said that, as the taking over of the lines by the President was wholly unwarranted and without any public necessity whatever, there is ground to fear that they may again be wrongfully taken, unless these cases now proceed to a decree condemning the original wrong; and, second, that although it is true that during the operation of the property while under the control of the

government all the revenues derived from it were separately kept and have been returned to the owners of the property—a result which financially is satisfactory to them—nevertheless, unless there is a decree in this case, the owners can feel no certitude that the revenues may not be claimed from them by the United States in the future. But we are of opinion that these anticipations of possible danger afford no basis for the suggestion that the cases now present any possible subject for judicial action, and hence it results that they are wholly moot, and must be dismissed for that reason.”

In *United States v. Alaska Steamship Co., etc.*, supra, the court says:

“Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot, and should be treated accordingly.”

[3] This appeal, however, involves the question of the right to a temporary injunction at the time of the hearing in November, 1919, only. There has never been any hearing upon the merits. It appears from the record before us that the main case is now pending in the trial court upon a motion to dismiss the complaint. In discussing the action of an appellate court upon an appeal in the case of *Meccano, Limited, v. John Wanamaker*, supra, in which the trial court granted a preliminary injunction, the Supreme Court of the United States said:

“But the appeal was from an interlocutory order, and the court could only exercise powers given by statute. On such an appeal a cause may be dismissed, if it clearly appears that no ground exists for equitable relief; but finally to decide a defendant's rights upon the mere statement of his adversary, although apparently supported by *ex parte* affidavits and decrees of other courts, is not within the purview of the act. He is entitled to a day in court, with opportunity to set up and establish his defenses.”

In the *Hamburg-American Co. Case*, above quoted, the court said:

“Although it thus follows that there are no issues on the merits before us which we have a right to decide, it yet remains to be determined what our order should be with reference to the decree below rendered, which, as we have seen, was against the government and in favor of the assailed combination, because it was found not to be within the prohibitions of the Anti-Trust Act. As established by the ruling in *South Spring Hill Gold Co. v. Amador Gold Co.*, 145 U. S. 300, our conclusion on such subject must be reached without at all considering the merits of the cause, and must be based solely upon determining what will be ‘most consonant to justice,’ in view of the conditions and circumstances of the particular case. Coming to consider the question in that light, and in view of the nature and character of the conditions which have caused the case to become moot, we are of opinion that the ends of justice exact that the judgment below should not be permitted to stand when, without any fault of the government, there is no power to review it upon the merits, but that it should be reversed, and the case be remanded to the court below, with directions to dismiss the bill without prejudice to the right of the government in the future to assail any actual contract or combination deemed to offend against the Anti-Trust Act.”

In *Commercial Cable Co. v. Burleson*, supra, the court said:

“In giving effect, however, to that conclusion, we are of opinion that the decree below, which in substance rejected the rights asserted by the complainants, ought not to be allowed to stand, but, on the contrary, following the well-established precedents (*United States v. Hamburg-American Co.*, 239 U. S. 466, 36 Sup. Ct. 212, 60 L. Ed. 387; *United States v. American-Asiatic S. S. Co.*, 242 U. S. 537, 37 Sup. Ct. 233, 61 L. Ed. 479), the decrees below should be reversed, and the cases remanded to the lower court, with directions to set

aside the decrees and to substitute decrees dismissing the bills without prejudice and without costs, because the controversy which they involve has become moot, and is no longer, therefore, a subject appropriate for judicial action."

The above quotations answer the first objection of the plaintiffs above set out, and, applying the rules therein announced, it is the opinion of the court that the order of the trial court, denying plaintiffs' motion for a temporary injunction, should not be permitted to stand, but should be reversed, and the case remanded to the lower court, with directions to set aside and vacate said order denying the plaintiffs' motion for a temporary injunction, and, in view of the changed conditions, the plaintiffs, if they desire, should be permitted to amend their complaint.

And it is so ordered. The parties to pay their own costs.

AMMERMAN et al. v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. August 23, 1920.)

No. 5507.

1. Indians ☞35—Oklahoma Enabling Act repealed Indian Liquor Shipment Act as to intrastate shipments.

Act March 1, 1895, § 8 (Comp. St. § 4136b), prohibiting the carrying of intoxicating liquors into Indian Territory, was impliedly repealed, so far as relates to intrastate shipments, by Enabling Act Okl. § 3, giving the state authority to punish such shipments.

2. Indians ☞35—Oklahoma Enabling Act did not repeal Indian Liquor Shipment Act as to interstate shipments.

Enabling Act Okl. § 3, giving the state jurisdiction to prohibit the sale of intoxicating liquors in Indian Territory and the shipment of such liquors into the territory, did not impliedly repeal Act March 1, 1895, § 8 (Comp. St. § 4136b), prohibiting the transportation of intoxicating liquor into Indian Territory, in so far as it related to interstate shipments which were not subject to the jurisdiction of the state.

3. Indians ☞35—Indian Liquor Shipment Act, applying only to interstate shipments, not unconstitutional.

Act March 1, 1895, § 8 (Comp. St. § 4136b), prohibiting transportation of intoxicating liquor into Indian Territory, since its limitation to interstate shipments by Oklahoma Enabling Act, does not violate Const. art. 1, § 9, by discriminating against the state of Oklahoma, or by giving that state a preference, inasmuch as it has authority to regulate shipments of such liquor into the Indian Territory.

4. Indians ☞35—Webb-Kenyon Act did not repeal Indian Shipment Act.

The Webb-Kenyon Act (Comp. St. § 8739), divesting intoxicating liquors of interstate character in certain cases, did not, since Rev. Laws Okl. 1910, § 3605, made shipments into the state unlawful, repeal Act March 1, 1895, § 8 (Comp. St. § 4136b), prohibiting interstate shipments of intoxicating liquor into the Indian Territory, especially in view of the Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a), imposing a penalty for illegal shipments.

5. Witnesses ☞48(1)—Previous conviction of felony does not disqualify.

In a prosecution for conspiracy, it was not error to permit a witness to testify for the government over the objection that he had theretofore been convicted of a felony.

☞For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 147, 65 L. Ed. —.

6. Criminal law ⚡444—Invoices held admissible, without direct proof of conformity to orders and shipments.

In a prosecution for conspiracy to ship intoxicating liquors into Indian Territory, where the evidence showed that triplicate invoices were made by the wholesale dealer when orders were received by defendants, and that the duplicate invoice was sent to defendant and the triplicate used by the shipping clerk in filling the order, and that defendant during a long course of business made no objection that the shipments did not conform to the orders or the duplicate invoices furnished, it was not error to admit the original and triplicate invoices in evidence, without calling clerks to testify that the invoice conformed to the order and that the liquor called for thereby had been shipped.

7. Criminal law ⚡829 (1)—Refusal of requests not error, where charge fairly presented case.

Where the charge of the court in a criminal prosecution fairly presented the case, it was not prejudicial error to refuse instructions requested by accused, even if accused were entitled to instructions in the language requested.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

R. L. Ammerman and others were convicted of conspiracy to carry intoxicating liquor from the state of Missouri into that part of Oklahoma which had been Indian Territory, and they bring error. Affirmed.

E. G. McAdams, of Oklahoma City, Okl., for plaintiffs in error.

Herman S. Davis, Asst. U. S. Atty., of Frederick, Okl. (Herbert M. Peck, U. S. Atty., of Oklahoma City, Okl., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and JOHNSON, District Judge.

JOHNSON, District Judge. Plaintiffs in error were convicted in the court below on an indictment charging them, under section 37 of the Penal Code (Comp. St. § 10201), with a conspiracy to violate the Act of March 1, 1895, § 8, 28 Statutes at Large, 697 (Comp. St. § 4136b), by introducing and carrying from without the state of Oklahoma—to-wit, from the city of Joplin, in the state of Missouri, into that part of Oklahoma which prior to its admission as a state was Indian Territory—intoxicating liquors, namely, whisky, etc. The indictment alleges numerous overt acts. Plaintiffs in error, whom we shall hereafter call defendants, demurred to the indictment on the ground that it failed to state a public offense. The same question was raised at the close of the trial by motion for a directed verdict.

The defendants have assigned the overruling of their demurrer and the refusal to direct a verdict in their favor at the conclusion of the trial as error. To understand the questions raised by these assignments it is necessary to have in mind certain parts of the Act of March 1, 1895, and of the Enabling Act of the state of Oklahoma. Section 8 (the part material here) of the Act of March 1, 1895, is as follows:

"Any person * * * who shall carry, or in any manner have carried into said territory [Indian] any such liquors or drinks (intoxicating), or who shall be interested in * * * carrying into said territory any of such liquors or drinks, shall, upon conviction thereof, be punished," etc.

The Enabling Act of Oklahoma (34 Statutes at Large, 267) contains the following:

"Sec. 3. * * * And said convention shall provide in said Constitution—
* * * * *

"That the manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said state now known as the Indian Territory and the Osage Indian reservation and within any other parts of said state which existed as Indian reservations on the first day of January, nineteen hundred and six, is prohibited for a period of twenty-one years from the date of the admission of said state into the Union, and thereafter until the people of said state shall otherwise provide by amendment of said Constitution and proper state legislation. Any person, individual or corporate, who shall manufacture, sell, barter, give away, or otherwise furnish any intoxicating liquor of any kind, including beer, ale, and wine, contrary to the provisions of this section, or who shall, within the above-described portions of said state, advertise for sale or solicit the purchase of any such liquors, or who shall ship or in any way convey such liquors from other parts of said state into the portions hereinbefore described, shall be punished, on conviction thereof, by fine not less than fifty dollars and by imprisonment not less than thirty days for each offense. * * *

"Upon the admission of said state into the Union these provisions shall be immediately enforceable in the courts of said state."

The first section of said Enabling Act, after providing that:

"The inhabitants of all that part of the area of the United States now constituting the territory of Oklahoma and the Indian Territory, as at present described, may adopt a Constitution and become the state of Oklahoma, as hereinafter provided"

—contains this proviso:

"Provided, that nothing contained in the said Constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed."

[1] The defendants state their first contention in the following language:

"The provisions of section 3 of the Oklahoma Enabling Act (34 Stat. 267), requiring the state of Oklahoma to forbid, under penalties, the introduction of intoxicating liquor from other parts of the state into the former Indian Territory, can be upheld only by construing it as repealing section 8 of the Act of March 1, 1895 (28 Stat. 697), in so far as that act dealt with such intrastate transactions. Otherwise, the provision of the Enabling Act must be held to be repugnant to article 1, section 8, Const. U. S., as an attempt to authorize the concurrent regulation of commerce which must be exclusively regulated either by state or nation. The Enabling Act is susceptible of a reasonable construction, which will avoid such conflict with the Constitution."

Upon the question of the introduction of intoxicating liquors from other parts of the state of Oklahoma into former Indian Territory,

the Supreme Court of the United States in *Joplin Mercantile Co. v. United States*, 236 U. S. 546, 547, 35 Sup. Ct. 291, 297 (59 L. Ed. 705), said:

"Without deciding that such control must necessarily be exclusive of co-existing federal jurisdiction over the same subject-matter, it seems to us that concurrent jurisdiction would be productive of such serious inconvenience and confusion, that, in the absence of an express declaration of a purpose to preserve it, we are constrained to hold that the active exercise of the federal authority was intended to be at least suspended pending the exertion by the state of its authority in the manner prescribed by the Enabling Act. * * * Our opinion upon this branch of the case is that, pending the continuance of state prohibition as prescribed by the Enabling Act, the provisions of the act of 1895 respecting intrastate transactions are not enforceable."

[2] Defendants' second contention is:

"The Act of March 1, 1895, having been superseded as to intrastate transactions by the Enabling Act, it is beyond the power of Congress to continue the former act in force as to interstate transactions."

The contention that—the Act of March 1, 1895, having been superseded as to intrastate transactions by the Enabling Act—it is beyond the power of Congress to continue the Act of March 1, 1895, in force as to interstate transactions, cannot be sustained. The Supreme Court of the United States has decided otherwise. In *Ex parte Webb*, 225 U. S. 682, 691, 32 Sup. Ct. 776, 779 (56 L. Ed. 1248), that court said:

"In view of these considerations, and others to be mentioned, it seems to us that Congress, so far from intending by the Enabling Act to repeal so much of the act of 1895 as prohibits the carrying of intoxicating liquors into the Indian Territory from points without the state, framed the Enabling Act with a clear view of the distinction between the powers appropriate to be exercised by the new state over matters within her borders, and the powers appropriate to be exercised by the United States over traffic originating beyond the borders of the new state and extending within the Indian Territory. * * * The power of Congress to regulate commerce between the states, and with Indian tribes situate within the limits of a state, justifies Congress, when creating a new state out of territory inhabited by Indian tribes, and in to which territory the introduction of intoxicating liquors is by existing laws and treaties prohibited, in so legislating as to preserve those laws and treaties in force to the extent of excluding interstate traffic in intoxicating liquors that would be inconsistent with the prohibition. *Dick v. United States*, 208 U. S. 340, 353. This being so, and since we find in the Oklahoma Enabling Act no repeal, express or implied, of the act of 1895 so far as pertains to the carrying of liquor from without the new state into that part of it which was the Indian Territory (saving as to liquor brought in by the state for the use of state agencies established under the provisions of the Enabling Act), it follows, upon the admitted facts, that the United States District Court has jurisdiction to punish the petitioner for the offense that he has committed."

[3] The third contention of the defendants, as stated by them, is:

"It cannot be sustained as an exercise of the power of Congress to regulate interstate commerce, because it discriminates against the ports of the state of Oklahoma, by forbidding transportation of liquor into Oklahoma from other states, while permitting the unrestricted transportation of liquor into the other states of the Union. It cannot be sustained as an exercise of the power of Congress to regulate commerce with the Indian tribes, because it gives a preference to the ports of the state of Oklahoma by permitting that state

to regulate for itself the commerce in intoxicating liquors between the people of other parts of the state and the former Indian Territory, while denying to the people of all other states the right to engage in such commerce under penalty of fine and imprisonment."

The contention raised by the defendants in the above proposition was argued to the Supreme Court of the United States in the Joplin Mercantile Co. Case. The question is referred to in the opinion, and in the course of the opinion it is stated:

"And it is said that this question is not foreclosed by the decision in the Webb Case sustaining the act as to interstate transactions, because—and this is true—the question under section 9 of article 1 of the Constitution was not then raised."

In this connection the court says:

"It is next argued that, the act of 1895 having been superseded as to intrastate transactions by the Enabling Act, it is beyond the power of Congress to continue it in force as to interstate transactions, and this for two reasons, both based upon the provision of section 9 of article 1 of the Constitution that 'no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another': (a) That the prohibition cannot be maintained as an exercise of the power to regulate interstate commerce, because in that aspect it discriminates against the state of Oklahoma by forbidding transportation of liquor into that state from without, while permitting the unrestricted transportation of liquor into the other states; and (b) that it cannot be sustained as an exercise of the power of Congress to regulate commerce with the Indian tribes because it gives a preference to the state of Oklahoma by permitting that state to regulate for itself the commerce in intoxicating liquors between the people of other parts of the state and the former Indian Territory, while denying to the people of all the other states the right to engage in such commerce with the same territory. The result sought to be deduced is that, by reason of the passage of the Enabling Act and the admission of the state thereunder, the act of 1895 cannot be sustained at all. It is said this does not impute to Congress the purpose to pass an act in excess of its powers under the Constitution; that the act when passed was justified not only as a regulation of commerce with the Indian tribes but as an exercise of jurisdiction over territory then within the exclusive jurisdiction of the United States; and that it is now unconstitutional as to interstate transactions, not because of the want of power in Congress to originally pass it, but because of the changed conditions growing out of the admission of the state under an Enabling Act inconsistent with the continuance in force of the act of 1895. And it is said that this question is not foreclosed by the decision in the Webb Case sustaining the act as to interstate transactions, because—and this is true—the question under section 9 of article 1 of the Constitution was not then raised [citing *Boyd v. Alabama*, 94 U. S. 645, 648]. The reasoning, like the opposed reasoning of the court below, has force; but we think it has also elements of weakness. Thus—to mention only one or two of these—it is not easy to see how any practical preference is given to the state of Oklahoma in the way of permitting commerce in intoxicating liquors to be conducted between other portions of the state and the former Indian Territory while denied to the people of other states, when the very clause of the Enabling Act that operates, if any does, to destroy the former universality of the act of 1895, does not permit, but prohibits, commerce in liquors between the one part of the state and the other; the only difference here important being that as to internal commerce the state enforces the prohibition, while as to interstate commerce, it is enforced by the United States. Nor is the suggestion convincing that the act of 1895 (if repealed as to intrastate commerce only) remains as a discriminatory regulation of commerce between the states unfavorable to Oklahoma; for in this aspect it forbids not the introduction of liquors from other states into Oklahoma, but only

their introduction into that particular part of it which, because of the larger population of Indians that it contains, and because of the previous treaties and the other circumstances pointed out in the Webb Case, Congress deemed to be properly entitled to that protection. Moreover, supposing that unconstitutional preferences must be deemed to arise from a partial repeal of the act of 1895 by the prohibitory provision of the Enabling Act, it would, we think, be more logical to avoid the constitutional difficulties by giving less force to that provision of the Enabling Act than by giving to it a force quite beyond the expressed purpose of Congress. The result would be, if the argument of petitioners as to the impossibility of concurrent regulation of intra-state transactions in liquors with the former Indian Territory by state and nation is sound, that the state prohibition of the liquor traffic in the territory and between the other parts of the state and the territory would have to remain in abeyance until Congress should expressly repeal the act of 1895."

We do not deem it necessary to enlarge upon the reasons suggested by the Supreme Court in the Joplin Mercantile Co. Case against the contention of the defendants made in this case. The contention of the defendants that the Act of March 1, 1895, is unconstitutional under section 9 of article 1 of the Constitution of the United States cannot be allowed.

[4] The defendants further urge that the trial court erred in overruling their demurrers to the indictment and denying their motion to direct a verdict in their favor, for the reason that the Webb-Kenyon Act (37 Stat. 699 [Comp. St. § 8739]), entitled as an act divesting intoxicating liquors of their interstate character in certain cases repealed by implication the Act of March 1, 1895, or at least suspended the operation of said act, the moment the state of Oklahoma enacted laws covering the matters and things set forth in the Webb-Kenyon Act, and they cite in support of their position *Witte v. Shelton*, 240 Fed. 265, 153 C. C. A. 191, a case in this court in which the opinion was written by Judge Sanborn. They also cite section 3605 of the Revised Laws of 1910 of the state of Oklahoma, in which there is a clause similar to that clause of the Act of March 1, 1895, above quoted, and upon which the indictment was based. This clause reads:

"Or to ship or in any way convey such liquor (meaning intoxicating liquors), from one place within this state to another place therein * * * shall be a misdemeanor," etc.

The argument is, as expressed by counsel in their brief:

"While the Webb-Kenyon Act does not repeal the act of 1895 by express language, yet it suspends its operation the very moment the state of Oklahoma enacted laws covering the matters and things therein set forth, and we believe that the statutes of Oklahoma here quoted sustain our position. Upon this point we respectfully refer this honorable court to the opinion in *Joplin Mercantile Co. v. United States*, 236 U. S. 531, 35 Sup. Ct. 291, 59 L. Ed. 705, and the opinion of this court in *Witte v. Shelton*, 240 Fed. p. 265, 153 C. C. A. 191."

The conclusion of the argument is that the effect of the Webb-Kenyon Act is:

"(a) To vest the several states with power to regulate the transportation (after crossing the state line), delivery and the use of liquor shipped into such state, in all cases where the consignee or other persons interested therein intend to sell or otherwise deal with such liquors in violation of the law of the state; and

(b) To renounce federal power and jurisdiction over such commerce in all cases where, by reason of the intent of such consignees the states were entrusted with the power of regulation."

The second postulate upon which the argument that the Webb-Kenyon Act repealed the act of 1895 rests cannot be admitted. It assumes that Congress in passing the Webb-Kenyon Act renounced federal power and jurisdiction over interstate commerce in all cases where by reason of the intent of the consignees the states were entrusted with the power of regulation of intoxicating liquors, and it assumes that the Webb-Kenyon Act—which removed, and was only intended to remove, the protection of the commerce clause of the Constitution from intoxicating liquors in certain cases—had the effect of repealing by implication the act of 1895 passed by Congress for a special purpose and pursuant to its treaty and guardianship obligations for the protection of the Indians of Indian Territory. Such an effect we do not concede. In the Joplin Mercantile Co. Case the Supreme Court, in discussing the effect of the Enabling Act upon the act of 1895, said:

"Reading the Enabling Act as a whole in the light of this situation, including the declaration in its first section of the continued authority of the government of the United States respecting the Indians, the specific requirement in the third section that the state Constitution should contain a stringent prohibition of the manufacture, sale, etc., of intoxicating liquors within the Indian Territory and the reservations for a period of 21 years from the date of admission, and thereafter until amendment of the Constitution, and the express provision that any person who should manufacture, etc., or should ship or convey such liquors from other parts of the state into the Indian Territory or reservations should be punished both by fine and imprisonment, we think the inference is irresistible that it was the purpose of Congress that the people of the state should be entrusted with actual power and control over the liquor traffic between the other portions of the state and the territory and reservations, and that, for the time at least, they should have the same control that is enjoyed by other states; it being, of course, subject to the effect of the acts of 1892 and 1897."

It will be noted that in this paragraph the court makes use of the terms "specific requirement" and "express provision." In *Ex parte Webb* the Supreme Court discusses and emphasizes the duties and obligations imposed upon the government in its relation with the Indians and Indian tribes arising out of treaties, and the relationship of guardian and ward existing between the government and the Indian. These same relations existed on March 1, 1913, the date of the Webb-Kenyon Act, and in the Webb-Kenyon Act we find neither specific requirement nor express provision that would require or presume the repeal by implication of the act of 1895.

We find subsequent legislation of Congress out of harmony with the claimed renunciation relied upon as a foundation for the contention that the Webb-Kenyon Act repealed the Act of 1895. The Reed Amendment of March 3, 1917 (39 Stat. 1069 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a]), makes it a misdemeanor and prescribes a penalty for doing substantially the very things which the Webb-Kenyon Act only prohibited, and the effect of which was, as

expressed by its title, to divest intoxicating liquors of their interstate character in certain cases.

If, as argued by the defendants, the Webb-Kenyon Act was a renunciation by Congress of federal power and jurisdiction over interstate commerce in intoxicating liquors in certain cases, then the Reed Amendment must be held to be a resumption of this power and jurisdiction, with the result that the Webb-Kenyon Act was repealed by implication by the Reed Amendment. The language of Judge Sanborn in the Witte Case may be adopted and applied to this case. His language is:

"It [the Webb-Kenyon Act] contains no express repeal of it [here the act of 1895], and it makes no reference to it. If it is repealed, therefore, the repeal is by implication, and such a repeal is not presumed. It is only when the later statute is so repugnant to or inconsistent with the earlier one that it is clear that the intention of the legislative body must have been thereby to repeal the former that a repeal by implication may be lawfully inferred. 'To induce a repeal of a statute by the implication of inconsistency with a later statute, there must be such a positive repugnancy between the two statutes that they cannot stand together.' *Arthur v. Homer*, 96 U. S. 137, 140, 27 L. Ed. 811; *Gowan v. Harley*, 56 Fed. 973, 978, 6 C. C. A. 190, 195."

Our opinion is that the act of 1895 was not repealed by the Webb-Kenyon Act.

[5] At the trial one M. F. Witte testified as a witness for the government. The defendants objected that the witness was disqualified on the ground that he had theretofore been convicted of a felony. The ruling is assigned as error and is presented in the brief of the defendants, though not argued, and is submitted upon the ruling of the Supreme Court in the case of *Rosen v. United States*, 245 U. S. 467, 38 Sup. Ct. 148, 62 L. Ed. 406. This assignment is overruled.

[6] Error is also assigned upon the admission in evidence of certain exhibits offered by the government which were objected to on the ground that proper foundation had not been laid for their admission. The defendants cite *Phillips v. United States*, 201 Fed. 259, 120 C. C. A. 149, a decision by this court in which the opinion was written by Judge Carland. We have carefully read and considered the opinion in the Phillips Case and are in accord with the rules of evidence as therein stated. This case, however, does not fall within the rules there announced.

The exhibits objected to in this case were original and triplicate copies of invoices of shipments made by the Joplin Mercantile Company of the liquors which the defendants, in the overt acts set out in the indictment, were charged with having carried from Joplin, Mo., and introduced into that portion of the state of Oklahoma which formerly had been Indian Territory. The witness Witte was the office and sales manager of the Joplin Mercantile Company engaged in the wholesale liquor business at Joplin, Mo., at the time of the transactions mentioned in the indictment. The business was carried on in this way: The defendant R. L. Ammerman resided at Keystone, a small village situated in the state of Oklahoma, just across the line from what had formerly been Indian Territory. He had in his service apparently practically all of the male and some of the

female inhabitants of the village. Liquors were ordered by him in their names from the Joplin Mercantile Company. The liquors were shipped by express from Joplin to Keystone, and there delivered by the express agent to the nominal purchasers, who immediately delivered the liquors received by them to R. L. Ammerman, and were paid by him so much per gallon or per barrel for the use of their names. This business was carried on and conducted in this way during the years 1915, 1916, and until the early part of February, 1917.

Orders for liquors were sent in by R. L. Ammerman practically daily, sometimes by the use of the telephone, sometimes by letters sent through the mail, but always in the name of the various parties who were employed by him for that purpose. These orders were received by the witness Witte. If received by telephone, he reduced them to writing. The orders received through the mail were usually accompanied by a check or draft, post office money order, or express money order, in payment. The witness Witte turned over the orders made out by him or received by him with the accompanying drafts, etc., to his billing clerk. The clerk made three invoices of each order—one copy being an original, and the other two being carbon copies. Upon the original the billing clerk noted the number of the draft, if any, accompanying the order, and placed it in the office files. The triplicate was delivered to the shipping clerk, who filled the order. The shipping clerk noted on the triplicate the data required in making up the government forms, showing the stock taken in filling the order, and the same was filed in his office. The duplicate invoice was sent to the defendant R. L. Ammerman. The witness Witte identified the original and the triplicate invoices as papers in the office and among the files of the Joplin Mercantile Company, made under his supervision and during the time that he was manager of the business of the company, and stated that they evidenced the business carried on between the company and the defendant Ammerman, and showed the liquors shipped by the company to the various parties named in the invoices for Ammerman's account. He did not see the invoices made by the billing clerk, but always and immediately after the shipments (within a day or two) checked the original invoices, to see that they were correct and corresponded to the orders. He did not assist the shipping clerk in filling the orders, and did not know of his own personal knowledge by inspection that the liquors were in fact packed and delivered by the billing clerk to the express company, although he was usually present at the time of such delivery.

The invoices were received in evidence over the objection of the defendants, and this ruling of the trial court is assigned as error. The grounds of the objection and assignment as error are, in effect, that said invoices were incompetent, for the reason that the billing clerk who made the invoices had not been called to prove that they corresponded to the orders, and that the shipping clerk who packed and delivered for shipment the goods named in the invoices had not been called to prove that the liquors mentioned in the triplicate invoices which he handled had been in fact packed and shipped, and that the notations made by him on said triplicate invoices were correct.

It is undoubtedly true that the method suggested by the objections to the invoices could have been pursued; but it does not follow that this method is exclusive, or that the invoices could not be rendered competent by other evidence in the case. It appears from the record in the case, as already stated, that this business was carried on for two years or more, and shipments made almost daily. In the great majority of cases remittances accompanied the orders. In all cases the duplicate invoice was sent to and received by the defendant R. L. Ammerman, who was the manager in this illicit trade and business. For two years and more settlements had been made upon invoices received by him, where payment had not been made in advance, without question or dispute, with one exception. The record contains the correspondence of the defendant R. L. Ammerman and the Joplin Company about certain shipments standing upon the books of the company as unpaid. The result of the correspondence was that after the parties had fully checked the items it appeared that certain remittances had been lost, or at least not received by the Joplin Mercantile Company. Duplicate drafts were issued by the bank, which had drawn the drafts, and the accounts closed. It is reasonably certain from the record that neither the defendant R. L. Ammerman, nor any one associated with him, ever made any claim that the shipments did not correspond to the orders or the duplicate invoices sent representing the same. We think the facts appearing on the face of the record render the original and triplicate invoices competent as evidence of the shipment and receipt of the liquors in said invoices mentioned.

[7] The defendants requested the trial court to give certain instructions, which it refused. We have carefully compared the instructions given by the court with the requests submitted by the defendants, and are of opinion—assuming the defendants were entitled to the instructions in the language requested—that the trial court, in the instructions given by him, fairly presented the case to the jury, and that the defendants were not prejudiced by the refusal of the court to give the requested instructions.

The judgment of the court below must be affirmed; and it is so ordered.

DUNDEE PETROLEUM CO. v. CLAY.*

(Circuit Court of Appeals, Eighth Circuit. August 14, 1920.)

No. 5493.

1. Continuance ⇐23—Testimony of absent witness as to subsequent transaction held not ground for continuance.

In an action for broker's commission, where plaintiff testified that, after he instituted negotiations with the persons who finally bought the property, he was excluded from further negotiations, which were completed without him, the absence of a witness who could testify only that plaintiff took no part in the negotiations to which he was a party, which were subsequent to the time plaintiff claimed his wrongful exclusion, does not entitle defendants to a continuance.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
267 F.—10 *Rehearing denied December 20, 1920.

2. **Continuance** ⚡26(3)—**Denial for witness whose deposition had been taken not abuse of discretion.**

It was not an abuse of discretion for the trial court to deny a continuance because of the absence of a witness whose deposition, taken after plaintiff's deposition, answered plaintiff's testimony, and where there was no showing as to the reason why the witness was not present at the time the case was set for trial.

3. **Appeal and error** ⚡966(1)—**Continuance** ⚡7—**Rests in trial court's discretion.**

The granting of a continuance is within the sound discretion of the trial court, and its ruling thereon is not reversible error, unless it clearly appears that there has been an abuse of discretion.

4. **Continuance** ⚡30—**Denial of continuance after amendment of complaint held not error.**

In an action for a broker's commission, where, at the trial, plaintiff amended his complaint, so as to conform to evidence of negotiations with an agent of the buyers not named in the complaint, it was not reversible error to deny a continuance to procure the testimony of the agent for defendants, where there was no showing what such testimony would be, and no showing that the witness was not at the place, within 100 miles of the trial, where he had been a few months before.

5. **Brokers** ⚡88(2)—**Evidence held sufficient to take issue of contract for compensation to jury.**

In an action for a broker's commission, plaintiff's testimony that he was employed at an agreed commission to procure sale of defendant's interest in oil properties to the same buyers to whom he was then negotiating a sale of other interests in those properties held sufficient to raise an issue for the jury, though defendants and the buyers denied that plaintiff had taken any part in the negotiations.

6. **Trial** ⚡260(4)—**Refusal of instructions as to plaintiff's interest not error, after instruction as to interest of all witnesses.**

Where the court instructed the jury to consider the interest of a witness in testing his credibility, it was not error to refuse an instruction requested by defendant to take into consideration the financial interest of plaintiff in determining the weight to be given his testimony.

7. **Brokers** ⚡85(6)—**Declarations of agent of buyer admissible to show readiness to buy.**

In an action for a broker's commission, declarations by an agent of the buyer, who was testing the property for the buyer, are admissible on behalf of the plaintiff to show the readiness and willingness of the prospective buyer.

8. **Appeal and error** ⚡1033(6)—**Refusal of instruction allowing recovery on quantum meruit held favorable error.**

In an action on an express contract for a broker's commission, where the court had instructed that, if the jury did not find the express contract was made as alleged, their verdict should be for defendants, the refusal of an instruction, requested by the defendants, authorizing recovery by plaintiff on quantum meruit, if the express contract was not proved, was not prejudicial to the defendants.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action by R. P. Clay against the Dundee Petroleum Company to recover a broker's commission. Judgment for plaintiff, and defendant brings error. Affirmed.

H. L. Stuart, of Oklahoma City, Okl. (W. A. Ledbetter, R. R. Bell, and E. P. Ledbetter, all of Oklahoma City, Okl., on the brief), for plaintiff in error.

F. E. Riddle, of Tulsa, Okl., and E. G. McAdams, of Oklahoma City., Okl. (Harry Hammerly, of Chickasha, Okl., on the brief), for defendant in error.

Before HOOK and STONE, Circuit Judges, and JOHNSON, District Judge.

JOHNSON, District Judge. The Crystal Oil Company (an Oklahoma corporation) in 1916 was the owner of oil leases upon several hundred acres of land situated in what is known as the Healdton oil field in the state of Oklahoma. It sublet to the Dundee Petroleum Company (a Delaware corporation) about 800 acres of its holdings. This sublease was a working contract for development purposes, in which the Dundee Company had a one-third interest and the officers of the Crystal Company a one-third interest; the Crystal Company retaining a one-third interest. The Dundee Company maintained offices in Tulsa, Okl., and in New York City. Thomas Carter was the vice-president of the company, and general manager in charge of its office at Tulsa, Okl. R. P. Clay, the plaintiff, in 1916 resided at Ardmore, in the state of Oklahoma. The Crystal Oil Company maintained its principal office at Ardmore. Wirt Franklin in 1916 was president and manager of the Crystal Oil Company. H. F. Sinclair was a New York capitalist investing, with his associates, quite heavily in the oil fields of the state of Oklahoma, and at said time was operating in said state through one or more corporations spoken of in the evidence as the Sinclair interests. One of his companies was known as the Sinclair Oil Company, with headquarters at Tulsa, in the state of Oklahoma. In 1916 the officers in charge were E. R. Kemp and C. E. Crawley, vice-presidents. C. N. Haskell was the agent of H. F. Sinclair in investigating and negotiating for properties in the oil fields of the state.

In the spring of 1916 Wirt Franklin and his associates owned 74 per cent. of the stock of the Crystal Oil Company. H. F. Sinclair about that time acquired the ownership of the remaining 26 per cent. of the stock of said company. Wirt Franklin and his associates, individually and as officers of the Crystal Company, employed the plaintiff as a broker to negotiate a sale to H. F. Sinclair, or to his interests of their 74 per cent. of the stock of said Crystal Company and of their interest as individuals in the Dundee lease. The plaintiff undertook to consummate such a deal and began negotiations with C. N. Haskell and other representatives of the Sinclair interests in April, 1916. About the same time, as he claims, and as testified by him at the trial, he interviewed Thomas Carter, the vice president and manager of the Dundee Company, in regard to selling to H. F. Sinclair, or to his interests, the holdings of the Dundee Company under its said lease, and as he claims and testified at the trial, Thomas Carter authorized him to negotiate a sale of the interest of the Dundee Company in

the Dundee lease for \$400,000, and agreed to pay a commission of 5 per cent., or \$20,000.

It is not disputed that the plaintiff negotiated and finally consummated a sale to H. F. Sinclair of the 74 per cent. of stock of the Crystal Company held by Wirt Franklin and his associates, and also their individual interests in the Dundee lease. This deal was closed in October, 1916, by a written agreement entered into between the parties, conditioned, however, upon the gauge of the properties of the Crystal Company showing the representations made by the plaintiff and by Franklin and his associates to be true. The gauge was satisfactory, and the deal finally closed by payment of the purchase price and the taking over of the stock of the said Crystal Company and all of the property of the same, and the taking over of the right of said Franklin and others in the Dundee lease, about the 1st of November, 1916. H. F. Sinclair, or his interests, continued to operate the property so taken over in the name of the Crystal Company. In the latter part of November, through negotiations conducted between Thomas Carter, the president of the Dundee Company, and C. E. Crawley, vice president of the Sinclair Oil Company, the interest of the Dundee Company in said sublease was acquired by and transferred to the Crystal Oil Company. This purchase and sale included, not only the interest of the said Dundee Company in the said sublease, but also its interest in tanks and oil stored therein. The total purchase price paid for all of said property was \$525,000, \$300,000 in cash and the balance in notes, one for \$100,000 and one for \$125,000.

It is claimed by the plaintiff, and he testified at the trial, that from April until the 1st of November he kept in touch with Thomas Carter in respect to the sale of the said Dundee interests to Sinclair, or to the Sinclair interests, and that he presented the same to C. N. Haskell, and to H. F. Sinclair personally, and that the agreement and understanding between him and the said Haskell was that if H. F. Sinclair, or the Sinclair interests, were able to acquire the Crystal interests, they would take over the Dundee interest at the price named. He testified that he frequently communicated to Thomas Carter the state of the negotiations and the understanding between him and the said C. N. Haskell, and that the said Carter constantly assured him that the situation with respect to the negotiations was satisfactory. He testified that, at the time of the making of the written agreement between H. F. Sinclair and the Crystal people, he advised the said Carter of the situation and of the requirement for a gauge to be taken of the property, and that the time necessary to take said gauge would be about 15 days, and that immediately the gauge was taken the Crystal deal would be closed, and the Dundee matter could immediately be taken up and successfully concluded, and that the said Carter expressed his satisfaction and reiterated again his willingness to pay the commission stipulated.

On the 31st of October Carter wrote the plaintiff a letter, in which he says:

"Referring to the conversation I had with you about a fortnight ago in continuation of the conversation I had with you in New York, this is to ad-

wise you that all tentative conversations then held regarding the possible sale of this company's interests in the properties of the Crystal Oil Company in the Healdton field must be considered at an end. I shall, however, always be pleased to consider any proposition you may put before us; but it must be understood that all previous negotiations must be considered as having been terminated, and anything in the future will be the commencement of a fresh negotiation"

—and thereafter refused to recognize the plaintiff as agent for the sale of the interest of the Dundee Company, and denied that the plaintiff had ever been its agent for the sale of its interest, and claimed, and so testified in the trial below, that he negotiated the sale of the Dundee interest through Crawley and made a sale to the Crystal Oil Company, and was paid by it the purchase price agreed upon. In his testimony he denies that he ever employed the plaintiff to sell the interest of the Dundee Company, or authorized him to negotiate for its sale to Haskell as representing Sinclair, or to negotiate its sale to any one. Sinclair and Haskell both testified as witnesses in behalf of the defendant, and denied substantially and in effect the testimony of the plaintiff material to the issues in the case.

In order to understand certain of the grounds urged by the Dundee Company as grounds for reversal of the cause, it should be added that Thomas Carter was a British subject, and in 1917 was appointed by the British government as a member of the food commission of said government in the United States. Carter thereupon took up his residence in New York City, and at the time of the trial of this cause in May, 1919, had not returned to the state of Oklahoma. W. R. Humes, the secretary and treasurer of the Dundee Company, was a British subject, and in 1917 went from the state of Oklahoma to England and joined the English army, and at the date of the trial of this action in May, 1919, he had not returned to the state of Oklahoma. C. E. Crawley, above named, vice president of the Sinclair Oil Company, with headquarters at Tulsa, in the state of Oklahoma, had charge of the gauge of the properties of the Crystal Oil Company above mentioned.

This case was set for trial in April, 1916, at the Enid term of the court (Eastern district of Oklahoma). Under date of April 4th the parties filed a stipulation that the cause be stricken from the assignment for trial at the Enid term of court. Later in April, in the assignment of cases to be tried at the Guthrie term of the court, this case was set for trial for the 12th of May. On May 10th the defendant Dundee Company moved the court for a continuance of said cause for the term, which was denied. This motion was repeated on the morning of the 12th of May, and again denied. The applications for a continuance upon the 10th and upon the 12th of May were sworn to by one of the attorneys for the defendant company, and state substantially the same facts. The ground for a continuance was the absence of Thomas Carter, the vice president and general manager of the said Dundee Company, and W. R. Humes, the Secretary and treasurer of said company, and necessary witnesses at the trial of the case. Trial was had on the 12th day of May, resulting in a verdict and judgment for plaintiff. The defendant Dundee Company brings

error, and assigns the action of the trial court in overruling its motions for a continuance as ground for the reversal of said judgment.

[1] It appears from the affidavit upon which the motion for a continuance on May 12th was made that W. R. Humes would testify that he participated in part of the transaction resulting in the sale of the property described in plaintiff's petition, and that in the part of said transaction that he participated in the said plaintiff in no way participated or was concerned, and that said Humes knew of no contract by which the Dundee Company was to pay the plaintiff a commission on the sale of the property of said company. The plaintiff did not mention Humes in his testimony, and, as it is not disputed that the negotiations which resulted in the sale of the property in question were conducted by Carter through Crawley after the plaintiff had been excluded from further participation therein by Carter, we fail to see how it would be material to have the testimony of Humes to the effect that the plaintiff in no way participated or was concerned in that part of the said transactions in which he (Humes) participated, as it must be assumed that his testimony would refer to the negotiations between Carter and Crawley. It was not error, therefore, to deny the continuance by reason of the absence of the witness Humes.

[2] The deposition of Carter had already been taken in the case and was introduced by the defendant upon the trial. In his deposition he gives his version of the transaction, and it has not been pointed out and we have not been able to find any statement made by the plaintiff that has not been substantially met and denied by the witness Carter. This is more readily accounted for when it is known that the deposition of the plaintiff was taken at the same time and place that the deposition of the witness Carter was taken, and that said deposition, or a copy thereof, was in the hands of the defendant or its counsel.

From the stipulation signed by counsel for the parties on April 4th, it appears that Carter was at that time in New York City. On the 30th of April, after the case had been set for trial on the 12th of May, it appears that he was in Tampico, Mexico. Why he had gone to Tampico, Mexico, from New York, how long he would stay, or why he could not return to Oklahoma in time for the trial, are unexplained. No explanation is offered of the failure of those in charge of the local office at Tulsa to keep in touch with the movements of Carter, or of the defendant's counsel to keep in touch with the action of the court in the setting of this case for trial at the Guthrie term of court. The stipulation filed continued the case for the Enid term only. The Guthrie term followed the Enid term, and no reason is suggested why counsel should not have expected the case to be set down for trial during the Guthrie term.

[3] The granting of a continuance is a matter within the sound discretion of the trial court, and the authorities are all to the effect that the granting or refusing to grant a continuance is not reversible error, unless it clearly appears that there has been an abuse of discretion. In this case we do not think that it clearly appears that there was an abuse of discretion in the action of the trial court in over-

ruling the application of the defendant for a continuance: *Western C. & M. Co. v. McCallum*, 237 Fed. 1003, 151 C. C. A. 65.

[4] At the conclusion of the trial the plaintiff was permitted by the trial court to file an amended complaint to conform the pleadings to the proof. In the original complaint the plaintiff had alleged that the deal had been negotiated and finally consummated with the Sinclair Oil Company. During the trial of the case it appeared that the deal had really been negotiated with H. F. Sinclair, and the Dundee interest conveyed to the Crystal Oil Company. The second amended petition alleged the fact in accordance with the evidence in the case. In addition, the second amended complaint mentioned C. E. Crawley as one of the parties with whom plaintiff negotiated as an agent of H. F. Sinclair. At the time the defendant objected to the allowance of these amendments, and asked for a continuance, so as to permit it to secure the deposition of C. E. Crawley. The motion was overruled, and this action of the court is assigned as error.

The defendant, at the time that it made its motion, did not state the testimony which it expected C. E. Crawley to give, should his deposition be taken. Nor does it appear from the record where Crawley was at that time, or that it was not within the power of the defendant to have called him at once to testify in the case. The record shows that Crawley, in November, 1916, was at Tulsa, and in charge of the business of the Sinclair Oil Company as one of its vice presidents. Tulsa is situated less than 100 miles from Guthrie, with reasonably direct railroad connections between the two places. A jury had been impaneled, all the evidence in the case introduced, and both sides had rested, when this matter came up. If, after having learned that the name of Crawley had been added to the complaint as one of the agents of Sinclair with whom plaintiff claimed he had negotiated, the defendant had communicated with him (Crawley) and learned what his testimony would be, and had then stated to the court what it expected to prove by him and the time it would require to bring him from Tulsa to Guthrie to testify, the matter would present a different aspect. It must be noted, too, in this connection, that the plaintiff, in his testimony on the morning of the 12th had referred to Crawley and stated the conversation which he claimed had taken place between them in October; so that from the morning of the 12th the defendant had been advised of the state of the evidence which suggested the advisability of calling, or at least of communicating with, Crawley, and learning what his testimony would be in respect to the conversation testified to by the plaintiff.

On the showing made it does not clearly appear that there was an abuse of discretion in the action of the trial court in the overruling of defendant's motion for a continuance at the close of the trial.

[5] The defendant also assigns as error the refusal of the trial court to direct a verdict in its favor. From the foregoing statement of the testimony of the plaintiff and of the witnesses called by the defendant, it is apparent there was a conflict in the evidence, and the case was one, therefore, for the jury.

[6] The court instructed the jury that in testing the credibility of the witnesses it was proper for them to consider the interest of a wit-

ness in the result of the trial. The defendant requested the court to instruct the jury that:

"The plaintiff has testified as a witness in this case, and [in] determining the weight to be given his testimony you are authorized under the law to take into consideration his financial interest in the result of this case."

The defendant did not ask for an instruction, applicable to all witnesses, to the effect that the jury might take into consideration their interest, if any, in the result of the case as affecting their credibility, but singled out the plaintiff alone as a witness whose interest should be considered in weighing his testimony. While we do not wish to be understood as holding that such an instruction as requested, in a proper case and under certain circumstances, might not be given without error, we do hold in the present case that the instruction given by the court was clearly proper, and the refusal of the court to give the requested instruction was not error, under the circumstances of this case.

[7] The plaintiff Clay was permitted to testify, over the objection and exception of the defendant, to a conversation had between him and C. E. Crawley, which we have heretofore referred to. The conversation referred to appears in the record in this way:

The plaintiff, being asked as to what he had found out in regard to the result of the gauge, answered:

"Mr. Crawley said, about the tenth day of the gauge, 'Clay, it is getting along very nicely.' 'Part of the Crystal lease was about a hundred barrels short, but I believe the wells are in shape now and they may make it up. It will run very close to your statement, and the Dundee property will show about 50 barrels a day more than your estimate; so far it looks very encouraging.'"

This testimony was objected to as hearsay, and is assigned as error, and it is claimed by the defendant company that said testimony was prejudicial to its rights, in that it tended to show that the purchase of the Dundee interest was being considered by the Sinclair people along with and at the same time with the purchase of the Crystal interest, contrary to the testimony of Carter, Haskell, and Sinclair, called by the defendant.

Considered from the standpoint of the defendant and its theory of the case only, this contention is true; but this testimony was admitted in the plaintiff's case, and must be considered from the standpoint of the plaintiff's theory of the case, which was, and he so testified, that he had been employed by the Dundee Company, through Carter, its managing officer, to sell its interest in the sublease to Sinclair, or the Sinclair interests; that said sale was being negotiated contemporaneously with the negotiations conducted for the sale of the Crystal interest; that the Crystal interest had been contracted for by Sinclair; that the understanding was, if the Crystal interests were taken over by Sinclair, he would take over the Dundee interest; that the taking over of the Crystal interest depended upon the result of a gauge then being made; that this gauge was being made of the property of both the Crystal and the Dundee interests; that plaintiff had informed Carter of the situation, and of the purpose of the gauge, and

the results which would flow from it; that Crawley had been designated by Sinclair to make this gauge.

The gauge, therefore, was being made, from the plaintiff's standpoint, in the interest of both the Crystal Company and of the Dundee Company, all of which Carter understood and agreed to. It also appears that Carter was advised and knew what representations had been made by the plaintiff as to the flow of the wells in which the Dundee Company was interested, and it would be natural, therefore, that he (Carter) as well as Clay, would be interested in knowing the result of the gauge.

The witness, immediately following the detailing of the above-quoted conversation, continued by saying:

"I went on down to the Tulsa Hotel for the purpose of looking Mr. Carter up. * * * He asked me how the deal was progressing. I told him: 'Fine as silk. Their property was showing about 50 barrels a day more than we represented it to show; that the Crystal was off a little bit, but that wouldn't have any effect.' He agreed with me to be at Mr. Crawley's office on the 30th day of October. I told him I had informed Mr. Crawley he would be on hand and would deliver this Dundee interest."

Crawley, in supervising the gauge being made, was admittedly the agent of Sinclair in his purchase of the Crystal interest, and upon plaintiff's theory of the case he was also, in supervising said gauge, the agent of Sinclair in the purchase of the Dundee interest, and any statement made by him with respect to said gauge would be the statement of Sinclair, his principal, and such a statement, if tending to show that the plaintiff had found a purchaser ready and willing to buy the defendant's property on its terms, would be material and relevant to show whether or not plaintiff's efforts procured the sale which was subsequently made by Carter through this same man Crawley. *Fordtran v. Stowers*, 52 Tex. Civ. App. 226, 113 S. W. 631; *Ross v. Moskowitz*, 100 Tex. 434, 100 S. W. 768; *Luhn v. Fordtran*, 53 Tex. Civ. App. 148, 115 S. W. 667. Of course, this testimony was not competent to prove, nor indeed did it tend to prove, that Carter had ever employed the plaintiff as a broker to sell the Dundee interest.

[8] The defendant company requested the court to instruct the jury that:

"If you find from the evidence that there was no contract for the payment to the plaintiff of a commission to sell or assist in selling the property described in the plaintiff's petition, but that the plaintiff, with the consent or at the suggestion of the defendant, rendered services in attempting to sell the property, then you may find for the plaintiff for the value of the services so rendered."

That is, the defendant submitted a request that the court instruct the jury that the plaintiff might recover upon a quantum meruit, if it found that there was no express contract as alleged in the complaint. This request the court refused. The court instructed the jury that, if the plaintiff was not authorized to find a purchaser as alleged in his complaint, he could not recover, and the court, having thus instructed the jury that, in order for the plaintiff to recover, he must prove an express contract, we fail to see how the defendant could be prejudiced by the refusal of the court to instruct the jury that he might recover

upon an implied contract, even though it be assumed that such instruction was proper under the pleadings.

The defendant also claims that the trial court erred in giving certain instructions to the jury in which the court stated the rules of law applicable to a suit by a broker for the recovery of a commission, substantially upon the ground that the evidence was insufficient to justify the court in submitting the case to the jury—the same ground, in effect, upon which it was claimed that the court should direct a verdict in defendant's favor. These assignments are without merit.

We find no prejudicial error in the record. Judgment affirmed.

ALASKA PACKERS' ASS'N v. HEDENSKOY.*

(Circuit Court of Appeals, Ninth Circuit. September 7, 1920. Rehearing Denied October 18, 1920.)

No. 3493.

1. Taxation ⚡106—Salmon fishers temporarily within territory liable for Alaska school tax.

Men employed by a salmon packing company, who were employed within the territory of Alaska for several months, though they were hired and finally paid off and discharged in California, are subject to the school tax imposed by Act Alaska May 1, 1919 (Laws 1919, c. 29), on all male persons within the territory.

2. Taxation ⚡106—Persons or property temporarily within state for business or profit subject to taxation.

Nonresidents of a state, temporarily engaged in business therein, like personal property owned by nonresidents, but temporarily used within the state for profit, acquire a situs for taxation within the state.

3. Taxation ⚡586—Telegraphic demand for payment of Alaska school tax on employes held sufficient to fix liability.

A demand by telegram on a salmon packing company for the payment of the Alaska school tax levied on its employes is sufficient demand, under section 4 of the act levying the tax (Laws 1919, c. 29), to render the employer liable for the tax, and thereby entitled to deduct it from his employes' pay, though the blanks and receipt books required by sections 8 and 10 of the act were not furnished by the collector.

Appeal from the District Court of the United States for the First Division of the Northern District of California.

Libel by John Hedenskoy against the Alaska Packers' Association. Decree for libellant, and respondent appeals. Reversed and remanded, with directions to render a decree for respondent.

In April, 1919, libellant and certain assignors, residents of California, were hired by the defendant, a California corporation, salmon fisher and packer, and shipped for a fishing venture to Alaska and return to San Francisco, agreeing to work as seamen and fishermen, beachmen, and trapmen. After they had unloaded cargo at a point in Alaska, they worked as salmon fishermen during the salmon run, or about 35 days, and then loaded canned salmon on ships bound for San Francisco, there to be distributed to other places. Except for a small sum, the earnings of libellant and his assignors were payable in San Francisco.

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 149, 65 L. Ed. —.

On May 1, 1919, the Legislature of Alaska passed an act to impose a tax upon male persons in Alaska for school purposes (Laws 1919, c. 29), "providing means for its collection." Section 1 is as follows: "There is hereby made, imposed and levied upon each male person, except soldiers, sailors in the United States Navy or Revenue Cutter Service, volunteer firemen, paupers, insane persons or territorial charges, within the territory of Alaska or the waters thereof, over the age of twenty-one years and under the age of fifty years, an annual tax in the sum of five dollars, to be paid and collected in the manner provided in the following sections of this act, and to be deposited by the treasurer of the territory of Alaska in a separate fund called the 'school fund' and used for no other than school purposes." Section 2 provides for the method of appointment of the school tax collector. Section 3 provides for advertisement by the school tax collector by notice, setting forth that the tax is due and payable and warning persons of the need of payment. Section 4 makes the tax payable between the first Monday in the month of April and the first Monday in the month of August of each year: "Provided, that all persons subject to the tax who are in the territory of Alaska on the first Monday in the month of April shall pay said tax on or before the 1st day of May in the same year, and all persons arriving in the territory of Alaska after the first Monday in the month of April shall pay said tax within thirty days after such arrival: Provided, further, that all persons subject to said tax shall pay the same within ten days after a written or oral demand by the said school tax collector made within the period between the first Monday in April and the first Monday in August in each year." Section 8 provides that the school tax collector shall demand, and it shall be the duty of every person or corporation employing labor in Alaska to furnish such collector upon demand, a list of employes subject to the tax imposed "and for this purpose the territorial treasurer shall furnish to each school tax collector suitable blank forms for the making of such lists, which blank forms shall be delivered by the school tax collector to the employers of labor aforesaid." The employer is required to deduct from the wages of each of its employes subject to the tax the amount thereof. By section 10 the treasurer of the territory shall, before the first Monday in the month of April in each year, deliver to each school tax collector blank tax receipts in book form with stubs numbered. Section 13 provides that the tax imposed by the act shall be due and payable "as to all persons within the territory subject to said tax at the time of the passage of this act, immediately upon its passage and approval, and, as to all persons arriving in the territory after the passage of the act, as elsewhere in this act provided."

On August 12, 1919, the school tax collector for the Bristol Bay school district, where the libelant was during the time he was in Alaska in 1919, by telegram demanded that the corporation pay the tax of all of its employes, and the bookkeeper of the corporation presented a statement to the libelant and his assignors showing the deduction of \$5 each for the tax, but libelant and his assignors refused to agree to the payment with the deduction included. Thereafter, in September, 1919, the corporation, without the knowledge or consent of the libelant or any of his assignors, paid the tax.

Chickering & Gregory, of San Francisco, Cal., and J. C. Murphy, Atty. Gen., for appellant.

H. W. Hutton, of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] We agree with the District Court in its view that the libelant was subject to the tax involved, but we disagree with the decision, which was that the necessary steps were not taken whereby to fix liability. Libelant was not a mere sojourner, bound through Alaska for another place. He agreed to perform work within the territory during the fishing sea-

son of 1919. The hours, compensation, and the nature of the work to be done are all set forth in detail in the contract, which also requires that libelant should be given a statement of the Alaska account before the vessel sailed for her home port. The enterprise became one which called for substantial employment within Alaska, and we think it is immaterial that the season for actual salmon fishing was only about 35 days. It is to be noted, however, that the shipping articles were signed in San Francisco in the beginning of April, 1919, and that the men arrived in Alaska in May and June, and left Alaska, bound for San Francisco, about the middle of August, reaching San Francisco the latter part of August. The period of employment, therefore, extended over some 5 months, 3 months of which were in Alaska.

In *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359, the officials of the territory of Wyoming endeavored to levy a tax upon a band of sheep which were being driven across Wyoming and into Nebraska. The question turned upon the purpose for which the sheep were driven into Wyoming. The court recognized that, if the purpose of bringing the sheep into the state was for grazing, then they could be assessed; but, if the purpose was only to drive them through the state to a market, they would be exempt as a subject of interstate commerce, although they might incidentally have supported themselves in grazing while actually in transit. In *Fennell v. Pauley*, 112 Iowa, 94, 83 N. W. 799, a resident of Missouri drove a band of cattle for feeding purposes into Iowa and kept them in Iowa for 6 months, and then took them back to Missouri. The Supreme Court of Iowa held that the cattle could be properly assessed within Iowa because they were within the state to be fed therein, and not merely to remain there temporarily to be transported elsewhere. In *Grigsby Construction Co. v. Freeman*, 108 La. 435, 32 South. 399, 58 L. R. A. 349, a resident of Texas owned certain personal property, which was taken to Louisiana to be used in certain railroad grading. Upon the question whether the imposition of a tax within Louisiana was valid, the Supreme Court of the state cited *Brown v. Houston*, 114 U. S. 633, 5 Sup. Ct. 1091, 29 L. Ed. 257, and held that the determinative factor was whether or not the property was within the state of Louisiana for use likely to be of some duration as distinguished from transit, and that the matter was not to be disposed of by the fact that the owner of the property intended at a future time to remove the property. The doctrine recognized is that, if the main purpose of the presence of the personal property is to devote it to a use within the state to which it has been removed, then it has a taxable situs within the state. In *Eoff v. Kennefick, Hammond Co.*, 96 Ark. 138, 96 S. W. 986, 7 L. R. A. (N. S.) 704, 117 Am. St. Rep. 79, 10 Ann. Cas. 63, a local assessor assessed certain horses and implements which had been brought into the state by a construction company in carrying out a railroad contract. The owners of the property lived in Missouri. The Supreme Court of the state held that under the familiar rule recognized by the Supreme Court of the United States in *Pullman Car Co. v. Pennsylvania*, etc., 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613, and other cases, personal property could be separated from its owner for taxation pur-

poses and that the property was not in transit, but was in Arkansas chiefly for use and profit.

[2] It is well established that taxation of personal property which may be temporarily within a state, but used therein for profit, is lawful, although the owner has his domicile in another state; and by like reasoning we hold that one who is in a territory for the purpose of carrying on a business during the season when such business is properly and usually carried on, is subject to tax within the district where the business is carried on, and the assessment is not invalid by reason of the fact that the permanent residence of the person assessed is not within the jurisdiction where such tax is levied. In the Chinese Tax Cases (C. C.) 14 Fed. 338, it was held that some Chinese laborers, who were taken into Oregon to engage in labor upon a railroad, were not residents within the district wherein they labored.

[3] There remains the question whether or not proper steps were taken to enforce payment against the libelant for the year 1919, so that the appellant corporation is legally bound. By section 4 of the act, all persons subject to the tax shall pay it within 10 days after written or oral demand by the collector made between the first Monday in April and the first Monday in August of each year. Inasmuch as the liability to pay the tax was fixed by the act, we think the demand by telegram on August 12th was a sufficient compliance with the statute in order to establish delinquency, and that upon failure to pay the delinquents became subject to the penalties provided by section 5 of the act, which makes all taxes delinquent if not paid within the time prescribed in section 4, or within 10 days after demand by the tax collector as prescribed in the act, and provides that each person delinquent shall be subject to a penalty. It would be most technical to hold that, because the collector failed to furnish the blank forms and receipt books required by sections 8 and 10 of the act, the libelant should escape liability. The blanks were not delivered to the collector by the treasurer of the territory; but it appears that before the statements were given to the men the collector looked through the books of the corporation, which showed the names of the employés, and that when the statements of account were given to the men by the corporation, such statements disclosed a charge of \$5 for the tax in each instance. In this way the tax collector gained the same information that would have been furnished to him, if the blanks had been available and filled out. Nothing in *Callaghan v. Marshall*, 210 Fed. 230, 127 C. C. A. 48, calls for a different view.

Our judgment being that the libelant and his assignors became liable to pay the tax, and that the proper steps to enforce payment for 1919 were taken, the decree will be reversed, and the cause remanded, with directions to enter a decree in favor of the association.

Reversed.

LUETKEMEYER CO. v. MURDOCK.**MURDOCK v. LUETKEMEYER CO.**

(Circuit Court of Appeals, Sixth Circuit. April 9, 1920. On Motion for Re-hearing October 16, 1920.)

Nos. 3331, 3332.

Sales ⇨77(1)—Contract for binding twine held definite and certain as to price.

A no-price contract for sale and purchase of binding twine, made in accordance with the custom of the trade, providing that the price should be one cent per pound below the "price to be made by the International Harvester Company for 1917," the contract being closed and a large part of the twine delivered thereunder prior to April 7, 1917, *held* rendered definite and certain as to price by the issuance on that day of a notice by the International Company fixing the price of twine under its contracts previously made, and not affected by the fact that such company reserved the right to, and did later, fix a different price to govern contracts thereafter made.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action at law by Samuel T. Murdock, successor to the Indianapolis Cordage Company, against the Luetkemeyer Company, formerly the Lockwood-Luetkemeyer-Henry Company. From the judgment, both parties bring error. Reversed.

Wm. B. Cockley, of Cleveland, Ohio, for plaintiff.

Walter L. Flory, of Cleveland, Ohio, for defendant.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. There is no dispute as to the amount due on the first cause of action. The second cause of action involves the construction of a written contract in the words and figures following, to wit:

"Cleveland, December 15, 1916.

"Indianapolis Cordage Co., Indianapolis, Ind.—Gentlemen: Enter our order for 100 tons sisal or standard binder twine, to be taken at our option on or before May 1, 1917, at 1c. per lb. less than carload price to be made by the International Harvester Co. for 1917.

"Yours very truly,

The Lockwood-Luetkemeyer-Henry Co.,
"Per H. Hutchisson."

This order was accepted by the Cordage Company. In March, 1917, the Luetkemeyer Company elected to take under this option contract, and prior to April 7, 1917, 87,000 pounds of twine were delivered by the Cordage Company to the Luetkemeyer Company in part performance thereof, and the same was received by that company and payments made from time to time upon account. The validity of this contract is not challenged by either party to this action, but, on the contrary, each seeks to recover upon the terms and conditions written therein.

This contract is in no sense doubtful or ambiguous in its terms. It provides for a definite amount of twine to be furnished by the Cordage Company to the Luetkemeyer Company on or before May 1, 1917, and also provides how the price to be paid for the twine so delivered may be definitely fixed and ascertained. Therefore, in the construction of this contract and the determination of the rights of the parties thereto, oral evidence is pertinent only in so far as that evidence tends to establish, by the method provided in the contract itself, the price to be paid for this twine.

Upon this subject there is no conflict in the evidence; therefore the question here presented is not one of fact, but of law. It is conceded that the International Harvester Company is one of the largest dealers in sisal or standard binder twine, and that the prices fixed by this company and the Plymouth Cordage Company govern the prices of other dealers. It also appears from the undisputed evidence that it was the custom of the International Harvester Company to make contracts of the character here under consideration, and known to the trade as priceless contracts, during the late fall and early spring of each year, and later fix a price that would govern and control these contracts; that other dealers followed this same trade custom, but instead of reserving to themselves the right to fix this price agreed that the price fixed by the International Harvester Company would be the basic price subject to such discount as agreed upon by the parties.

There is evidence that it was the custom of the International Harvester Company to fix a price that would control throughout the season, but it also appears from the evidence of the plaintiff that in some seasons prior to 1917 it changed the price at least once and perhaps oftener. During the fall and spring of 1916-17 the International Harvester Company entered into a number of contracts for the sale of binder twine, similar to the contract in suit. On April 7, 1917, it notified its sales department that the price of sisal or standard binder twine would be 15½ cents per pound on less than carload lots for all twine furnished or agreed to be furnished by it under priceless contracts taken prior to that date, but that no other or future order should be taken at that price; that in the near future it would quote new prices for twine based upon the then current prices for fiber. This order of the Harvester Company did not in terms direct its sales department to cease operations in the sale of binder twine; but it was evidently so understood, for on the 23d of April, 1917, the Harvester Company issued another order to its sales department, directing it to renew operations in the sale of twine for 1917 harvest, using only the priceless contract, specifying therein that prices would be named on or before May 15th. On May 16th it fixed a price of 19¼ cents per pound on quantities less than carload lots, with the usual allowance of ¼ cent per pound on carload lots. It does not appear from the evidence that this price was changed by the Harvester Company during the season of 1917.

The dispute between the parties to this action is whether the price fixed by the Harvester Company on April 7th or the price fixed by

that company on May 16th applies to the contract in suit. The trial court found that neither of these prices fixed by the International Harvester Company was the price contemplated by the parties to this contract, and therefore disallowed the plaintiff's claim for damages for alleged breach of contract by the defendant, and dismissed the defendant's cross-petition for damages based upon the alleged breach by plaintiff, and thereupon entered judgment in favor of plaintiff on his first cause of action, concerning which there is no dispute, and upon his second cause of action for the amount asked for the 87,000 pounds of twine furnished by him to defendant under this contract, upon the theory that that amount was its reasonable value.

Plaintiff's cause of action, however, was not based upon quantum meruit, but on contract; therefore evidence touching the reasonable value at the time it was delivered would not have been competent. No evidence tending to prove value was offered, except the prices fixed by the Harvester Company April 7 and May 16, 1917, and the price that defendant was required to pay for 113,000 pounds in June of that year. This evidence was offered and properly admitted as relevant to the issues joined by the pleadings.

If the trial court was right in its conclusion that this contract failed by reason of the fact that the International Harvester Company did not fix a price within the meaning and intent of the parties thereto, its judgment as to the reasonable value of twine furnished in 1917 is not only not sustained by any competent evidence, but is contrary to the only evidence that, under any view of this case, could have been appropriated by the court in determining value.

It is conceded that the price fixed by the International Harvester Company is substantially the market price for binder twine. The reasonable value, of course, must be determined by the market price. At the time this 87,000 pounds of twine were delivered to defendant, or at any time before April 7, 1917, the defendant could have purchased it directly from the International Harvester Company upon a priceless contract for 15 $\frac{5}{8}$ cents per pound. It cannot now be required to pay more than that market price for the twine delivered to it in March, because of the increased price in May and June of that year.

It appears in the letter of the Harvester Company of April 7, 1917, to its sales department, that it would in the very near future quote new prices for twine based upon the then current prices for fiber. Evidently the price quoted on that date was based upon the current prices for fiber at that time and prior thereto, and it is undoubtedly due to this increase of price in fiber from and after April 7, 1917, that the market price for binder twine advanced to 19 $\frac{1}{4}$ cents per pound; but this increase in May and June does not affect values in March of that year.

We are of the opinion, however, that the District Court erred in its finding the contract void by reason of the failure of the International Harvester Company to fix a price within the meaning of its terms. The Harvester Company did fix a price that applied to all priceless contracts made and entered into by it prior to April 7, 1917.

It was undoubtedly the intent and purpose of the parties to this contract that whatever price the International Harvester Company should fix, as applicable to its own contracts written during the same period of time, should apply to this contract.

It appears from Plaintiff's Exhibit No. 30 that the usual allowance made by the Harvester Company on carload lots was $\frac{1}{4}$ cents per pound. Yet the Cordage Company, evidently for the purpose of securing this business, agreed with the defendant that it would make to it an allowance of 1 cent per pound on the price named by the Harvester Company on less than carload lots. It is therefore apparent that it was not the purpose and intent of the parties to this contract, and particularly of the Cordage Company, that its customers would be required to pay almost 4 cents a pound more than the price at which they could purchase the same quality of twine from the Harvester Company, but, on the contrary, that its customers should have an advantage over the customers of that company of $\frac{3}{4}$ of a cent per pound when the same was purchased in carload lots.

In view of the well-known custom of the trade, the words "for 1917," appearing in this contract, must be construed to mean that any price fixed by the Harvester Company for any period of time should control the transactions within that particular period, and that, if this price should later be increased or diminished, such later price should attach to all transactions within the period covered thereby.

For the reasons above stated, the judgment of the District Court is reversed, and the cause remanded for a new trial in accordance with this opinion.

On Motion for Rehearing.

PER CURIAM. This motion for rehearing challenges for the first time the jurisdiction of this court to consider and determine the question of the sufficiency of the evidence, for the reason that the question was not properly raised in the court below. If this were the only reason for the reversal of this judgment, this motion would be allowed.

This judgment, however, was reversed for the further reason that it was not responsive to the issue joined by the pleadings or to the evidence offered by either party upon the trial of the cause. *Merrill v. Rokes*, 54 Fed. 450, 4 C. C. A. 433; *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464.

For this reason, the motion for rehearing is overruled. However, on the retrial of this cause by the District Court, that court is hereby directed to disregard all that portion of the opinion of this court heretofore filed touching the question of the sufficiency of the evidence.

EMPIRE VOTING MACH. CO. v. CITY OF CHICAGO et al.*

(Circuit Court of Appeals, Seventh Circuit. March 30, 1920. Rehearing Denied June 5, 1920.)

No. 2680.

1. **Municipal corporations** ⚡868 (1)—**Appropriation must precede municipal expenditure.**

In Illinois no recovery can be had on a municipal contract, where no previous appropriation was made, as required by Cities and Villages Act Ill. art. 7, § 4, in view of Cr. Code Ill. § 208.

2. **Municipal corporations** ⚡868 (1)—**Board of election commissioners may not contract without appropriation; "officers"; "departments of corporation."**

Cities and Villages Act Ill. art. 7, § 4, requiring appropriation, before any contract is made or expense incurred by municipal "officers" or "departments of the corporation," applies to the board of election commissioners; they being included within the terms "officers" or "departments of the corporation."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Department; Officer.]

3. **Municipal corporations** ⚡859—**Statute requiring appropriation before municipal expenditures not repealed or amended; "expenses."**

Cities and Villages Act Ill. art. 7, § 4, requiring appropriation before municipal expenditure, was not amended or partly repealed by the City Election Law or the Voting Machine Law, as respects the power of the board of election commissioners to contract for voting machines without prior appropriation by the municipal authorities; section 5 of the Voting Machine Law, authorizing the local authorities to determine manner of paying for voting machines, not being inconsistent with the requirement of prior appropriation, and the purchase price of voting machines not being covered by the word "expenses" in City Election Law, art. 7, § 1, providing that all "expenses" incurred by the board of election commissioners shall be paid by the city.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Expenses.]

4. **Statutes** ⚡224—**Construction may be aided by considering subsequent legislation.**

While an act must be construed as of the date of its passage, subsequent legislation may be considered in determining the intent of the prior enactment.

5. **Estoppel** ⚡62 (6)—**City held not estopped to deny validity of contract for voting machines.**

The city of Chicago held not estopped to deny the validity of a contract for voting machines, in a suit for balance of their purchase price, by acceptance and payment for 200 machines delivered under the contract, and acceptance by the board of election commissioners of 300 more for the price of which the suit was brought, or by the action of the state board of election commissioners in certifying that that particular kind of machine complied with the requirements of the Voting Machine Act; the seller having relied solely on its contract and the certificate from the state board.

6. **Estoppel** ⚡56—**Party relying on estoppel must have been induced to change his position.**

To establish an estoppel the party asserting it must be induced to act through such conduct of the other party as to make it unconscionable for the latter party to repudiate his position.

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 14, 65 L. Ed. —.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the Empire Voting Machine Company against the City of Chicago and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Stephen A. Foster and Herbert Pope, both of Chicago, Ill., for plaintiff in error.

F. B. Johnstone, Horace Kent Tenney, and Leon Hornstein, all of Chicago, Ill., for defendants in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. Plaintiff in error, hereinafter termed plaintiff, instituted this action to recover a money judgment, basing its cause of action upon a contract executed July 21, 1911, between it and the board of election commissioners of the city of Chicago, hereinafter called the board, whereby 1,000 Empire voting machines were purchased for the specified price of \$942,500. The contract was made after the board had received bids from various manufacturers and had examined various machines. The type selected had been examined and approved by the Illinois state voting machine commission.

The contract provided for the delivery of 200 machines on or before 8 months from the date of the contract, 300 on or before 15 months from the date of the contract, 200 on or before 21 months from the date of the contract, and 250 on or before 26 months from the date of the contract. Plaintiff delivered 200 of the machines between February and April, 1912, for which it was paid in two installments; the last payment being made in April, 1912, and after 192 of the machines had been used in the April primary election. The 300 machines were delivered shortly thereafter. A taxpayer's suit was then begun to restrain the board and the city from carrying out the agreement, and such suit was shortly followed by this action to recover the contract price for the 300 machines. The District Court directed a verdict in defendant's favor.

The city of Chicago, herein called the defendant, sought by way of counter relief to recover the purchase price of the 200 machines, but at the close of the testimony withdrew this issue.

Numerous questions, both of law and of fact, are presented on this writ of error; but in our view of the case it will be necessary to consider but one of them. Defendant denies plaintiff's right to recover, because the board had no power to bind defendant without a prior appropriation by the city council having been made to cover the purchase price of the voting machines. That no such prior appropriation had been made is conceded.

[1] Two sections of the Illinois statutes are relied upon in support of this defense. Section 208 of the Criminal Code of Illinois (Hurd's Rev. St. 1917, c. 38) reads:

"Every person holding any public office (whether state, county or municipal) * * * who shall be guilty of contracting directly or indirectly, for the expenditure of a greater sum * * * of money than may have been, at the time of making the contracts, appropriated or set apart by law or au

thorized by law to be contracted for or expended upon the subject matter of the contracts * * * shall be fined not exceeding \$10,000, and may be removed from his office. * * *

And article 7, section 4, of the Cities and Villages Act (Hurd's Rev. St. 1917, c. 24, § 91) reads as follows:

"No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided."

Statutes or constitutional provisions quite similar to the last quoted section are common. *Green et al. v. City of Everett*, 179 Mass. 147, 60 N. E. 490; *Commonwealth v. Foster*, 215 Pa. 177, 64 Atl. 367; *Mineralized Rubber Co. v. City of Cleburne*, 22 Tex. Civ. App. 621, 56 S. W. 220; *Fabric Fire Hose Co. v. City of Teague* (Tex. Civ. App.) 152 S. W. 506. They have uniformly been held to be mandatory. If contracts are made in defiance of this statutory requirement, they are void. *Hurley v. Trenton*, 66 N. J. Law, 538, 49 Atl. 518, affirmed 67 N. J. Law, 350, 51 Atl. 1109; *Roberts v. City of Fargo*, 10 N. D. 230, 86 N. W. 726; *Kelly v. Broadwell*, 3 Neb. Unof. 617, 92 N. W. 643.

The section under consideration has been frequently before the Supreme Court of Illinois, and the right to recover without such appropriation has been denied. *May v. City of Chicago*, 222 Ill. 595, 78 N. E. 912; *Litz v. Village of Hammond*, 230 Ill. 310, 82 N. E. 634; *Gathemann v. City of Chicago*, 263 Ill. 292, 104 N. E. 1085. The wisdom of this legislation cannot be doubted. It localizes official responsibility for municipal indebtedness and makes intelligent action by the appropriating body of a city possible.

[2] But plaintiff contends that:

(a) Article 7, section 4, of the Cities and Villages Act does not apply to the board of election commissioners.

(b) That if the word "officers," as used in this section, is construed to include the board of election commissioners, the City Election Law (Hurd's Rev. St. 1917, c. 46, §§ 155-287e45) and the Voting Machine Law (Hurd's Rev. St. 1917, c. 46, §§ 430-451) are inconsistent therewith, and should be construed as amendments or as exceptions to said section.

(c) The city is estopped to assert the invalidity of its contract.

Contending that the duties of the board under the Voting Machine Act call for independent action, and that article 7, section 4, of the Cities and Villages Act, if applicable to the board, would destroy such independence, plaintiff asks for a construction in harmony with the purpose of the act.

But does it follow that such freedom is attainable only by the city's surrender of the control of its purse strings? The Cities and Villages Act has long been in force. Since 1875 it has been expressive of the public policy of the state of Illinois toward the debt-creating body of the municipalities of the state. If this policy were to

be abandoned in whole or in part, it is hardly conceivable that the Legislature would have expressed its intention inferentially and by indirect legislation. The power of the board or any other municipal board to create debt for the city or incur expense must somewhere be traced to legislative enactment and the extent of such power will be strictly construed.

While the board is authorized to determine the advisability of using voting machines and to select the kind of machine to be used, there is no authority on its part to vote appropriations, make assessments or otherwise provide for the payment of its obligations. These last-named duties rest with the city council, subject again to certain limitations. For the board to report its recommendations to the council, the only tax-voting body, and to secure appropriations for its needs prior to incurring indebtedness, is not surrendering to the council its independence nor its duties, any more than it would be to surrender to the county judge who appoints the members of the board in any given county, the prerogative of the office. True the council may refuse an appropriation notwithstanding the board is satisfied that voting machines are productive of accuracy in election counts and tend to eliminate frauds in elections. But such contentions can hardly outweigh the reasons which induced the Legislature to enact section 4 of article 7 of the Cities and Villages Act. It is hardly necessary to suggest the possibilities that would result from a policy that permitted various boards, in addition to the city council, to incur unlimited indebtedness or appropriate money without limit.

But this is a question of statutory construction. The wisdom of such legislation was for the lawmaking body to determine. We are interested in construing the legislation and ascertaining the legislative intent as expressed therein. Are the members of the board "officers" of the city of Chicago, or can it be said that the board is a "department of the corporation"? Plaintiff answers this query in the negative.

In enacting this legislation, the state of Illinois was endeavoring to check irresponsible officials and make possible intelligent action by the taxing and debt creating body of the city. Could it possibly have been intended that "officers" and "departments" of a city were powerless to act without a prior appropriation, yet others could bind the municipalities without prior appropriation? Or could it have been intended by this Legislature to deny to a "Department" or "Officer" of the city the right to incur debt, yet to permit a board which was but a quasi city department to burden the municipality with unlimited debt without first obtaining an appropriation from the council? To state either question is to answer it. The Legislature intended no narrow or limited definition of the words "officers" or "departments of the corporation," when it prohibited them from incurring debt or creating expenses without a prior appropriation by the council.

Moreover, the status of the members of the board has been defined by the Supreme Court of Illinois on at least two occasions. *People v. Board of Commissioners*, 260 Ill. 345, 103 N. E. 282; *Wetherell v. Devine*, 116 Ill. 631, 6 N. E. 24. In the former case, after referring

to the holding in *Wetherell v. Devine*, that the election commissioners were corporate authorities, the court said:

"It was declared that they are such corporate authorities because they are appointed in a mode to which the municipality has given consent * * * and it necessarily follows that they are officers of the municipality within and for which they are appointed. The appellants were officers appointed for a definite term of office, for the exercise of certain powers and the performance of certain duties under the laws of the state, in and for the city of Chicago and the town of Cicero, and they cannot be distinguished in any manner from other officers occupying public positions created by the law, all of whom are municipal officers within the meaning of the Constitution."

True, in that case the court was not construing the word "officer" as used in article 7, section 4, of the Cities and Villages Act, but it was defining the status of the members of the board.

Bearing in mind the purpose of the legislation and the object to be accomplished, we conclude that the word "officers," as used in said section of the Cities and Villages Act, should be given its broadest and most comprehensive definition, and should include members of the election board.

[3] (b) As bearing upon the question of the effect of the City Election Act and the Voting Machine Act upon article 7, section 4 of the Cities and Villages Act, two cases are brought to our attention: *People v. City of Geneva*, 98 App. Div. 383, 90 N. Y. Supp. 275, and *Darling v. City of Manistee*, 166 Mich. 35, 131 N. W. 450. These two courts, construing very similar acts, reached exactly opposite conclusions. In the Michigan case, however, it is apparent that an extreme situation was presented. The court in passing upon this question said:

"We are of the opinion that the provisions of the city charter cited do not apply to the purchase of voting machines provided for by separate and distinct acts, and that contracts made in conformity with the provisions of the act should be held valid, although not in conformity with general provisions of the charter. * * * The provisions as to the purchase of, and payment for, the machines are inconsistent with the view that the Legislature intended that appropriations for their purchase should precede their acquisition."

In that case, however, an appropriation was sought prior to the purchase of the voting machines. The city council by a vote of 7 to 4 out of a membership of 14 voted the appropriation. There were 3 members of the council absent, and the validity of this action was therefore assailed. Later the contract was executed, and a claim for the purchase price of the machines was presented, and by the unanimous vote of the council duly allowed. The voting machines were in the possession of the city. They had been intelligently accepted after fair trial, and the equities were strongly in favor of the ultimate conclusion reached by the court.

In the New York case the questions were more fully and elaborately considered in the opinion, the various arguments separately considered, and the conclusion reached that a voting machine act did not operate either as an amendment to, or a partial repeal of, the general act prohibiting the creation of a debt without the prior appropriation by the council.

In the present case plaintiff specially invokes section 5 of the Voting Machine Act in support of its position. It reads:

"The local authorities, on the adoption and lease or purchase of a voting machine or voting machines, may provide for the payment therefor in such manner as may be deemed for the best interest of the city, village, incorporated town or county. They may for that purpose make leases, issue bonds, certificates of indebtedness, or other obligations, which shall be a charge on the city, village, incorporated town or county. Such bonds, certificates or other obligations may be issued with or without interest, payable at such time or times as the authorities may determine, but shall not be issued or sold at less than par."

Commenting upon this section, the District Judge appropriately observed:

"This section, as I view the law, provides for the disposal of the question of compensation by provision other than by the payment of cash, and authorizes the city or county in the event that cash is not to be paid but something else is to be substituted in the place of cash, to issue bonds or certificates of indebtedness. It does not repeal the Cities and Villages Act provisions respecting an antecedent appropriation, and is in entire harmony with it, and can be in full force and effect with the city and village antecedent appropriation requirement."

The authority to determine the form of an indebtedness is one thing, but the authority to create the debt without the prior appropriation by the city council is quite another matter. We fail to see anything inconsistent with this grant and the requirement that, before a binding obligation can be created, action by the city council must be invoked.

Plaintiff also relies on section 1 of article 7 of the City Election Act for its express authority to purchase the voting machines. This section reads in part:

"All expenses incurred by such board of election commissioners shall be paid by such city. Such salaries and expenditures are to be audited by the county judges, and such salaries shall be paid by the county treasurer, upon the warrant of such county judge, of any money in the county treasury not otherwise appropriated, and such expenditures shall be paid by the city treasurer, upon the warrant of such county judge, out of any money in the city treasury not otherwise appropriated. It shall also be the duty of the governing authority of such counties and cities respectively to make provision for the prompt payment of such salaries and expenditures, as the case may be."

It is claimed that the word "expenses," as here used, covers the purchase price of voting machines. Is this justifiable? The court defined the word "expenses" in the case of *Wetherell v. Devine*, 116 Ill. 631, 6 N. E. 24:

"The expenses incurred by the election commissioners, which the city is required to pay, are for office rent, clerk hire, stationery, printing, books, registers, poll lists, blanks, ballots, ballot boxes, etc."

While this language is inclusive rather than exclusive, it must be conceded that the court would be required to take a long step before the word "expenses," which included "office rent, clerk hire, stationery, printing, books, registers, poll lists, blanks, ballots, ballot boxes, etc." would also include the purchase price of voting machines. In other words by the Election Act the election board might well have been

authorized to bind the county for salaries of employes, etc., and to bind the city with expenses such as office rent, clerk hire, stationery, printing, books, registers, poll lists, blanks, ballots and ballot boxes, and yet not be authorized to incur a \$1,000,000 debt for voting machines. In fact, if authority may be found in this section for purchasing voting machines, then there unquestionably exists authority in the same section for creating a debt of five times \$1,000,000 for the same purpose.

[4] Again, if the board was authorized by this section to purchase voting machines, why did the Legislature give express power to purchase voting machines by the Voting Machine Act? While it may be fairly admitted that the City Election Act under consideration must be construed as of the date of its passage, subsequent legislation by the Illinois Legislature may be considered in helping us determine the intent of the prior enactment. *Farmers' & Mechanics' National Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Cape Girardeau County Court v. Hill*, 118 U. S. 68, 6 Sup. Ct. 951, 30 L. Ed. 73; *Grahl v. United States* (C. C. A.) 261 Fed. 487.

Basing our conclusion upon the judicial definition of expenses which we have quoted and also upon the legislative intent as gathered from a reading of the two acts, we feel justified in denying the board's power to purchase voting machines under section 1 of article 7 of the City Election Act. It therefore becomes unnecessary for us to consider the effect of the other provision of the City Election Act, which calls for the payment of such expenditures "out of any moneys in the city treasury not otherwise appropriated."

[5] (c) *Estoppel*.—The contract was made July 2, 1911. Two hundred machines were delivered between February and April, 1912, and the 300 for the purchase price of which this action was begun were delivered between June 14, 1912, and October 23, 1912. One hundred and ninety-two machines were used in the 1912 spring elections and the last payment for the 200 machines was made shortly thereafter. Some 460 machines were used in November, 1912, and 134 were used in the election held in April, 1913. The 300 machines delivered in the summer of 1912 were received by the board, which, so far as it was able so to do, accepted them, stored them away, and not until after this suit was commenced were they tendered back to the plaintiff. In fact, until there was a change in the personnel of the board, that body insisted that it had accepted the machines and the city was bound to pay for them.

It appears that in one of the elections, wherein some of these machines were used an unusual test was given. Many referendum questions, some of unusual length were submitted. The candidates were numerous, and voters not infrequently used the machine more than a minute. Whether this fact evidenced a failure of the machine to comply with the statutory requirements (section 1 of the Voting Machine Act), or was the result of the voter's failure to properly study the ballot before attempting to use the machine, we do not decide. A similar question of fact was quite fully litigated in a case that reached the Illinois Supreme Court (*People ex rel. Hull v. Taylor*, 257 Ill.

192, 100 N. E. 534), and the court found that the machine did not meet the "one minute voting test" required by the statute. While this case is not conclusive upon either party before this court, it is interesting as showing the lack of satisfaction manifested after a trial of the machines. For the purposes of this opinion, however, we may assume that the machines operated to the satisfaction of the board, and that the members of the board were honestly persuaded that the machines were a success.

These facts conceded, was the city estopped to question the validity of the contract? The question is not whether a city may not estop itself under any circumstances, a position which plaintiff erroneously ascribed to defendant; but the query is: Do the facts in this case estop the city from asserting the defenses here under consideration?

That the mere making of the contract by the board and the acceptance of the machines by the board will not necessarily estop the city is, we think, quite clear. *Badger v. Inlet Drainage District*, 141 Ill. 540, 31 N. E. 170; *Hope v. City of Alton*, 214 Ill. 102, 73 N. E. 406; *Chippewa Bridge Co. v. City of Durand*, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931. If an officer may, in the absence of an appropriation by the council, obligate the city to pay a debt by merely contracting to buy a machine and accepting it when delivered, then section 4 of article 7, of the Cities and Villages Act is a comparatively valueless piece of legislation, and the safeguards that under this section were intended to surround the city treasury are mythical.

We are unable to find anything in the action of the state board of election commissioners in certifying that the Empire voting machine complied with the requirements of the Voting Machine Act that would in any way tend to estop the city. The state board examined various machines of different types, made by different manufacturers, and issued a certificate to each one that manufactured a machine that complied with the Voting Machine Law. No machine that failed to secure such an indorsement could be used in any election. Such a requirement was merely an extra precaution, which the state took to surround its elections. But by no stretch of the imagination could it be construed as a substitute for section 4 of article 7, of the Cities and Villages Act, or for a compliance in fact with those tests which the state board certified to in its certificate. *People ex rel. Hull*, supra.

The retention of the machines by the board is also advanced as grounds for an estoppel; it being urged that this action was with the knowledge and approval of the city. But the board occupied a peculiar position. While acting for the city in incurring certain expenses and in supervising its elections, it was singularly independent of the city government. In so far as it contracted for the city, the members were unquestionably acting as officers of the city and bound by all of the statutes and ordinances which regulate and limit the powers of such officers. But their duties related generally to elections, which not infrequently were of interest chiefly to the state, the county, and the nation. They were appointed by the county judge. Neither the mayor nor the city council had any approval or ratification of such appointment. They were city officials, and yet more. Their action was not subject

to that implied control or approval which usually marks the conduct of city officials. A payment of an unauthorized bill, when supported by the certificate of this board, backed by the warrant of the county judge, would not, therefore, have the significance that such a payment and such a retention of the machines might otherwise evidence.

But the city is not here seeking to recover the \$200,000 paid for the first 200 machines. It is questioning plaintiff's right to recover for the second installment of 300 machines, for which an obligation of approximately \$300,000 is claimed to have arisen against the city. Therefore acceptance and payment for the machines delivered under an unauthorized contract plus acceptance by the board of more machines under the same agreement raises the precise question of estoppel we must decide. The Illinois courts have answered this question in the negative. *Chicago v. Shober Lithographing Co.*, 6 Ill. App. 560; *Village of Harvey v. Wilson*, 78 Ill. App. 544; *Village of Marysville v. Schoonover*, 78 Ill. App. 189; *Keith v. DuQuoin*, 89 Ill. App. 36; *May v. City of Chicago*, 222 Ill. 595, 78 N. E. 912; *Roemheld v. City of Chicago*, 231 Ill. 467, 471, 83 N. E. 291; *Indiana Road Machine Co. v. Keeney*, 147 Mich. 184, 110 N. W. 530; *McQuillan, Municipal Corporations* (1912) §§ 1164, 1180.

In the present case, while payment was made for the 200 machines before the 300 machines were delivered, it does not appear that the material for the 300 machines was purchased or that the machines were completed prior to such a payment. In fact, the president of the Empire Voting Machine Company admitted that he relied, not on the acceptance of the 200 machines by the board, or the payment of the purchase price therefor by the council, but solely upon his contract and the certificate of the state board heretofore referred to. This issue was squarely presented to him; and his replies were unequivocal. We quote from the testimony:

"Q. Mr. Lomb, in entering into this contract and manufacturing and delivering these machines, did you act upon the strength of and in reliance upon the report of the voting machine commissioners of the state of Illinois made to the effect that your type of Empire voting machine complied fully with the requirements of the statute?

"The Court: Did you act solely on their action? A. I think we did.

"Q. Solely? A. Yes, sir.

"The Court: Go ahead. I amended that as you wanted it, didn't I?

"Mr. Foster: That's all right, surely. I think you may cross-examine."

But we are inclined to go further. We think that a city whose right to incur obligations is limited by a prior appropriation therefor as prescribed by article 7, section 4, of the Cities and Villages Act, heretofore quoted, might, under a misapprehension of its rights and liabilities accept a part of the goods purchased under an unauthorized contract and make a partial payment for such delivery, and yet not be estopped by such payment from disputing claimant's right to recover on the balance of the contract. That there may be extreme cases warranting the opposite conclusion we will not deny.

But if we turn from case law, and apply to this record the ordinary tests for determining estoppel, we must find against the plaintiff.

[6] To establish an estoppel, the party asserting it must be induced

to act through such conduct of the other party as to make it unconscionable for the latter party to repudiate his position. Here plaintiff was not and could not have been influenced by the payment of the first 200 machines. It was no doubt moved to act by its contract with the board. It proceeded with the manufacture of its machines with dispatch, in order to meet the delivery dates named in the contract. As its president said, he secured a contract which called for the delivery of certain voting machines, and he proceeded on the strength of that contract, and upon the strength of the certificate from the state board, and upon nothing else.

We conclude that a prior appropriation by the city council was necessary, that the city is not estopped to assert the invalidity of the contract so far as it relates to the 300 machines under consideration, and that the judgment should be and it is hereby affirmed.

MARDIS v. HINES, Director General of Railroads, et al.

(Circuit Court of Appeals, Eighth Circuit. August 23, 1920.)

No. 5484.

Railroads  5½, New, vol. 6A Key-No. Series—Carrier under federal control not suable for personal injuries.

Under the Federal Control Acts (Act Aug. 29, 1916, and Act March 21, 1918, § 10), the President's proclamation of December 26, 1917, and the Director General's General Order No. 50 issued pursuant thereto, a passenger on a railroad operated by the Director General cannot maintain an action against the railroad company for injuries.

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Action by Earle J. Mardis against Walker D. Hines, Director General of Railroads, and the Missouri Pacific Railroad Company, for damages for personal injuries. From a judgment for defendant railroad company, on sustaining demurrer to the petition against it (258 Fed. 945), plaintiff brings error. Affirmed.

Jephtha H. Evans and Charles I. Evans, both of Booneville, Ark., and Heartsill Ragon, of Clarksville, Ark., for plaintiff in error.

Edward J. White, of St. Louis, Mo., and Thomas B. Pryor, of Ft. Smith, Ark., for defendant in error Missouri Pac. R. Co.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

HOOK, Circuit Judge. Mardis, a passenger on the Missouri Pacific Railroad, was injured January 26, 1918, while it was in the possession of and being operated by the Director General of Railroads under the authority of the United States. He sued both the Director General and the railroad company. On a demurrer to the petition by the latter, the trial court held there was no cause of action against it. The question here is whether the ruling was correct.

The Act of Congress of August 29, 1916 (Comp. St. § 1974a), authorized the President in time of war to take possession and assume control of systems of transportation. War with Germany having occurred, the President issued his proclamation, dated December 26, 1917, taking over the transportation systems, including the Missouri Pacific Railroad, and placing them under the control of the Director General. The proclamation provided that, until the Director General otherwise directed, his duties should be performed through the officers and employes of the systems of transportation, who should continue operation in the usual way of common carriers in the names of their respective companies; also that until otherwise directed by the Director General the systems of transportation should remain subject to all existing statutes and orders of commissions, but that any order, general or special, thereafter made by the Director General, should have paramount authority and be obeyed as such.

As above noted the accident to Mardis occurred January 26, 1918. Afterwards Congress passed the Act of March 21, 1918, section 10 of which provides:

"Carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President." Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½j.

On October 28, 1918, the Director General issued his General Order No. 50, which provided, among other things, that actions for death or personal injury arising after December 31, 1917, and growing out of the possession, use, control, or operation of any railroad by the Director General, which but for federal control might have been brought against the carrier company, should be brought against him, the Director General, and not otherwise. Finally this action was brought by Mardis January 21, 1919.

Although the officers and employes of the railroad company were being utilized by the Director General at the time of the collision, they were, in respect of everything that pertained to its causes and responsibilities, in his service, not in the service of the company. The negligence was his. Tested by familiar rules of law of general application, the railroad company would not be liable. It was not in possession or control of its railroad, and was not operating it, though for reasons of convenience its corporate name was being employed by the government. This being so, the contention that nevertheless the railroad company remained corporately liable for the negligent acts and omissions of the Director General, and inferentially as a consequence that its property not under federal control as necessary for transportation might be taken on execution to satisfy a judgment on such a demand, so involves considerations of fundamental rights that it would require most serious attention.

In *Northern Pacific R. Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897, the court held that under the act of 1916, the proclamation of the President, and the act of 1918, the possession and control of the railroads by the United States was complete and un-

divided; that the private ownership during the period provided was displaced. As regards the conditions of the case here, which arose before the act of 1918, we see no reason for saying less of the act of 1916 and the proclamation. We need not say however that the question of liability of the railroad company should be tested by the narrow rules of lessor and lessee of a railroad and their relations to the public, nor need we consider whether the government in the exercise of its power of eminent domain may not impose personal liability for the acts of its agents upon the owners of private property in its temporary possession under a statutory promise or engagement of reimbursement or reparation. The two acts of Congress and the proclamation furnish their own clear construction without resort to such considerations. The provisions in section 10 of the Act of 1918 which seem to support the claim of corporate liability are expressly made subject to the inconsistent orders of the President, and the like provisions of the proclamation of the President were only effective "until and except" so far as the Director General by "general or special orders" otherwise determined. The orders of the President controlled, and in the sense of the act of 1918 the orders of the Director General under the express authority of the proclamation were the orders of the President.

The power conferred upon the President was unlike that customarily given administrative officers to carry out the provisions of a statute. In such cases the observance of the express statutory limitations is obligatory and action under them must be in harmony. But there is evident in the act of 1918 an intent to confer a much broader power upon the President. The provision in section 10 that carriers while under federal control should be subject to all liabilities as common carriers arising under state, federal, or the common law was expressly subordinated to any inconsistent order of the President. The later provisions in the same section about the bringing and defense of actions are dependent upon the existence of a liability. They do not purport to create a cause of action not otherwise existing. The proclamation of the President under the act of 1916 was before Congress at the adoption of the act of 1918, and it was known that the President was exercising his powers through the Director General. As we have said, the orders of the Director General were in the sense of the act of 1918 the orders of the President. According to General Order No. 50 the action of *Mardis* should have been brought against the Director General alone. We have not thought it necessary to review the decisions on this subject. There is quite a conflict among them.

The judgment is affirmed.

BARTON et al v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. August 2, 1920.)

No. 1797.

1. Larceny **⌘64(1)**—Possession of stolen goods raises presumption of guilt. The possession of recently stolen goods, unless otherwise explained, raises a presumption of guilt, which will authorize a conviction in event there are no circumstances to rebut the inferences.

2. Internal revenue **⌘47**—Possession of an illicit still raises a presumption of guilt.

In a prosecution for violation of the internal revenue laws (Rev. St. §§ 3258, 3279, 3281 [Comp. St. §§ 5994, 6019, 6021]) the possession of an illicit still, which is unlawful property, the operation of which is also unlawful, will raise a presumption of guilt; hence a charge that, if defendants were caught at an illicit distillery, that was a suspicious circumstance, and would demand explanation, was proper.

3. Internal revenue **⌘47**—Sufficiency of presumption from possession of illicit still is for the jury.

The question of the sufficiency of the presumption of guilt, from the fact that defendants were in possession of, or were at least apprehended at, an illicit still, is for the jury.

In Error to the District Court of the United States for the Western District of South Carolina, at Greenville; Henry H. Watkins, Judge.

Gus Barton and Leo Barton were convicted of violation of Rev. St. §§ 3258, 3279, 3281 (Comp. St. §§ 5994, 6019, 6021), and they bring error. Affirmed.

P. A. Bonham, of Greenville, S. C. (Bonham & Price, of Greenville, S. C., on the brief), for plaintiffs in error.

J. William Thurmond, U. S. Atty., of Edgefield, S. C. (C. G. Wyche, Asst. U. S. Atty., of Greenville, S. C., on the brief), for the United States.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

SMITH, District Judge. The plaintiffs in error, defendants below, were indicted in the District Court of the United States for the Western District of South Carolina for a violation of sections 3258, 3279, and 3281, R. S. (Comp. St. §§ 5994, 6019, 6021). They were tried before a jury at the October term, 1919, at Greenville, S. C., and convicted upon all the counts of the indictment.

When the illicit distillery was found by the officers, according to the testimony, it was ready for operation. No one was then there present, but the officers concealed themselves and laid in wait with the purpose of apprehending whoever came to operate it. In a short time, three persons (the plaintiffs in error and another person) came to the distillery, and, according to the officers, had a conversation among themselves as to whether the beer was ready to be run or distilled, and which tub of beer they would first run. The officers then rushed in and caught all three of the men.

At the trial, the presiding judge charged the jury that, if they concluded that the plaintiffs in error were at the time at the place where they were alleged to have been caught, and that it was at a distillery, as set out in the indictment, that that would be a suspicious circumstance, and would demand some explanation of the plaintiffs in error, either from the facts testified to by the witnesses for the government, or upon their own part.

The presiding judge, upon an exception to this charge, further charged the jury that, in the absence of some explanation of why the prisoners were there, either from the testimony for the government, or the surrounding circumstances, or their own testimony, when one is found at an illicit distillery, it becomes incumbent upon him to give some explanation of his presence there.

It is upon an assignment for this charge as error that the case is now before this court.

[1-3] An illicit distillery is a business or operation wholly prohibited by law. As in the case of other operations of an illicit character, it is carried on as covertly as may be. Like larceny, or theft, or other crimes of that kind, the malefactor or evil doer does not commit his crime in the open, but in as concealed a manner as possible. In such cases the law raises certain presumptions necessary in the administration of justice. One is that possession of stolen goods justifies the inference that the possession is a guilty possession, and though it be only *prima facie*, it authorizes, if no other testimony be adduced, the presumption of guilt. To state it more concisely, the possession of stolen goods, if it be proven that the party charged was in possession, and that the goods were stolen, and no other evidence was adduced of any kind, either by the prosecution or the defendant, and there were no circumstances to rebut the inference to be drawn from this fact of possession, then it would authorize the jury to find the defendant guilty. There is no reason that the same rule of reason and law should not apply in the case of other unlawful possession of property. An illicit still is unlawful property, and its operation an unlawful act, and its possession would logically justify the same inference that would arise in the case of the possession of stolen goods. It is a mere presumption, creates only a *prima facie* inference of guilt, and may be rebutted, either by circumstances, or by the direct testimony of the parties charged, or of others.

The proximity of the accused to the place of the crime and the unlawful apparatus used in the perpetration of the crime, at or about the time of its perpetration, may by a reasonable inference raise the presumption of possession, and that the party so found was guilty of a participation in the crime charged, which required the possession and use of the property. It is entirely a question for a jury whether this inference is, on consideration of all the testimony, sufficient to convict the defendant beyond a reasonable doubt.

In the instant case, the learned judge below merely instructed the jury that the presence of the party charged at an illicit distillery was a suspicious circumstance, and that, when one is so found present, it becomes incumbent upon him to give some explanation of his presence there.

Under the circumstances of the instant case, we do not find that this charge violated any principle of law, but, on the contrary, was fully authorized.

Affirmed.

WHITE OAK TRANSP. CO. et al. v. BOSTON, CAPE COD & NEW YORK CANAL CO. et al.*

(Circuit Court of Appeals, First Circuit. September 23, 1920.)

No. 1399.

Canals ⇐29—Negligence of canal company held not proximate cause of injury to cargo.

Negligence of a canal company in permitting a vessel which was not fit to enter its canal, and which contributed to the first stranding of the vessel, is not the proximate cause of injury to the cargo, when the vessel sank after a second stranding, due to the negligence of the master in attempting to navigate the canal with his vessel down by the head from the first stranding, in which attempt the canal company did not concur.

Anderson, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Massachusetts.

On motion to amend decree. Motion denied.

For former opinion, see 265 Fed. 538.

Henry E. Warner, of Boston, Mass., for Northern Coal Co.

Samuel H. Pillsbury, of Boston, Mass., for Boston, Cape Cod & New York Canal Co.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. The Northern Coal Company, as the owner of the cargo of the steamer Bay Port, was an intervening petitioner in the above libel. In our opinion, filed May 18, 1920, we affirmed the decree of the District Court dismissing the libel. 265 Fed. 538. The Northern Coal Company filed, and has been heard upon, its motion to amend our decree of affirmation, so that the decree of the District Court shall be reversed as to it, and it be decreed to be entitled to recover its damages and costs from the Boston, Cape Cod & New York Canal Company, upon the ground that its allegation of negligence against the Canal Company, to wit, that it was negligent in representing said canal to be safe for passage by vessels of the type and draft of the said steamer Bay Port, when it was not safe, was sustained by our opinion.

In discussing the liability of the owners of the Bay Port under the libel of the Canal Company against them we said:

"While we think the Bay Port was negligent in attempting to use the canal in her deeply laden condition, we think the Canal Company was equally at fault in allowing her to use it, and that neither should recover for any damage

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*Certiorari granted 254 U. S. —, 41 Sup. Ct. 9, 65 L. Ed. —.

which may have been suffered by reason of her attempt to go through in the condition in which she was when she entered it."

—and we also said:

"While we think the Bay Port was negligent in attempting to go through the canal, yet we also think the Canal Company was equally negligent in allowing her to enter it, and that the hazard of her attempted passage was assumed by the Canal Company with full knowledge of the risk."

We were then discussing the liability of the owners of the Bay Port under the allegations of negligence in the libel of the Canal Company that they had caused a vessel of the type of the Bay Port, and laden as she was, to enter the canal, and what we then said related to the condition of the Bay Port when she entered the canal.

The Bay Port ran aground twice in the canal. We have concurred in the finding of the District Court that neither stranding was occasioned by any negligence of the Canal Company in the construction or maintenance of the canal.

The second stranding of the steamer we have found was occasioned by the negligence of the captain of the Bay Port in attempting to navigate the canal with a vessel which was partially filled with water and down by the head to such an extent that it sheered badly. We have found that the Canal Company did not consent to the navigation of the canal by the Bay Port in her then condition, and that the owners of the Bay Port are liable to the Canal Company for whatever damages it may have sustained by reason of the attempted navigation by the Bay Port in her disabled condition.

We think that the Bay Port, when her hold was filled with water above her cargo, and she had a bad list to port, and was down by the head, was much more liable to sheer than when she entered the canal; that she had become altogether a different vessel from what she was when she entered the canal, in respect to her liability to sheer; and that it was the attempt to tow her when in this condition, when, as described by the captain of the tug boat which had her in tow, she went "from one side to the other of the canal after she came off, that she would dive from one side to the other, and this was true all the way until she struck," which was the proximate cause of her loss, and of the loss of the cargo.

We see no reason why we should modify our decree, and the entry must be—

Motion denied.

ANDERSON, Circuit Judge (dissenting). This court has already found the Canal Company negligent in inviting the Bay Port into its canal, because of the probability that what did happen would happen, to wit, that the vessel would run aground. The fact that the Bay Port ran aground twice, and that the second grounding might have been avoided if the captain had more accurately sensed the situation and been more careful, does not seem to me to prevent the original negligence of the Canal Company from continuing an efficient and proximate cause of the loss of the cargo.

This cargo was lost because both the owners of the Bay Port and the Canal Company ought to have known that it was unsafe to try to take it through that canal in that type of vessel. The fact that, after this dangerous enterprise had been negligently entered upon, the captain was guilty of an additional act of negligence, does not seem to me to make that additional act of negligence the sole proximate cause of the loss of the cargo.

I think the motion should be granted.

THE BRETANIER.

(Circuit Court of Appeals, Fourth Circuit. August 4, 1920.)

No. 1827.

Salvage ~~Case~~ 30—Award of \$12,000 for salvage of stranded vessel held not insufficient.

Where salvors sent a tug, which with its tackle was worth about \$175,000, to aid a grounded vessel worth \$500,000 and the salvors laid wrecking anchors, passing lines to the vessel, so that it was able by its own machinery to be floated, and after being towed a short distance proceeded under its own power, held, that an award of \$12,000 was not, under the circumstances, inadequate.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Libel by the Merritt & Chapman Derrick & Wrecking Company against the ship *Bretanier*, claimed by Seward E. Drake, master. From a decree for salvage, claimed to be insufficient, libellant appeals. Affirmed.

Leon T. Seawell, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for appellant.

Edward R. Baird, Jr., of Norfolk, Va., and John M. Woolsey, of New York City (George M. Lanning, of New York City, on the brief), for appellee.

Before PRITCHARD and WOODS, Circuit Judges, and SMITH, District Judge.

SMITH, District Judge. This is an appeal in admiralty from the award of the judge of the District Court of the United States for the Eastern District of Virginia in a salvage case. The decree awarded to the salvor, the appellant herein, the sum of \$12,000, together with costs. This appeal is taken upon an assignment of error that the amount allowed is insufficient, and that the court should have decreed a larger amount.

It appears that the steamship *Bretanier*, bound on a voyage to Hampton Roads, got out of her course on November 4, 1919, and grounded on the coast near Little Island life-saving station. On the same day word was received by the appellant, the libellant below, that the steamship was ashore and needed assistance, and thereupon the libel-

ant's tug Rescue with her full crew, and well equipped with a wrecking salvage apparatus and crew, proceeded from Norfolk to the scene of the stranding, where she arrived about 9 p. m. on November 5. On the 6th a gale was prevailing, and the weather was so rough that it was impossible to communicate by boat with the steamship Bretanier. The Bretanier was then lying aground, and according to the evidence of the libelants, there was a bar or slight shoal, which lay between the Bretanier and the open ocean; the Bretanier lying inside of this shoal in a gully, closer to the beach.

The steamship had been endeavoring to extricate herself by working her engines, and seems to have slightly moved her position, but was unable to extricate herself. On the 7th of November communication was established between the tug Rescue and the steamship, and the official of the appellants, who was styled the wrecking master, who seems to have been a person of skill and competence, went aboard the steamship with some of his men, and after considering the situation, laid a 9,000-pound wrecking anchor off from the ship's stern, at a sufficient distance, which was made fast to a 6-inch steel cable, and connected with a 15-inch Manila cable, which was taken aboard the steamship. With this cable aboard, strain was put upon it by the engines and machinery of the steamship to heave her off, and this continued at high water on the 8th and 9th of November, and on the 9th another large wrecking anchor was taken aboard the surf-boat, and properly laid during the afternoon, and connected with the ship.

On November 10th the ship with her engines began heaving on both anchors in the morning, and put on an extra strain, and she was gradually hauled off of the shoal, and floated about 10 o'clock in the morning, when the Rescue took her in tow and towed her about 2 miles off shore and anchored in 7 fathoms of water. Thereafter the steamship lifted her anchor and proceeded under her own steam to Hampton Roads, where she arrived during the early evening of the 10th.

What the salvors accomplished was to send a fully equipped wrecking tug to the place of stranding, and there efficiently lay two heavy anchors at proper points, so as to afford the necessary fixed points of leverage, with the aid of which the vessel by the use of her own engines was enabled to extricate herself. The work of the salvors, as far as it went, was most commendable and efficient.

There does not appear to have been any peril involved to the lives of the salvors or to the salving property. Nor does there appear to have been any serious immediate danger either to the stranded vessel or her crew, except the danger which always attends a vessel which is stranded on the shore in the face of the open ocean. The value of the salved vessel is stipulated to have been \$500,000, and the value of the Rescue and her apparatus is stipulated to have been \$175,000.

Under all the circumstances, considering the time employed and the values involved, the court is of opinion that it should not disturb the award made by the District Judge, who heard all the witnesses, and whose award is not shown to have been clearly inadequate, but that the decree below should be affirmed.

CHAPIN-SACKS MFG. CO. v. HENDLER CREAMERY CO. et al. *

(Circuit Court of Appeals, Fourth Circuit. July 17, 1920.)

No. 1803.

1. Appeal and error — 1097 (1) — Decision on former appeal law of case.

The decision on a former appeal is the law of the case, and assignments of error questioning matters adjudicated then will be overruled.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Bill by the Chapin-Sacks Manufacturing Company against the Hendler Creamery Company and another. From the decree, complainant appeals. Affirmed.

Isaac Lobe Straus, of Baltimore, Md., and Walter A. Johnston, of Washington, D. C., for appellant.

John Watson, Jr., of Baltimore, Md. (Vernon Cook, of Baltimore, Md., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

WOODS, Circuit Judge. Chapin-Sacks Manufacturing Company, claiming the words "The Velvet Kind" as a trade-mark for its ice cream, brought this suit to enjoin the use of the words by Hendler Creamery Company and L. Manuel Hendler in their ice cream business, and for damages for their alleged unlawful use. In modifying the decree of the District Court of July 16, 1917, this court decreed as follows (254 Fed. 553, 166 C. C. A. 111):

"(1) The words, 'The Velvet Kind,' applied to ice cream, being descriptive, are not valid as a trade-mark. (2) Advertisement and sale by the defendants of their ice cream in the city of Baltimore did not constitute unfair competition with the complainant. (3) The complainant has an established business for ice cream under the designation of 'The Velvet Kind,' indicated by its advertisements, its containers and wagons, in Washington, D. C., Richmond and Alexandria, Va., and Annapolis, Buckeystown, Woodstock, and Frederick, in the state of Maryland. (4) The defendants have been competing unfairly with the complainant in Annapolis and Laurel, in the state of Maryland. (5) The defendants should be enjoined from the advertisement and sale of ice cream under the designation, 'The Velvet Kind,' and from the use of containers, wagons, and other instrumentalities of the trade similar to those used by the complainant, in Washington, D. C., Richmond and Alexandria, Va., Annapolis, Laurel, Buckeystown, Woodstock, and Frederick, in the state of Maryland, and all other places where the complainant has established the sale of its ice cream under the designation of 'The Velvet Kind,' until they shall submit to the District Court a plan of business which will satisfy the court that their ice cream will not be confused with that of the complainant, and will not in any wise unfairly affect complainant's business. (6) Complainant is entitled to an accounting as required by the District Court. (7) The unfair course of conduct pursued by the defendants requires that they pay the entire cost in the District Court and in this court."

On May 8, 1919, the District Court entered its decree in conformity with the decree of this court. The defendants not having submitted

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*Certiorari denied 254 U. S. —, 41 Sup. Ct. 62, 65 L. Ed. —.

to the District Court a plan which would prevent confusion of its ice cream with that of the complainant, a petition was filed by complainant on July 1, 1919, asking the District Court to require the defendants to submit such plan to the end that the cause might be disposed of by final decree of the District Court. The District Court thereupon ordered the defendants to submit within 30 days a plan to meet the terms of the decree of this court on pain of the injunction being made absolute by decree, or to show cause why such decree should not be made. At the hearing under this order defendant contended that complainant had no right to require the submission of a plan by the defendants, since it was protected by the order of injunction. The District Court having overruled this contention, the defendant submitted on October 22, 1919, a plan for their use of the words "The Velvet Kind," which, according to their view, would prevent the confusion of their cream with that of complainant. This plan was disapproved on objection of the complainants. Subsequently on January 21, 1920, another plan was presented by defendants, and approved by the District Court by decree entered January 25, 1920. This decree contained this provision:

"And it is further adjudged, ordered, and decreed that this decree shall be taken and read in connection with and pursuant to the modified decree entered by this court in this cause on the 8th day of May, 1919, which said modified decree, as completed by the provisions of this order and decree, is hereby made absolute and final."

In its appeal from this decree as the final decree of the District Court in this cause the complainant assigns error in all the findings in the decrees of the District Court adverse to its claims.

Discussion of the plan adopted by the District Court for the protection of the complainant from unfair competition would be of little value. It is enough to say that, upon careful examination of it, we think it is about as fair and just as any that could have been presented.

All other questions made in the assignments of error were involved and decided in the former appeal, and the decrees of the District Court were entered in precise accordance with the decree of this court.

Affirmed.

CITY OF POCA TELLO v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1920.)

No. 3471.

Contracts ⚙️10(1)—**Municipal corporations** ⚙️347(1)—**Option to city to terminate contract held to render it unenforceable against sureties for want of mutuality.**

A city contract, which provided that, if the city for any reason failed to sell bonds due to be sold on a certain date, it might terminate the contract was voidable at the option of the city, since it required no steps for the sale of the bonds, and the contract was therefore unenforceable against the surety of the contractor for want of mutuality.

In Error to the District Court of the United States for the Eastern Division of the District of Idaho; Frank S. Dietrich, Judge.

⚙️For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Action by the City of Pocatello against the Fidelity & Deposit Company of Maryland. Judgment for defendant on sustaining demurrer to the complaint, and plaintiff brings error. Affirmed.

Ross W. Bates, of Boise, Idaho, and B. A. Cummings, of Pocatello, Idaho, for plaintiff in error.

Wyman & Wyman, of Boise, Idaho, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Action by the city of Pocatello, Idaho, upon a bond given by Mitchell, contractor, with the Fidelity Company as surety, for the faithful performance of a construction contract relating to an additional water supply for the city. The complaint states that work was to begin February 1, 1917, and to be finished not later than May 10. No work was done, and under the provisions of the contract, if the contractor failed diligently to proceed, the city could have the work done at the expense of the contractor. After notice to the contractor to proceed, and after his failure to act, the city did the work at an expense in excess of the contract price, and thereafter brought this action against the surety company to recover the excess sum paid. General demurrer was sustained, and the action was dismissed, whereupon the city brought writ of error.

Article 11 of the contract provided that if—

“for any reason the city of Pocatello shall fail to make sale of and receive money for the \$150,000 of waterworks bonds due to be sold on the 8th day of January, 1917, then and in that event this contract, at the option of the party of the second part, may be terminated without the party of the second part becoming liable in any manner or upon any account to the party of the first part upon any claim or demand whatsoever.”

There is no allegation that the city failed to sell the bonds on January 8th, but it is alleged that upon April 16th the city engineer notified the contractor that he must proceed by the 19th, and that on April 19th the contractor said he could not proceed with the work unless the city would grant an extension of time for performance sufficient to cover the delay in selling bonds, and that he would proceed “only upon the condition” that the extension be granted. Whether Mitchell was ever advised by the city that it waived or intended to waive whatever right of option it may have had under article 11 does not appear.

Under the contract the option of the city was conditional upon the failure to sell the bonds, and the city had the right to exercise the option of terminating the contract at any time. Had Mitchell proceeded with the work, he would have done so, knowing that the city could terminate the contract any time without liability to him in any manner, or upon any account, or upon any claim or demand that he might have had for work he had already done. There is no provision in the contract requiring the city to make an effort to sell its bonds, and no specification as to terms or conditions upon which sale of the bonds was to have been had. The purpose of the city, as made apparent by the language of article 11, was to reserve the right to terminate the contract, provided it did not dispose of its bonds, and in

the exercise of such right, to escape any liability to any one upon any claim or demand whatever. A contract of such a nature could not be enforced; it lacks mutuality. There was no performance by either party to the contract and no waiver of lack of mutuality. Parsons on Contracts (9th Ed.) 486.

The judgment is affirmed.

KRAUSE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. August 23, 1920.)

No. 5479.

1. Indictment and information ⚡121(5)—Bill of particulars not part of charge.

A bill of particulars is not a part of an indictment or information.

2. Indictment and information ⚡111(1)—Need not negative exception.

An information charging use of free interstate railroad transportation, contrary to Act Feb. 4, 1887, § 1, as amended by Act June 29, 1906, § 1 (Comp. St. § 8563), need not negative the exception of the "necessary caretakers of live stock."

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Fred Krause, Jr., was convicted of using interstate free transportation, and he brings error. Affirmed.

G. F. Dullam and C. L. Young, both of Bismarck, N. D., for plaintiff in error.

Melvin A. Hildreth, U. S. Atty., and John Carmody, Asst. U. S. Atty., both of Fargo, N. D.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

HOOK, Circuit Judge. Krause, the plaintiff in error, was convicted and sentenced for using interstate free railroad transportation contrary to the act to regulate commerce, approved February 4, 1887, as amended by the Act of June 29, 1906 (34 Stat. 584, § 1 [Comp. St. § 8563]).

[1] He contends that the information against him, as supplemented by a bill of particulars, does not charge a public offense under the statute. A bill of particulars is not a part of an indictment or information. *Dunlop v. United States*, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799. It is sufficient if the latter adequately charges an offense against the laws.

Briefly summarized, the information in this case sets forth that the accused, by representing to the Northern Pacific Railroad Company that he was the owner of a certain carload of stock about to be shipped from Hazen, N. D., to South St. Paul, Minn., entered into a live stock shipping contract with the company, and that by means of it he ob-

tained for himself as owner and shipper free transportation for the round trip between the places mentioned; that the stock was shipped, and the accused willfully, knowingly, and unlawfully, made the round trip journey on the tickets so obtained; that in fact the carload of stock did not belong to the accused, but to another person, who was named.

[2] The argument against the sufficiency of the information proceeds in this way: The statute prohibiting free transportation excepts "necessary caretakers of live stock"; the exception so inheres in the statutory definition of the offense that it should have been negated; and there is nothing in the information to show that, aside from the matter of ownership, the accused was not a necessary caretaker of the animals in the car. There are other contentions, but they depend upon the soundness of the above.

The broad prohibition of the statute is against the giving and using of any interstate free ticket, free pass or free transportation, directly or indirectly. The exceptions, of which there are many in favor of various classes of persons, are not inherently a part of the statutory definition of the offense. They are exceptions to the general prohibition, as their designation naturally signifies, and whether a person is or is not within them is largely within his own peculiar knowledge. It appears from the information that the accused obtained and used the interstate transportation of himself as a passenger by falsely representing himself as the owner of the carload of live stock. It was no more necessary to allege that he was not in some other sense a caretaker than it was specifically to negative his membership in each and all of the other excepted classes. On the face of the information the transportation was free transportation unlawfully used in the sense of the statute.

The sentence is affirmed.

W. E. STEWART LAND CO. v. ARTHUR.

(Circuit Court of Appeals, Eighth Circuit. August 23, 1920.)

No. 5428.

1. Courts ⇐508(1)—Injunction by federal court against proceeding in state court not authorized.

Where an action in the federal court was purely in personam, and no property was involved which might lawfully be protected by injunction, such court had no jurisdiction to enjoin a proceeding involving the same matter in a state court.

2. Courts ⇐508(2)—Injunction by federal court, staying taking of depositions in state court, not authorized.

The prohibition of injunctions by federal courts, staying proceedings in state courts, extends to the taking of depositions.

Appeal from the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

Suit by A. W. Arthur against the W. E. Stewart Land Company. From an order enjoining proceedings in a state court, defendant appeals. Reversed.

W. F. Zumbrunn, of Kansas City, Mo., A. Ray Maxwell, of Corning, Iowa, and E. E. Bowers, D. C. Meyer, and Floyd S. Strattan, all of Kansas City, Mo., for appellant.

Before HOOK and STONE, Circuit Judges, and LEWIS, District Judge.

HOOK, Circuit Judge. This is an appeal from an order of the United States District Court for the Southern District of Iowa enjoining proceedings in a state court of Oklahoma.

The W. E. Stewart Land Company, having sued Arthur in the court below upon two checks and a promissory note, afterwards brought an action against him upon the same instruments in the Oklahoma court, where it attached property as fraudulently conveyed and had a receiver appointed. It started to take testimony in aid of its Oklahoma action, whereupon at Arthur's instance the court below enjoined it from taking his deposition and from "in any manner proceeding" in that case, so as to interfere in any way with his right to have a trial of the Iowa action "according to the usual and ordinary procedure for the trial of such cases."

[1, 2] In the Iowa case there was no custody of property which might lawfully be protected by the injunctive process. It was purely in personam. The pendency of two or more such actions between the same parties upon the same causes of action in different jurisdictions gives to the court in which the first was brought no power to enjoin the prosecution of the others. Each may take its normal course. See *Barber Asphalt Co. v. Morris*, 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761. The prohibition of injunctions by courts of the United States staying proceedings in state courts extends to all steps in the progress of a cause. This obviously includes the taking of depositions. Otherwise a case might be effectively halted at the start or brought to failure.

The order is reversed.

BECKERMAN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 27, 1920.)

No. 2732.

Larceny ⇨21—Stealing from "station house" does not include station house of a transfer company.

Comp. St. § 8603, penalizing stealing from a "station house" goods in interstate commerce, refers only to a railroad station house, and does not cover stealing from the station house of a transfer company, handling freight by wagon.

In Error to the District Court of the United States for the Eastern District of Illinois.

Jake Beckerman was convicted of an offense, and brings error. Reversed.

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Chester H. Krum, of St. Louis, Mo., and Charles A. Karch, of East St. Louis, Ill., for plaintiff in error.

Andrew B. Dennis, of Danville, Ill., for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. Plaintiff in error was convicted upon two counts of an indictment—the first charging him with having stolen five cases of shoes from “the station house of the Columbia Transfer Company in St. Louis, which said shoes were then and there consigned and in transit in interstate commerce from St. Louis to Kimberland, N. C.”; the second charging him with having in his possession five cases of shoes that to his knowledge had been stolen and carried away from the “station house” of the Columbia Transfer Company, etc. The Columbia Transfer Company handles freight by wagon, maintains a warehouse in East St. Louis, and hauls freight between the railroad depot and its warehouse, or a shipper’s place of business. The five cases of shoes had been delivered by the manufacturing company to the drayman of the Columbia Transfer Company, and by such drayman taken to the warehouse. They were later to be shipped to North Carolina.

The judgment is assailed because unsupported by the evidence; it being the urge of plaintiff in error that the “station house” referred to in the statute must be a railroad station house. The statute reads:

“Whoever shall steal or unlawfully take, carry away, or conceal * * * from any railroad car, station house, platform, depot, steamboat, vessel, or wharf, with intent to convert to his own use any goods or chattels moving as, or which are a part of or which constitute, an interstate or foreign shipment of freight,” etc. Comp. St. § 8603.

No case has been called to our attention, and we have been unable to find any decision that supports the government’s position. Under the doctrine of *noscitur a sociis* the meaning of the words “station house” is dependent upon the associated words. The word “railroad” not only modifies “car,” but “station house,” “platform,” and “depot.”

It follows that the judgment must be and is hereby reversed.

EGRY REGISTER CO. v. STANDARD REGISTER CO.*

(Circuit Court of Appeals, Sixth Circuit. June 14, 1920.)

Nos. 3238, 3323.

1. Patents 328—940,481, claims 1 and 2, for improvements in shipping bill register, held to disclose invention.

Claims 1 and 2 of the Schirmer patent, No. 940,481, for the combination of a feeding device and tearing-off mechanism for shipping bill registers, disclose invention, though each of the elements was anticipated by prior patents.

*For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 14, 65 L. Ed. —.

2. Patents ☞168(2)—Acquiescence in rejection of claims involving one element does not estop claim of combination including it.

The acquiescence by an applicant for patent in rejection by the Patent Office of claims for one element of his machine does not estop him from relying on claims for a combination involving that element.

3. Patents ☞66—Part of prior art only as to disclosure on their face.

Previous patents are part of the prior art only by what they disclose on their face.

4. Patents ☞81—Evidence held not sufficient to show prior use.

Testimony that machines constructed under a prior patent were substantially the same as plaintiff's, though the drawings of the prior patent disclosed a different construction, which testimony was sharply disputed, and not corroborated by the production of machines, does not show the alleged prior use by evidence of the high degree required therefor.

5. Patents ☞25—Combination whose elements coact is not mere aggregation.

A combination is not unpatentable as a mere aggregation, if its two elements so coact as to produce a new and useful result, not a mere aggregation of several results.

6. Patents ☞323—New reference held not to entitle defendant to reopen decree.

New references after a decree in a suit for infringement of patents for shipping bill registers, all of which were drawn from other arts and failed to disclose one element of the claims in suit, do not warrant the reopening of a decree finding infringement.

7. Patents ☞328—940,481, for a shipping bill register, held infringed.

Schirmer patent No. 940,481, for a shipping bill register, involving combination of feeding device and tearing-off apparatus, *held* infringed, though the clamping means in the tearing-off device in defendant's register was operated by the manual lifting of the strips in the tearing-off process.

8. Patents ☞245—Substitution of manual for mechanical operation held not to avoid infringement.

While a mere manual operation is not an equivalent for mechanical operation, the substitution in a shipping-bill register for a mechanically operated pressure roller during the tearing-off process of a bar operated by the manual operation of tearing off the slips does not avoid infringement.

Appeal from the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Suit by the Standard Register Company against the Egry Register Company. Decree for plaintiff, motion to reopen the case for newly discovered evidence denied, and defendant appeals. Affirmed.

H. A. Toulmin, of Dayton, Ohio (Toulmin & Toulmin, of Dayton, Ohio, on the brief), for appellant.

Alfred M. Allen, of Cincinnati, Ohio (Allen & Allen, of Cincinnati, Ohio, and Earl H. Turner, of Dayton, Ohio, on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Suit on United States patent to Schirmer, No. 940,481, November 16, 1909, for improvements in shipping bill register. Defendant appeals, first, from an interlocutory decree finding the first and second claims of the patent valid and infringed; and, second, from the refusal of the District Court to re-

open the case, and vacate the decree therein, in view of alleged newly discovered evidence.

The invention relates to so-called autographic registers for making a plurality of shipping bills, sales slips, and the like; the register consisting of a case containing two or more rolls of paper appropriately journaled therein, the paper on each roll being drawn therefrom to and upon a writing tablet in the top of the case, entries made upon the top sheet being transferred to the lower ones by the use of interleaved carbon paper, the sheets being then fed forward the length of the bill, when they are severed by a cut-off arrangement at the rear end of the register. Fresh sheets are thus left ready for use upon the writing tablet.

In the machines in use prior to Schirmer there had always been more or less difficulty in maintaining the writing lines of the various superimposed strips of paper in uniform positions, due to irregularity of feed, resulting from a variety of causes, prominent among which are variations and irregularities in the thickness of the paper (not only as between different rolls, but in the same roll), slipperiness and tendency to shrink or stretch. Uniformity of alignment became even more necessary in the case of bills carrying various printed items thereon, as improper alignment might easily make an entry opposite a given division in the upper sheet appear opposite a different division in a lower sheet.

Schirmer sought to secure and preserve uniformity of alignment in this way: The sheets of paper are specially prepared for use by perforating openings in the parallel margins "at uniform distances apart and in exact alignment with each other." These marginal openings are engaged by a series of pins extending radially from the peripheries of each of two circular plates rigidly mounted on the respective ends of the feed roller, the positions of the pins as to each other corresponding to the positions of the perforations, whereby the pins successively engage the corresponding perforations in each of the strips, thus advancing all the sheets a uniform distance as the feed roller is rotated. As the circumferences of the plates upon which the pins are mounted are respectively equal to the length of the bill, one complete revolution of the feed roll (effected by a manually operated crank) feeds a complete bill, at the expiration of which revolution the feed is automatically stopped. A so-called pressure roller, which during the feeding operation is kept out of engagement with the paper, is at the end of each feeding operation caused by a cam action to descend upon and rigidly clamp the strips of paper, permitting their manual tearing off against the sharp rear edge of the upper casing of the machine. The tearing-off device is that of the Shoup patent, No. 561,350, June 2, 1896, except that Shoup's pressure roller is the upper feed roller, and exerts pressure on the paper strips all the time. Schirmer's pressure roller is by the resumption of the feeding operation again automatically lifted out of engagement with the sheets, and so remains until the completion of that feeding movement. The claims in suit are as follows:

(1) "In a shipping bill register, two series of pins, a rotating body upon which each series of pins are mounted, means for rotating said body to cause the pins of each series to successively engage perforations uniformly arranged in sheets of paper placed one upon the other, a pressure roller adapted to engage said sheets at the termination of each feeding operation and to release said sheets at the beginning of each feeding operation, and means so controlling said pressure roller."

(2) "In a shipping bill register, two series of pins mounted upon a rotating body, means for rotating said body to cause the pins of each series to successively enter perforations in a plurality of sheets of paper arranged one above the other to uniformly feed said sheets, a cutting edge for severing said sheets, and a pressure roller adapted to rigidly engage said sheets at the termination of each feeding operation and to hold said sheets while they are being severed."

The only substantial respect in which the second claim differs from the first is that it expressly includes the element of a cutting edge. The elements of these claims, broadly stated, are, first, the feeding device; and, second, the device for facilitating the tearing off of the sheets. Both validity and infringement are denied.

[1] Setting to one side for the moment the patents to Kirby, the methods of feeding the strips employed or disclosed by patents prior to Schirmer were either a manual drawing out of the sheets for a proper distance, the passing of the strips between upper and lower rotating feed rolls, or the use of mechanically actuated grippers which held the strips tightly until released to allow the strips to be cut off. The prior art generally (still passing by Kirby) had thus recognized it as necessary to preventing slipping of the strips and inaccurate registering that the strips be held tightly together during the entire feeding operation, as well as during the cutting-off process.

In our opinion the essence of the Schirmer invention is the adoption of a mechanism by which the gripping devices of the prior art are dispensed with and the sheets fed loosely by means of the engagement of the pins on the feed drum with the perforated openings previously prepared in the sheets; the pressure roll having no function except to hold the sheets rigidly against the plate during the operation of tearing off the used sheets, and the device thus resulting in correcting the effects of slipping, instead of preventing it. We see no merit in the contention that the features referred to were not disclosed by the specification and claims. In our opinion the specification sufficiently discloses a mechanism whereby an ungripped plurality of sheets is fed by the action alone of the pin roll mechanism, and sufficiently supports the theory now claimed of automatically maintaining alignment. The lack of a gripping element (as a constantly operative pressure roll) is sufficiently suggested by the omission of disclosure thereof, in connection with the express statement in the specification that the pressure roller "engages the sheets of paper at the end of each complete rotation of the [feed] roller and holds said sheets firmly against the surface of the [feed] roller while said sheets are being severed at the front of the machine"; also the statement that it is necessary that the pressure roller "shall engage the sheets of paper only at the expiration of each feeding operation," and the further statement that the construction and location of the cam rings are

such as to permit the pressure roller "to descend against the sheets of paper at the end of each feeding operation and to rise therefrom upon each initial movement of said feed roll in order to not obstruct each feeding movement of the sheets of paper."

It was unnecessary to state that the pins fed the perforations loosely. The latter were described as previously prepared, spaced, and aligned, and as preferably round; and the presumption would be that they were large enough so that the pins would readily enter the three sheets at once, notwithstanding presumed inequality in texture and cut of the strips naturally affecting to some extent the perfect registering of the perforations in the different strips. Neither the fact that the pins are tapered, nor that the drawings show small perforations (the drawings being on different scales), persuade to the contrary. The engagement between pins and perforations could not well accurately be accomplished, so as alone to carry on the feeding operation and at the same time maintain constant alignment of all the sheets, unless the perforations were substantially larger than the pins. That it was not intended that the pins should puncture the paper either wholly or in part, but that the perforations should be large enough to permit the pins to readily enter, especially appears by the statement in the specification that the ends of the pins are "tapered to enable them to readily enter the perforations or openings in the edges of the sheets."

[2] We think the claims in suit, when read in connection with the specification, should be construed as claiming the invention of the patent as above defined, viz. the combination of the feeding device disclosed and the cutting-off mechanism described. Nor do we find anything in the Patent Office history which estops the patentee from claiming the benefit of the feeding device as an element of the combination of these claims. The fact that the patentee acquiesced in the rejection of claims 1 to 4, inclusive, as originally presented—which claims were confined entirely to the feeding mechanism—does not bar him from relying upon the claims now in issue, which are combination claims and include, not only the feeding mechanism, but the added element of the tearing-off mechanism. It is almost a commonplace that a new combination of elements, old in themselves, but which produce a new and useful result, amounts to invention. *Expanded Metal Co. v. Bradford*, 214 U. S. 366, 381, 29 Sup. Ct. 652, 53 L. Ed. 1034.

[3] Unless Kirby is to the contrary, the prior art indisputably contains no anticipating device—indeed, no device which anticipates even Schirmer's feeding mechanism. In our opinion Kirby does not anticipate the invention of the claims in suit. The Kirby patents are three, viz. Nos. 469,665 and 469,666, both issued February 23, 1892, and No. 545,342, issued July 23, 1895. Each of the three discloses a pin-feed mechanism. In the third patent the sheets of paper are not shown to be previously perforated; the sheets being pierced by the pins as the roller rotates in the feeding process. The first and second patents describe the strips as perforated near their edges or along their sides, and the teeth as engaging with the perforations. The drawings of both the first and second patents show what would seem to be longitudinal perforations, as distinguished from the round

openings of Schirmer. Such longitudinal openings would seem not to serve the full purpose of Schirmer's openings. Defendant has not persuasively shown a draftsman's practice of indicating round holes by lines or slits. Prior patents are part of the prior art only by what they disclose on their face. *Munising Paper Co., Ltd., v. American Sulphite Pulp Co.* (C. C. A. 6) 228 Fed. 700, 703, 143 C. C. A. 222, and cases there cited.

[4] There is, however, express testimony that Kirby's perforations were round, and that machines were constructed under the patents (or one of them) with round strip perforations and with a feeding mechanism substantially that of Schirmer. This testimony is sharply disputed, and defendant's testimony is not corroborated by the production of any machine so constructed or operated. In our opinion, defendants have not shown the alleged prior use by evidence of the high degree required therefor.

But it is enough to say that neither of the Kirby patents discloses the combination of the patent in suit, viz. Schirmer's feed and tearing-off mechanism combined. In the device of the first Kirby patent springs maintain a constant pressure upon the strips to prevent them "from freeing themselves" from the teeth "while being fed through the register," and apparently the same pressure is maintained during the tearing-off process. In the second patent pressure rolls seem to be constantly applied to the strips while fed over the pin wheels. But unless there is a pressure of the paper against the pins during the feeding operation, there would seem to be none during the cutting-off process. In the third patent the strips are fed between two rolls, one being the pin roll. None of the three shows a mechanism in which pressure is applied to the strips only while the feeding is suspended. The quotations already made from the Schirmer patent negative the suggestion that his pressure bar is intended during the feeding operation to keep the strips on the pins. It is difficult to see how the bar could keep the strips on the pins while exerting no pressure whatever on the paper, or, to borrow the language of the specification, if they "engage the sheets of paper only at the expiration of each feeding operation," and if the bar rises from the paper "upon each initial movement of said feed roll in order to not obstruct each feeding movement of the sheets of paper."

[5] We think the claims of the Schirmer patent in suit are not subject to the defense of mere aggregation. True, the cutting-off process does not occur simultaneously with the feeding process. It is enough that the two elements so coact that, as a consequence thereof, a new and useful result, and not a mere aggregation of several results follows. But both the feeding and tearing off are necessary to an effective register. *Houser v. Starr* (C. C. A. 6) 203 Fed. 264, 273, 121 C. C. A. 462; *Krell Co. v. Story & Clark Co.* (C. C. A. 7) 207 Fed. 946, 951, 125 C. C. A. 394; *Sievert v. Mausoleum Co.* (C. C. A. 6) 213 Fed. 225; *Ohmer v. Ohmer*, 238 Fed. 182, 190, 151 C. C. A. 258.

[6] We find nothing in any of the references, sought to be introduced upon the motion to reopen, which, if received, should have af-

fected the result. None of these references are in the register art. Several of them relate to the feeding of motion picture films in the process of printing. Some of them involve feeding more than one strip, and show that it was old in that art, even before Schirmer, to evenly feed a plurality of celluloid strips by means of perforations in the margin engaging pins mounted upon rollers. One at least of these patents states that, "were there any appreciable slipping at any tooth, the next tooth would tend to correct the error." Another reference relates to a vending machine, in which a perforated tape or paper, slotted to receive the article to be sold, is fed by means of pins (on a drum) which engage the perforations in the tape. Another involves a speedometer, in which a ribbon is carried by means of perforations therein engaging with points on a drum. But neither one of these references discloses the combination of the Schirmer patent or throws any appreciable light upon the question of invention in the Schirmer device.

In our opinion the claims of the Schirmer patent in suit involve invention. Assuming, for the purposes of the opinion, that Schirmer's feeding device involves no invention over Kirby, and thus that each element of the combination is old, it yet remains that the combination itself is new; and we think it clear that this combination marked a distinct advance in the register art, in that it accomplished a better result than had ever before been achieved, and in a distinctly new way. This is invention. Walker on Patents (5th Ed.) § 26, and numerous cases cited.

This conclusion of fact is supported, not only by the testimony of experts, but also by the fact that during a long period of years it had not occurred to those actively experimenting in an effort to produce an effective registering device to combine Schirmer's feed mechanism and his cutting-off mechanism, but also by the success of the Schirmer invention and its favorable reception by the buying and using public.

[7] In our opinion, also, the defendant must be held to infringe. Its feeding device is substantially that of Schirmer. Pressure is applied to the strips only during the cutting-off operation and while the feeding is suspended. Instead, however, of employing the cutting-off device adopted by Schirmer, defendant employs the device shown in the patent to Begg, No. 467,393, January 19, 1892. Begg's device differs from Shoup's device before explained in this: It consists of a pivoted flat bar with a cutting edge, which is out of-engagement with the sheets until the tearing-off operation. When the sheets are, by the hand of the operator, pulled upwardly and against the cutting edge of the bar, the latter is tilted, and the opposite edge thereby automatically presses upon and holds the strips firmly while they are being so severed. We think, under the reasonable range of equivalents to which Schirmer's invention entitles him, defendant's cutting-off device must be considered the mechanical equivalent of Schirmer's. Plaintiff is not limited to the specific form shown in the patent. *Schiebel Co. v. Clark* (C. C. A. 6) 217 Fed. 760, 768, 133 C. C. A. 490.

[8] True, Schirmer's so-called pressure roll (in some respects a

misnomer) automatically engages the strips to be torn off, while defendant's plate is brought into such engagement by the manual lifting of the strips; but the question of mechanical equivalency goes farther and must be determined by comparison of the entire operation in each case. In each the strips are torn off by hand; the differences are merely that in Schirmer the strips are clamped before the tearing operation begins, and the rear edge of the top of the machine is the cutting plate, while in defendant's machine the act of manually lifting the strips for the cutting-off operation mechanically raises the plate, thereby clamping the strips, which are then torn by the opposite cutting edge of the plate. While a mere manual operation is not the equivalent of a mechanical operation (*Brown v. Davis*, 116 U. S. 237, 249, 6 Sup. Ct. 379, 29 L. Ed. 659), in our opinion this rule as applied to the methods in question here does not defeat equivalency. In each of the two methods the same result is accomplished in substantially the same way and by substantially the same means. Both devices were old, were borrowed from the same art, where they were used for the same purpose, and may fairly be considered interchangeable. The fact that the Begg patent had expired when defendant adopted its device is not important.

It follows, from these views, that the decree of the District Court, finding the claims in suit valid and infringed, should be affirmed. In view of the conclusion already announced, that the new references which formed the subject of the motion to reopen contain nothing which should change the result theretofore reached below, and the ground of the refusal to reopen not appearing, the order of denial is affirmed.

Appellee will recover its costs of this court in each appeal.

OUTLOOK CO. v. PRESTO CLOTH MFG. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. August 3, 1920.)

No. 3392.

Patents 328—993,816, for wind shield cleaner, not clearly shown infringed.

Refusal of a preliminary injunction against infringement of the Beitman patent, No. 993,816, for a wind shield cleaner, *held*, on the record, within the discretion of the court notwithstanding prior decisions sustaining the patent.

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Suit by the Outlook Company against the Presto Cloth Manufacturing Company and others. From an order denying a preliminary injunction, complainant appeals. Affirmed.

Charles E. Brock, of Cleveland, Ohio (Hull, Smith, Brock & West, of Cleveland, Ohio, on the brief), for appellant.

George E. Kirk and Alex L. Smith, both of Toledo, Ohio, for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. The court below denied a motion for preliminary injunction in an infringement suit upon the Beitman patent, No. 993,816, dated May 30, 1911, for a wind shield cleaner. The same patent had been sustained and injunctions granted against other infringers in earlier cases; one before Judge Westenhaver, in the Northern district of Ohio, and one before Judge Hand, in the Southern district of New York. In the former, there was an opinion discussing the validity and scope of the patent; the latter seemingly was merely supplementary to the earlier one. The present appeal is upon the theory that validity and infringement are so far established by these decrees and are otherwise so clear that it was an abuse of discretion to deny the preliminary injunction.

In certain weather conditions, the outside of the glass wind shield, in front of the driver of an automobile, becomes obscured by rain, mist, snow, etc., and, in order to maintain his clear vision, it must be occasionally cleaned by some device which can be operated by him from the inside. The sixth claim of the Beitman patent sufficiently indicates his construction. It is:

"The combination, with an upright window pane or transparent screen forming a wind shield, of a shaft arranged above and transversely of the top edge of the pane or screen, which shaft terminates at the outer side of the pane or screen in a depending arm, which is spaced from the pane or screen, said shaft terminating at the inside of the pane or screen in a downwardly projecting lever which is spaced from the pane or screen and arranged substantially parallel with the aforesaid arm, a suitably supported bracket bearing the shaft, and a wiper arranged between the aforesaid arm and the outer edge of the pane or screen, and extending longitudinally of and connected to the said arm."

The other claim in suit, No. 1, differs chiefly from claim 6 in that it requires that the shaft-bearing bracket shall be adjustable longitudinally of the edge of the screen, and does not specify any downwardly projecting lever from the inner end of the shaft. It should be added that, in the construction shown in Beitman's drawing, and fully described in the specification, the shaft which extends transversely of the screen edge and the downwardly projecting wiper holder on the outside and the downwardly projecting lever upon the inside comprise one continuous metal rod, substantially U-shaped, but with a double right-angled bend at the central portion, in order to make the transverse shaft, and with a spring tension toward each other between the two depending inside and outside members. The inside as well as the outside arm is in spring contact with the glass, and thereby the necessary constant spring pressure of the wiper against the outside is maintained. This limitation to the unitary construction of inside and outside members and transverse shaft is not found in claim 1, and is not expressly

stated in claim 6; but it is not difficult to imply it from the language of the latter claim.

An examination of Judge Westenhaver's opinion in the former case shows that, in discussing the references and reaching the conclusion that the claims of Beitman embodied patentable invention, he placed some force, not only upon this mutual spring action of the two depending arms, but upon several other matters of detail tending to simplicity and efficiency, either of attachment or of operation, in which Beitman differed from the references, and in which the construction of the defendant in that case was to be classified with Beitman. The construction used by the defendant in this case does not involve such a unity of transverse shaft and depending arms, and differs from Beitman in some other particulars, which were considered by Judge Westenhaver as deserving mention in distinguishing between Beitman and the prior art. Further, the present record contains additional instances of patents issued, or at least carried back, earlier than Beitman, and a further instance of a device upon the market before Beitman, and which is alleged to have an important bearing on the issues.

It is clear enough that, except for the prior decision, the refusal of the District Judge to grant a preliminary injunction in this case would be well within the limits of discretion; and we think the differences between the former record and the present one are sufficient to make a basis for a discretionary refusal of the writ in the present case. Further than that we do not think it best to go upon this preliminary record.

The order below is affirmed.

CAN'T SLIP COLLAR BAR CO. v. C. R. HETTEL JEWELRY CO.

(Circuit Court of Appeals, Eighth Circuit. August 26, 1920.)

No. 5490.

Patents 328—1,265,214, for improvements in a collar clasp, held not infringed.

The Kunz patent, No. 1,265,214, for improvements in a collar clasp, the claims of which were limited by the patentee, to avoid the prior art cited by the Patent Office, to the specific construction in which the teeth passed on opposite sides of the bar, *held not infringed*.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by the Can't Slip Collar Bar Company against the C. R. Hettel Jewelry Company for infringement of a patent. From a decree dismissing the bill of complaint, plaintiff appeals. Affirmed.

Alfred A. Eicks, of St. Louis, Mo., for appellant.

Edwin E. Huffman, of St. Louis, Mo., for appellee.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

HOOK, Circuit Judge. This is a suit for infringement of patent No. 1,265,214 to Kunz, May 7, 1918, for improvements in a collar clasp. On final hearing the trial court dismissed the bill of complaint, and plaintiff, the assignee of Kunz, appealed.

The invention claimed in the patent relates to improvements in the common collar pin or clasp, consisting principally of a curved bar and two spring members back of it, arranged to engage and support the ends or wings of a soft collar. In order to avoid the prior art, the Patent Office required Kunz to narrow each claim of the patent to his particular specific arrangement of the projecting teeth on the rear or spring members of the clasp. He acquiesced in the ruling, and specified that the teeth straddled the bar. In other words, to quote from the patent specifications:

"The teeth are so shaped as to pass on the sides of the bar, and when the clasp is in its normal position, and not applied on the collar, the outer teeth will project slightly above the outer surface of the bar."

In defendant's device there is a tooth at each extreme end of the bar, which under like circumstances lies between two teeth on the end of the corresponding spring or clamping member of the clasp. Consistently with the ruling of the Patent Office on the prior art, and the limitations imposed on Kunz and accepted by him in order to get his patent, the spring teeth of defendant neither pass on the sides of the bar nor straddle it. The conclusion that defendant's clasp does not infringe is so plain as not to require discussion, and it makes it unnecessary to consider whether the patent in suit is void for want of novelty.

The decree is affirmed.

INDIVIDUAL DRINKING CUP CO., Inc., v. SANITARY PRODUCTS CORPORATION.

(District Court, E. D. Pennsylvania. July 22, 1920.)

No. 2023.

Patents ⚡328—1,043,854, for drinking cup dispenser, valid and infringed.

The Luellen patent, No. 1,043,854, for individual drinking cup dispenser, under prior decisions, *held* valid and infringed, on motion for preliminary injunction.

In Equity. Suit by the Individual Drinking Cup Company, Incorporated, against the Sanitary Products Corporation. On motions by defendant to dismiss and by complainant for preliminary injunction. Motion to dismiss denied, and preliminary injunction granted.

Henry P. Brown, of Philadelphia, Pa., and Dunn, Goodlet, Massie & Scott, of New York City, for plaintiff.

Joseph C. Fraley, of Philadelphia, Pa., and O. Ellery Edwards, Jr., of New York City, for defendant.

THOMPSON, District Judge. The defendant moves to dismiss the bill upon the ground that the plaintiff cannot ultimately prevail in any event, in view of admitted facts, which it is claimed by the de-

fendant establish the invalidity of the patents in suit. As to Luellen patent in suit, No. 1,043,854, the defendant relies on the Wilson and Neeley patent, No. 570,113, and the Bauer German patent, No. 45,842.

Taking up first the attack on No. 1,043,854, Judge Haight, in *Individual Drinking Cup Co. v. United States Drinking Cup Co.* (D. C.) 220 Fed. 331, passed on the question of anticipation by the Wilson and Neeley patent, and held that the use to which it was designed to be put, namely, a cabinet of cork holding and dispensing tubes, was not analogous to that of a device for storing and dispensing individual drinking cups, and the validity of the patent was sustained in the above-cited case on final hearing, as well as in *Individual Drinking Cup Co. v. Osmun-Cook Co.* (D. C.) 220 Fed. 335, on motion for preliminary injunction.

The Bauer patent was not cited before Judge Haight. It is now referred to as a defendant's exhibit in its motion to dismiss the bill. This patent has been examined, with its single claim, specifications and drawings, and I fail to see any similarity to Luellen, No. 1,043,854, in the principle or means by which the result—that is to say, the dispensing of the cups one at a time right side up—is accomplished. They are so entirely different that it does not seem necessary to discuss them. That being the situation, we have two decisions in this circuit in contested cases in which the patent has been held valid, with the only additional evidence of a patent which has no bearing on the question of anticipation. It is insisted, however, that the decision of the Circuit Court of Appeals of the Second Circuit in *Individual Drinking Cup Co. v. Public Service Cup Co.*, 250 Fed. 620, 162 C. C. A. 636, is in conflict with Judge Haight's decisions in the cases above referred to. The Court of Appeals for the Second Circuit had under consideration certain claims of another patent covering a dispensing apparatus for paper cups, and held the patent valid and infringed by a vending machine for cups, but not infringed by a free dispenser.

Upon the evidence before me in the present suit, it is not demonstrated that the reasoning of the Circuit Court of Appeals for the Second Circuit, upon the question of the effect of the commercial development of the art upon the patent then before them, must be disregarded, if Judge Haight's ruling upon the patent in suit is followed. Judge Haight's opinions are directly in point, and for the purposes of the present motions must be taken as having established the validity of the patent.

The defendant has not established a right upon the record as presented to have the bill dismissed as to patent No. 1,043,854. It contends, however, that the bill should be dismissed as to the other patent in suit, No. 1,131,255. That patent was granted on an application filed November 18, 1914, which is a divisional application of an original application filed March 24, 1911.

I am not convinced that it is necessary to consider the motion to dismiss as to the junior patent, because the plaintiff can, for the purposes of maintaining its bill, rely upon the older patent, so that, if there is sufficient in the bill to preclude the conclusion that the plain-

tiff cannot under any circumstance recover, it is not necessary to consider the technical question raised by the defendant's construction of the decision of the Supreme Court in *Chapman v. Wintroath*, 252 U. S. 126, 40 Sup. Ct. 234, 64 L. Ed. 491, No. 117, October Term, 1919, Patent Office Gazette, vol. 272, page 913.

The motion to dismiss will therefore be denied.

Upon the motion for preliminary injunction, the defendant has, apparently for the purpose of the present motions, withdrawn its objection to the lack of proof of plaintiff's title, for in its rebuttal brief the court is asked to decide the case on its merits. The question of title being out of the way, and the validity of the patent being established for the purpose of this application by Judge Haight's decisions discussed above, the remaining questions are whether the plaintiff has established infringement and such irreparable damage as to justify the court in issuing a preliminary injunction.

I do not think it is seriously disputed that the defendant's dispenser No. 1 is as clearly an infringement as Plaintiff's Exhibit "United States Drinking Cup Company's Enjoined Dispenser," which is covered by Judge Haight's injunction. While the defendant's manufacturer has attempted to differentiate the device in appearance by the use of small projecting rollers at the withdrawal or lower extremity of the tubular container, it is impossible to see that in effect it is more than an equivalent of the ribbed device shown in the patent drawing in figure 2. Neither is there any real mechanical difference between the carton dispenser of the plaintiff and those of the defendant.

The plaintiff is entitled to a preliminary injunction upon the same grounds upon which Judge Haight based his decision in the cases of *Individual Drinking Cup Co. v. United States Drinking Cup Co.* (D. C.) 220 Fed. 331, and *Individual Drinking Cup Co. v. Osmun-Cook Co.* (D. C.) 220 Fed. 335.

A preliminary injunction may issue.

CURTISS AEROPLANE & MOTOR CORPORATION et al. v. JANIN et al.

(District Court, E. D. New York. April 30, 1920.)

Patents 114—Priority of invention of hydro-aeroplane determined.

The decision of the Court of Appeals of the District of Columbia in *Janin v. Curtiss*, 45 App. D. C. 362, on an interference issue awarding to Janin priority of invention of a hydro-aeroplane, held correct in a suit by Curtiss under Rev. St. § 4915 (Comp. St. § 9460), to obtain a patent therefor, and his right to a patent denied.

In Equity. Suit by the Curtiss Aeroplane & Motor Corporation and Glenn H. Curtiss against Albert S. Janin and the Janin Company, Incorporated. Decree for defendants.

S. Mortimer Ward, Jr., of New York City (Richard Eyre, of New York City, of counsel), for plaintiffs.

Thomas A. Hill, of New York City, for defendants.

CHATFIELD, District Judge. The present action is brought under section 4915 of the Revised Statutes (Comp. St. § 9460) asking an adjudication that the plaintiff Glenn H. Curtiss is entitled according to law to receive the patent for certain improvements in aeroplane structures, having the capacity of alighting upon and flying from water, for which the Court of Appeals of the District of Columbia rejected the application of the plaintiff Curtiss, holding on June 1, 1916 (Janin v. Curtiss, 45 App. D. C. 362), that the defendant Albert S. Janin should be granted this patent based upon claims which in the form of a single issue were the subject-matter of an interference proceeding between the plaintiff Curtiss, herein and the defendant Janin, herein, in the Patent Office of the United States. This is not a case between interfering patents, under section 4918, R. S. (Comp. St. § 9463). The scope of a decision such as is sought in the present case is stated at more or less length in *General Electric v. Steinberger* (D. C.) 208 Fed. 699, affirmed 214 Fed. 781, 131 C. C. A. 193.

The first record in the Patent Office was an application filed by the defendant Janin on January 26, 1911. This particular application was followed by a second, in which biplane wings were used in the place of the monoplane wings. This second application was filed August 9, 1911, and was in the Patent Office under consideration when on July 31, 1913, after the instituting of the interference proceeding, Janin's attorney had prepared and filed a divisional application showing only such parts of the original drawings and specifications as related to the subject-matter of the interference issue. The plaintiff Curtiss' patent application was filed on the 22d of August, 1911.

The first Janin application has been abandoned, as has, apparently, been the application filed August 9, 1911. These applications described a vehicle or vessel capable of flight in the air with an automobile running gear, for use in either starting or lighting upon the land from the air, and in proceeding on the land as well, and with a body for the machine which would constitute a boat or floating and supporting craft, intended by the inventor to be driven forward when resting upon the water by the same air propellers used to propel the apparatus when flying in the air, and also by paddle blades attached to the spokes of the wheels.

The expressed intention is to reach a speed upon the water at which the air lift of the planes will separate the craft from the water and allow it to continue its course as an aeroplane, in the same way in which it would be operated if it had arisen from the ground. The boat-shaped body of the craft was also planned to enable it to alight from flight upon the water as well as upon the land. Mechanism was shown for folding the monoplane or biplane wings and rotating them about a universal joint to a position where they would present the edge of the folded surfaces toward the front when the machine was to proceed as an automobile on the land.

The defendant Janin has always claimed throughout the proceedings that he conceived the idea of a boat, with wings for operation in the manner described, in the year 1899, when he, as a boy of about 19 years, worked upon a steamer between New York and the West Indies

Islands. His ideas were copied from the flying fish, which, leaving the water, seemed to him to balance itself by the fluttering motion of its under wings or fins, until its larger wings were able to steady it in the air, and from the tips of the wings and the tail of the sea gull, which, as every one knows uses the flexible tips of its wings in controlling its motions in the air, changes the angle of those wings and of its tail in rising or falling and settling upon the water, and which leaves the water for the air by lifting itself with the supporting force of its wings, through muscular effort. The flying fish, on the other hand, according to Janin's testimony, shoots up or darts up out of the water, evidently exerting a part of its muscular force against the water, and getting into the air, before its wings furnish a complete support by the lifting thrust of the air resistance against the wings.

The defendant Janin was a man of straitened circumstances working as a carpenter after his return ashore, and with a family which increased rapidly. In 1912 he had 7 children, and has had 13 children in all, of whom 7 are now living. He lived in a small building on Clifton avenue, at Rosebank, Staten Island, until about the year 1912. For several years before moving from that house (because of sickness and lack of room) he made use of a small shed or shop back of the place where he lived and in the rear of the house of one Lamb on the next cross street. In this shop during that period he worked upon a full-sized model of his invention.

During the course of this trial many minor points have been put in issue as to the exact dates and circumstances of this work, but the witnesses are sufficiently corroborated, and corroborative of each other, to satisfy the court that Janin was working on this boat long prior to the date when he filed his application in the Patent Office on January 26, 1911. His work amounted to nothing practical, for his lack of funds and the necessity of leaving the machine when he moved led him to use the material as firewood, and nothing remains but a sheet iron pontoon, which has been marked as an exhibit in this case, and which in size and shape corresponds exactly with the original drawings and with the patent application of 1911, but differs a little from the application of 1913.

There has also been put in evidence one of two propellers made by the defendant and exhibited by him to several of the witnesses in the year 1909. Later he delivered one of these propellers to a witness Daniels, referred to as a prospective witness for the defendant, but called to the stand by the plaintiff, whose testimony is undoubtedly accurate, as evidenced by a letter produced, written by him to Janin, and put in evidence in the case. The workmanship and features of this propeller will be referred to subsequently.

This witness Daniels testified that Janin afterwards became involved in some altercation with him over an endeavor to have Daniels testify that Janin applied to him for the rental of an engine at the time of exhibiting to him the propellers. One of the propellers is still in Daniels' possession and some acrimonious dispute arose over Janin's efforts to have Daniels find and produce the propeller, which would involve a great deal of work on the part of Daniels.

But, ascribing to Janin all of the conversation which Daniels attributes to him, and assuming that Janin has endeavored to get Daniels to testify to things as to which Janin might have been mistaken, or should know did not occur, nevertheless Daniels' testimony establishes the date of 1908 or 1909 as the time when Janin was constructing his boat and making inquiries about engines for aeroplanes which were being built by Daniels on Staten Island, and as to which Janin must have had knowledge. These engines were two and six cylinder gas engines, and their existence corroborates the testimony of the Janin witnesses in fixing the dates in years earlier than the plaintiff now contends Janin could have understood and had in mind the matters disclosed by his application of January, 1911.

The plaintiff Curtiss had had mechanical experience in the repair and construction of bicycles and of motorcycles and engines therefor when he undertook experiments in the building of aeroplanes and their engines at his home in Hammondsport, on Lake Keuka, N. Y. He had successfully flown an aeroplane prior to 1908, and his means of controlling an aeroplane was involved in litigation with the Wright Bros., finally terminating in favor of the Wrights, by the case reported as *Wright Co. v. Herring Curtiss Co.*, in 211 Fed. 654, 128 C. C. A. 158.

Curtiss obtained means to carry on his aeroplane experiments and for the building of his improved engines by exhibiting at county fairs and other places where crowds would be assembled. In 1908 Curtiss experimented with an idea of the witness McCurdy, using a catamaran formed with two canoes as a support for the wings and engine of an aeroplane (which he had named the "June Bug," and with which he had made successful flights from the land) by gliding over the waters of Lake Keuka, in an endeavor to see whether the aeroplane would leave the smooth surface of the lake under similar conditions to those under which it would rise from the land. Curtiss' association with the neighboring lake, and the evident ease of proceeding in canoes over its surface, made this attempt natural, and of itself indicated no great discovery or inventive idea. The same idea from time to time occurred to other people and was attempted in different ways, arousing great curiosity and interest in the press and public.

In evidence in this case are the Forlanini United States patents, No. 1,024,067, issued in 1912, on an application filed July 26, 1907, and No. 1,112,405, issued September 29, 1914, on an application filed April 9, 1905, showing wings or airplanes supported by several sets of hydroplanes or hydrofoils; each set consisting of several planes suspended below each other in the water on a vertical frame projecting down from the wing structure on each side of the center line or pontoon. Also the Dyer application for a land, water, and air craft with planing surfaces on each side, was filed April 26, 1905, but not allowed until September 1, 1914.

In May, 1910, Fabre flew an aeroplane from the water in France, and this was described in the United States in the *Scientific American* of December 17, 1910. He used three hydroplanes attached to a tricycle frame supporting his wings, engine, and operator's seat. Hydroplane

surfaces and the hydroplaning idea were old, but little used. Long, narrow craft, such as canoes and racing shells, propelled and also held on an even keel, or righted by the use of paddles or sweeps (not continually on the water), and rendered more stable as speed increased, on the principle of a bicycle, had long been in common use. An automatic application of this idea for restoring balance had not been needed, but was suggested by the De Lambert hydroplane of 1895, patent No. 538,527, and by Forlanini, who used rudders in his device, but suggests that on a straight course they may be lifted, and the accuracy of the course regulated by proper distribution of weights, or by varying the relative angle of the submerged blades on the opposite sides of his craft, and who also restores equilibrium by the differing bearing surface of the planes as they are forced up and down in the water.

The general idea of proceeding upon the water or flying from the water with a so-called hydro-aeroplane was not patentable as invention, or was never claimed as such by the many persons who sought to devise a successful and practical means for obtaining the result. Curtiss knew of the form of catamaran used in the South Seas, with an outrigger. He was familiar with bicycling, and his suggestion, as an improvement over the two-canoe catamaran, was to use one canoe with outriggers. This idea by itself would not be patentable, unless applied to an aeroplane in such a way as to show mechanical invention over the two-canoe catamaran in other respects than lessening the drag of the boat part of the craft. It was common knowledge at this time that a bicycle or racing wheel could be kept in equilibrium and attain greater speed than could be reached with a structure having stable or constant points of contact and balance with the earth or the water, as the case might be.

Curtiss evidently made the suggestion that a single canoe, with outriggers, would run more easily and give more speed than a double canoe, but shows no definite appreciation of the other principles which he subsequently used in constructing a device which would do what he and others had in mind. He did not attempt to put his suggestion into practice, or to work out the possibilities of that idea. The "June Bug," with the two canoes, never left the water or was brought to a speed where leaving the water could be attempted; in other words, a speed where the lift of the wings would be sufficient to fly in the air in case the water could be arisen from. At one time he tried the idea of a single canoe with outriggers. He placed the outriggers on the underside of his planes, using tin pontoons and later old automobile tire tubes, in order to get buoyancy with little weight, and fixing them in position by a so-called slat, which would drag in the water at an angle, like the toe of a small boy, steering his sled while sliding down hill, or like the paddle of a canoe, dragging in the water both to change direction and preserve balance. Curtiss testifies that he was more or less familiar with the use of canoes, and it is probable that this was the source of his idea.

Curtiss dropped the matter temporarily and began preparations for the winning of a prize offered for a continuous flight by aeroplane from Albany to New York, along the line of the Hudson river. For this

purpose Curtiss constructed an aeroplane with a canoe rigidly supported beneath the aeroplane, by means of which he hoped to succeed in floating in case he was compelled to alight while following the river. He did not intend to proceed upon the water, nor to rise from the water, and had the usual wheels for flying from the land. He was successful in winning the prize and did not descend upon the water at any time. He later exhibited this machine at Atlantic City, and in such ways spent his time until later in the year 1910, when he again, at Hammondsport, went in with his experiments with one canoe attached to his ordinary aeroplane wings and engine. He attempted to get this structure up to a speed where the planes would support it in the air and force it from the water. The canoe not only dragged heavily as the speed increased, but buried itself in the boiling water at the stern. Small boards or hydroplanes under the canoe had been tried in June, 1910, but were unsuccessful, and experiments with the canoe were abandoned. He showed no idea of using hydroplanes instead of the canoe, and in fact showed no appreciation of the principles of hydroplaning in any way.

Curtiss learned of the experiments then being conducted by Fabre in France, in which Fabre was using hydroplane surfaces as supports for his aeroplane. The prior art shows that the principles of hydroplaning had been known since 1872, when they were discussed by Froude¹ in England; but no application was made, through the lack of demand for such surfaces, until the development of power engines and higher grade steam engines. The ordinary steam engines of the prior art had not been able to drive boats at such speeds as to lead builders to the conclusion that increased speed resulted in a disproportionate increase of resistance, when the speed reached a point where the mutability and mobility of water was lost, and where it resembled a more or less solid or congealed surface.

But the development of engines brought out that a boat moving sufficiently fast could slide up and out of the water until a point was reached where it in effect rested on the water as on a jellylike, or even congealed, surface, and the utility of the hydroplane was recognized. The bottoms of boats were then shaped in hydroplane fashion to conserve and appropriate to the greatest possible extent the qualities of water in allowing a boat to slide up and rest on the water as well as to cleave through it:

Andrews patent, No. 7449 (1850), for a hydroplane surface boat.

De Lambert patent, No. 538,527, issued in 1895, for a boat with hydroplaning outrigger surfaces.

Holmstrom French patent, No. 395,111, of December 18, 1908.

With Fabre's ideas in mind Curtiss built a hydroplane float of the same shape as Fabre and of sufficient size to support the weight of his aeroplane, with its engine and driver. He took one of his land machines, in which the engine was placed some distance above the wheels and nearly in a line with the propellers. The probability that the ma-

¹Reported by Rev. C. W. Rasmus, and printed July 21, 1874, by Syre & Spottiswood, Limited, East Harding street, London.

chine would tip forward or back in rotation around the point of support on the pontoon, and that this tendency to rotate would be increased when the engine was started, was so self-evident that, apparently as soon as these experiments were started, Curtiss placed a small pontoon at the front of his frame, where, for use upon the ground, he had a third wheel, by means of which the downward rotating thrust of his engine could be converted into a forward push in getting up speed on the earth. This thrust naturally had to be overcome on the water, and another hydroplane surface was the obvious way for him to prevent nosing over, and at the same time to provide for forward progress on the water. His machine for these experiments was sent to California. For several days in the month of January, 1911, he and his assistants experimented, using the vertical and horizontal rudders and the wings and the aeroplane as he would use them in tilting his machine up in leaving the ground. He employed in this the back draft of his propellers, in so far as they would overcome the forward thrust of the power applied in the line of his propeller shafts.

Various failures resulted in causing him to add a canvas extension to his main pontoon to increase its hydroplane surface, the addition of a canvas shield, to protect from spray and also to help the lift of the planes, and finally in the placing of a so-called hydroplaning board (which was several feet in length and a few inches wide) at the extreme forward point of the braces intended to hold the forward wheel of the land structure. With this last hydroplane Curtiss succeeded in stopping the tendency of the machine to nose over, and developed hydroplaning qualities sufficient to make him feel satisfied that he could get the machine off the water.

For at least a day, and probably two days, he experimented with the arrangement and strengthening of the parts of the machine as last described, making what he calls "skips" or short flights from the water, not of sufficient height or duration to demonstrate to observers what he could do, but proving to his own satisfaction that a flight could be accomplished. On January 26, 1911, he did attempt a flight, and succeeded in leaving the water for such distance and at such a height that he was able to proceed over the waters of the bay at San Diego and to return to his starting point, thus proving to the satisfaction of those present that sustained flight had been accomplished with this machine.

It is evident from the testimony in this case that on January 26, 1911, and for one or two days prior thereto, Curtiss had a conception, with sufficient reduction to practice to furnish a basis for a claim of invention by him of the particular means of accomplishing the feat of flying from the water with an aeroplane, which was publicly disclosed by the San Diego experiments on January 26, 1911, and published to the world on the following morning in the newspapers.

In this machine Curtiss again used the idea of supporting pontoons as paddles or outriggers to maintain and create lateral balance as in his previous experiments on Lake Keuka. But Curtiss had already observed sufficient in connection with the hydroplaning idea to cause him to attempt to build one hydroplaning pontoon long enough to support the forward thrust when the engine was started, instead of the

two or three small devices which he was then using to accomplish that result. He had such a pontoon built, and evidently having in mind the amount of buoyancy needed and the unnecessary lateral stability and friction caused by the width of his original pontoon, he narrowed his hydroplane surface to the point where he would have sufficient support with the least width in comparison with the length which he felt necessary. This structure was completed somewhere around the 1st of February, 1911, and resulted in successful flight. He sold two of these machines later in the year to the United States government for practical use.

The feature that must be remembered in connection with this main pontoon and with the lateral balancing pontoons is that they were all hydroplaning surfaces, and the large pontoon had at the rear end a sharp departure, in a straight line across its width. But even by this the lesson was not completely learned. Subsequent experiments were made with a buoyant tail or after part attached to the hydroplaning surface of the forward part of the boat, and Curtiss himself, long after, undertook to build a large hydroplane for the carrying of passengers and cargo, known as the *America*, for a flight across the Atlantic, which had a long sloping tail. The *America*, however, would not rise with the load intended for her until a step or break (the sharp departure previously referred to) was constructed on the underside of the body.

After the experiments at San Diego, Curtiss came East, further experiments were had with a single main pontoon on Lake Keuka, and on August 22d of that year his application was filed, which has been brought into interference with the Janin application then on file. Subsequently, as has been stated, Janin filed a divisional application for the direct purpose of conducting the interference, and in his divisional application Janin omitted entirely his automobile or land structure and the mechanism to fold the wings in order that the machine could be used as a land structure. Necessarily, in doing away with the wheels, he omitted any reference to the paddle wheel blades which he had previously described as attached to the spokes of his land structure, and which were designed to speed up operation on the water, to reach an effective speed for lifting the device from the water and supporting it by the aeroplane wings.

By this divisional application Janin relinquished, so far as this case is concerned, any attempt to retain the automobile or land-operating features of his machine. It could not even start from the land, but, as was suggested by the issue in the interference proceeding, involved only the idea of an aeroplane that could be started from and which could alight upon water.

No legal objection appears which would prevent such division, and there is nothing improper in law or in morals in the claim by Janin that the parts described in his divisional application were all fully disclosed in his original application, and that he is entitled to the benefit of that disclosure. He has altered neither the drawings nor the language. The plaintiff, however, objects to the result on various grounds. He contends, and the evidence seems to show, that such great resistance

would be caused by the wheels, springs, and other parts of the land apparatus that the original Janin application would never attain speed sufficient to allow it to leave the water so long as these were all attached.

The plaintiff claims, and seems to show, that the paddle wheel blades would not by rotation of the automobile wheels effectively increase the speed of the machine. The plaintiff shows, and has proven, that a long fish-shaped body cannot be driven at sufficient speed upon the surface of the water to cause it to hydroplane, in the absence of hydroplaning surfaces on the underside of the body.

The plaintiff has shown and proven that a long fish-shaped body cannot be tilted in the water without thereby causing additional sucking down of the tail and dragging of the underbody, thus retarding hydroplaning and such increase of speed as would be required to bring the boat to a position where the aeroplane can take it into the air, so long as the aeroplanes and the engine are in any sort of proportion to the size of the total structure.

The plaintiff claims and has proven that the defendant did not disclose anywhere in his original application any idea of separating or dividing his claims or device so as to show the thought of a hydroplane apart from the automobile features with aeroplane wings and boat body. But Janin's original sketches and model were for the wings and boat only, and to that he added the automobile parts and made the changes called for thereby.

The plaintiff contends that to thus physically divide the application into two parts, one of which has the aeroplane wings, the engine, the boat structure, and the balancing pontoons, while the rest of the application has also the wheels and folding mechanism for the wings, is not an allowable division, but is the making of a new application which is junior in date to the application of Curtiss, in which no such modification has been made.

This question was raised in the Patent Office with regard to the shifting of the burden of proof; the question being raised in a different interference between Janin and Curtiss involving a fourth divisional Janin application, having identically the same disclosure as the present Janin divisional application involved in this suit, and a divisional application of Curtiss having identically the disclosure of Curtiss' application involved in this suit. In that interference, Curtiss' application being the first filed, he was made the senior party, and Janin moved to shift the burden of proof to Curtiss, on the ground that Janin had filed an earlier application, namely, his first application of 1911. The examiner of interferences denied the motion to shift the burden of proof, holding that—

"No positive opinion as to the merits thereof [referring to Curtiss' contention of the inoperativeness of Janin's device] will be expressed at this time, inasmuch as it would have to depend, to some extent at least, upon the interpretation of the issue. * * * Inasmuch as it is not conclusively apparent that either application filed by Janin in 1911 constituted constructive reduction to practice of the invention in issue, said applications do not afford an adequate basis for shifting the burden of proof at this stage of the proceedings."

The same proposition is now presented on this trial, in that the plaintiff insists that Janin's divisional application should not be considered as a part of the application filed January 26, 1911, but is in reality a junior application, and that Janin therefore must show with certainty prior date of conception and diligence in reduction to practice by his application, in order to prevail.

The cases of *Laas v. Scott* (C. C.) 161 Fed. 122, *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657, and *General Electric v. Steinberger*, *supra*, outline the proposition that a junior application must do more than sustain, by mere preponderance of proof, the earlier date of conception and diligent reduction to practice. But in the present action testimony was received from both parties, without attempting to hold them down technically as to order of proof. Every particle of proof that either side saw fit to submit was let in the case, if it was competent and material.

The court must find the facts, and the facts alleged must be established by the plaintiff, so as to show that the decision of the Court of Appeals is incorrect. Thus the burden is on the plaintiff Curtiss to overcome the presumption created by that decision. This can be done only by new and highly persuasive evidence clearly establishing the decision to be incorrect. *Morgan v. Daniels*, *supra*. Further, if Janin be deemed junior in application, it would be because his first application does not disclose the invention. This question goes to the merits of his case and will be discussed later.

Another question which arose during the course of the proceedings of the above-mentioned Curtiss divisional application, and which was taken to the Court of Appeals for the District of Columbia, had to do with the decision of the Commissioner of Patents that as a *res judicata* Curtiss was not the prior inventor of the device of certain claims of the original application included in a divisional application filed June 12, 1916. The language of these claims describes solely the operations of the device when in contact with the water, and Curtiss therefore argued before the Court of Appeals that that issue was limited to a mere glider, not even necessarily possessing hydroplaning qualities, inasmuch as there was no specification that the structure must get in the air. The Court of Appeals decided (46 App. D. C. 183) that Curtiss in his 1910 experiments with the canoe structure, which he was unable to get off the water, showed no reduction to practice of any idea beyond that of a glider, while the issue in the preceding interference contemplated a device having the capacity of getting into the air. *Janin v. Curtiss*, 45 App. D. C. 362, rendered June 1, 1916.

Leaving, therefore, the question of seniority of application as a matter which will be disposed of upon the merits by determination as to whether Janin was entitled to a finding of prior conception and reduction to practice, we will pass on to a consideration of these issues, as well as consideration of the issue of operativeness as presented upon the whole case, and to a finding of the necessary facts from which this determination can be made.

The file wrappers put in evidence show that Janin's application was rejected first on the prior art, which showed a machine consisting of a buoyant member or members supplied with aeroplane wings, an engine, and stabilizing or equilibrium producing means. After considerable argument, the application was viewed by the examiner as narrowed in scope to the description of a device of which the buoyant portion consisted of a central main water-borne hydroplane member, with lateral hydroplanes as balancing and equilibrium restoring devices. On this issue Curtiss and Janin were thrown into interference, and the issue of the interference was stated as follows:

"A hydro-aero machine comprising a main aeroplane supporting surface, lateral stabilizing aeroplane surfaces to create a difference of lift, a main water-borne central boat structure adapted to support the entire machine when on the water, and, except for the aeroplane lift, constituting substantially the entire supporting element at all speeds so long as the boat structure is traveling in contact with the water, relatively small horizontal water-balancing floats located below the supporting plane and beyond each side of said boat structure, said floats being located above the level of the boat bottom and provided with surfaces inclined downwardly and rearwardly, adapted to be acted upon by the rush of water when the machine loses its lateral equilibrium, and means for operating the stabilizing surfaces to create a difference of air lift."

The examiner of interferences decided in favor of Curtiss. The examiner held that Janin was entitled to the date of January 26, 1911, as the date of constructive reduction to practice, inasmuch as his application at that date contained a disclosure of the invention in issue, but that Janin was guilty of lack of diligence from the time he stopped work in 1909 until January, 1911; that during this time Curtiss, with the same conception, reduced the idea to practice in May, 1910, by his canoe glider, which failed to rise from the water solely through the lack of engine power; that it was capable of skimming over the water, and was therefore a "reduction to practice of the invention of the issue, even if it did not get up into the air." The examiner said that Curtiss' statement, in the New York World of July 3, 1910, that he (Curtiss) was disappointed in not getting into the air, was no evidence that the test was not satisfactory, inasmuch as after his experiments at San Diego, with an additional front float, he returned to the single float construction of May, 1910. The examiner held that Curtiss had solved the problem of preventing the wings from dropping when running over the water, and of obtaining proper flotation for gaining speed, while Janin had slept on his rights until the achievements of Curtiss had been widely published, and that Janin then did nothing but file a patent application, which he subsequently abandoned.

An appeal to the Board of Examiners in Chief resulted in a reversal of this finding; the board holding that Janin, by producing a model made as early as 1907, with inclined balancing side pontoons and with all the features of the interference issue, antedated Curtiss, and that "on this same date, January 26, 1911, Curtiss flew in San Diego, Cal., with a machine which embodied the subject-matter of the count, with the possible exception that the central boat structure was not a single, but a double, pontoon device arranged tandem. This flight, however, even though it be regarded as constituting a reduction to practice by Curtiss, cannot be accepted as prior to Janin's filing date of the same

day, not only because of the difference in time between Washington and San Diego, but also, assuming that the filing of Janin's application and the flight of Curtiss occurred simultaneously, Janin should prevail because the first to conceive." Curtiss did nothing in the way of successful reduction to practice until after the date of January 26, 1911, beyond obtaining proper flotation and rising from the water's surface with a machine similar or substantially identical with that produced by him in 1910, so that there was no warrant therein for overriding the law as to the sufficiency of an unchallenged constructive reduction to practice by Janin on January 26, 1911, to show the completion of his earlier invention. The board held that Janin did not sleep on his rights, but was as diligent as was possible, and finally did that which was sufficient in the law; that is, to file an application embodying his invention.

On appeal to the Commissioner of Patents it was held that the testimony on Janin's behalf did not establish that the exhibits existed in their present conditions at any date early enough to avail him, and did not establish with reasonable certainty that he had in mind at any time prior to the filing of the application of January 26, 1911, the necessary elements of a hydro-aeroplane which could rise from the water. By this date the Commissioner held that Curtiss' efforts had been widely heralded and might easily have affected Janin's statements as to what he sought to attain. If, on the other hand, rising from the water was not deemed essential, the Commissioner considered that the examiner of interferences had properly disposed of the controversy.

On this finding it was necessary for the Commissioner to decide whether Curtiss' work with the canoe amounted only to conception, or whether it constituted reduction to practice. The Commissioner based his finding upon a conclusion that the issue in interference depended upon a machine capable of rising in flight from the water.

Examination of the Janin application of July 31, 1913, and of the Curtiss application of August 22, 1911, shows plainly that both Janin and Curtiss intended to describe a machine which could operate on the water and in the air and return to either element as the case might be. This finding was also made by the Court of Appeals of the District of Columbia.

In the case at bar that meaning of the issue in interference has been assumed by all parties. The statement in the issue that the machine is an hydro-aeroplane, and that the buoyant member is substantially the entire supporting element at speeds while the structure is traveling "in contact with the water," indicates that it is adapted to travel thereafter; that is, in the air. There can be no question that every one concerned with the invention has contemplated a machine which could get into the air from water and fly therein, and it is futile to quibble over the possible limitation of the words of the issue to the description of a glider or skimmer alone.

On the present trial the situation of the parties in this respect has been somewhat reversed from that of the interference. Janin and his counsel claim that the charge by Curtiss of willful deception by Janin and his solicitor, in concealing the bottom of the boat in the drawings of the divisional application of July 31, 1913, is answered by Janin

by showing at this time that hydroplane surfaces were well known and therefore to be understood or usable by any one acquainted with the art in building a device after the language of the Janin specification. But they also suggest that the issue in interference presupposes and does not specify description of the parts which cause the boat to plane out of the water, and that therefore the under surface of the buoyant member is of no importance.

With this the court cannot entirely agree. If the Janin structure was specifically described and limited as of such shape that it could never fly after once in contact with the water, it would be inoperative as a hydro-aeroplane. It could hardly be argued that, if Janin showed an anchor weight suspended from the bottom of his craft, in order to hold it upright, his device would be inoperative, and not movable at all. In the same way, if his device shows nothing beyond a skimmer or glider, the Patent Office might decide in his favor as to the claims describing this skimmer, and could decide in Curtiss' favor as to the claims corresponding entirely to the issue in interference, viz. as to a hydro-aeroplane capable of getting into the air, and the latter claims would be those upon which the patent under discussion in this case would be based. But this charge of inoperativeness must be taken up on the merits in connection with the new testimony on this trial and must be considered further.

The Commissioner upon the appeal to him decided that priority of invention should be awarded to Curtiss, holding that the evidence showing the present condition of the exhibits at any date prior to the filing of the original drawings in the Patent Office, viz. to January 26, 1911, was very slight, and was not established as to any machine which could rise from the water. On appeal to the District Court of Appeals this decision was again reversed, the Court of Appeals holding, as has been previously intimated in this opinion, that Janin's proof as dates, both with respect to conception, preparation of drawings, and work upon models, was clearly established, while Curtiss was held not to have succeeded in rising from the water until January 26, 1911, which was the same date as Janin's first application, and that, since Janin was the first to conceive the invention, this date was too late to avail Curtiss.

The Court of Appeals found that the device of the early Curtiss experiments—that is, the canoe machines used on Lake Keuka—were very different from the modern flying boat. In all of these the engine and the operator's seat were also far above the boat in which both the operator's seat and the engine were placed, as shown in modern devices, and required a long base on the water. This was not changed, even in the Curtiss application of August 22, 1911.

Curtiss evidently was attempting to develop a structure which would fly from the water into the air. The Court of Appeals says that his earlier attempts in 1910 with the canoe machine were nothing more than crude experiments with an inoperative device, but with the purpose in his mind of accomplishing the result which he finally obtained by a different machine. It must be remembered in this particular that the Curtiss device of January 26, 1911, did fly from the water, it did have lateral balancing members, and did have structures in a single

line supporting the device when at rest, and until it planed upon the surface at a speed at which the aeroplane wings could be used both for balancing and lifting purposes. But the San Diego device was gradually modified, and the testimony upon the present case has shown clearly the process of development.

As has been stated, Curtiss was working on the line of the balance of a bicycle. He apparently did not conceive, at any time until the San Diego experiments, that the balance fore and aft was a necessary element to be considered as a part of his hydroplaning surface. He intended to take an aeroplane and put under it surfaces which would hydroplane upon the water and which could be maintained in balance, so far as motion from side to side was concerned. In this he departed from the stable balance of Fabre, and pursued some of the ideas shown by Forlanini in the public print. But Forlanini and Fabre both show that the idea of causing an aeroplane to rise from the surface of water by placing under it hydroplanes was old, at the time of Curtiss' reduction to practice on January 26, 1911, and of the Janin application on that day, and Curtiss has substantially no earlier date of successful conception of a complete structure.

If, on the other hand, we leave out other difficulties, and take the Curtiss structure of January 26, 1911, as a mechanical equivalent of a single pontoon with hydroplaning surface, yet if the Janin structure is operative, Janin's conception was much earlier, and his reduction to practice on that day was good, if he had been diligent in following up his conception without abandonment thereof. The record in the case shows plainly that Janin never abandoned his idea. His diligence was remarkable in the face of the difficulties which he encountered, and, as has been found already in this opinion, he shows clearly and satisfactorily that at some date long before the year 1911, he had prepared the large drawings in the form in which they were ultimately in 1910 given to his attorney for filing an application. His original drawings were not filed with the Patent Office until later, but they are in all respects like the drawings embodied by his solicitor in the patent application. His witnesses, while possibly uncertain or mistaken as to some of the erasures or changes in these original drawings, are positive as to the essential portions thereof, in the papers shown them long before the filing of the patent application.

The propeller in evidence, which was in existence long before the date of this application, shows an apparent improvement or change from the steamboat style of propeller indicated by Janin in the original drawings and in his patent application of 1911, as well as in that of 1913, and, if any inference is to be drawn from this, it would indicate merely that his drawings were of an earlier date than the construction of his large model and of these propellers.

Much attempt has been made by the plaintiff to show discrepancy in the testimony of Janin and his witnesses as to the dates of the construction of this model and their viewing of the exhibits; but the witnesses were carefully observed by the court and their testimony led to the inevitable conclusion that they were testifying from things of which they knew, and that the confusion as to dates and substantial details in no way showed deliberate intention to falsify, nor any rea-

son to doubt that the transactions of which they were telling occurred prior to the date when Janin delivered his drawings to his solicitor for preparation of the application, and hence prior to any date at which Curtiss had successfully brought his device to the point of practical demonstration, whether this demonstration be of a device covered by the issue or not.

The plaintiff sought to show that Janin was not the impoverished person whom he described himself to be. But, while Janin might have obtained the money to have paid a filing fee, there is nothing in the evidence which discredits his testimony that his lack of money was the reason why he accomplished no more than he did, and even if his knowledge of contemporary development in such matters may have finally spurred him on to make the application, his previous delay is not equivalent to an abandonment or a failure to use due diligence equivalent thereto. His small wooden model, introduced in evidence on this trial, corresponds exactly to his original small drawings, as to which he ascribes the date of 1899. Both these drawings and the model describe and illustrate solely a flying boat. The automobile features are entirely lacking, and the devices are evidently intended for use only on the water and in the air.

A serious attack has been made upon the genuineness of the model, inasmuch as Janin made an affidavit at the time of filing his application that no model of his structure had been made. But this model was produced, shown to his attorney, and filed in the Patent Office, on the 4th of December, 1913, and its existence in 1907 or 1908 is plainly indicated by the testimony of the lay witnesses. The fact that it has no automobile structure, no collapsible wings, and is but a partial representation of the structure of the patent application, is sufficient explanation as to why Janin did not refer to this in connection with a model of the complete structure.

The plaintiff also attacks this model because it is like the original sketch of 1899, and because neither of these devices show the changes indicated by the erasures upon the original drawings filed in the Patent Office. The pontoons on this original sketch are closer to the boat structure, while those on the model are further out than the ones shown upon the drawings, and the model shows plain signs that these pontoons have been attached to the wings. The drawings also show the placing of these pontoons on the wings and subsequent erasure therefrom, for the obvious reason that, if the wings are folded, the pontoons would be carried therewith, and hence removed from any possible contact with the water. The wings were to be folded for travel upon the land, and the placing of these pontoons upon outrigger braces from the hull would be plainly a mechanical equivalent for fastening them from braces either to the wings alone or to the wings and the hull together. Their original position upon the model of 1907 is sufficient evidence to indicate that Janin contemplated the possibility of attaching the pontoons to the wings when desirable, long before the completion of the original drawings.

When we consider the sketch of 1899, however, more serious doubts immediately arise. The ideas expressed in this sketch, in the model of 1907, and the drawings used in making the application of

1911, when considered with the erasures and changes in those drawings, show an appreciation of many ideas developed in the prior art and in the progress of aeroplane construction, which make it hard to believe that an untrained youth like Janin could have, as early as 1899, conceived the perfect device portrayed in the original sketch. The book from which the paper upon which this sketch was made was obtained is about 100 years old. Janin's testimony as to its whereabouts and his knowledge or rediscovery thereof is more or less indefinite. It is true, as charged by the plaintiff, that if he had sought to subsequently prepare a sketch for which he intended to claim an earlier date, his use of a book published some 90 years before would prevent any possible proof that the paper had not been in existence. But this does not settle the question, and the wonderful perfection of his idea is the strongest argument that the plaintiff can present against its authenticity. As was said by Dr. Zahm, the plaintiff's expert:

"This sketch, as an original conception and invention of a boy of 20, so trained, would be the most phenomenal thing in the history of aeronautics. This sketch shows the crystallized and perfected results of the inventive genius of a large number of the foremost students in aviation, many of whom were highly trained, and devoted years of time to the study of the principles of mechanical flight."

The drawings as well as the model of 1907 show a so-called stick control, providing for simultaneous direction of the ailerons and rudders, which would have been considered wonderful a decade after this sketch was made.

The Wright experiments, culminating in their patent No. 821,393, of May 22, 1906, application filed March 23, 1903, show a similar method of operation, but with certain features lacking in which the Janin method may be superior. The Bleriot patent, No. 1,009,017, of November 14, 1911, application filed January 31, 1908, and the Esnault-Pelterie patent, No. 1,115,795, of November 3, 1914, application filed January 16, 1908, fix the time when the aeronautical world was working upon a somewhat similar solution of these problems, but in a less perfect manner than that disclosed by Janin. In fact, the ailerons themselves, with the vertical and horizontal rudders of the Janin sketch and model, were impossibilities, so far as the teaching of the prior art is concerned, until the date of the Wright patent, which is the pioneer in aeronautic matters. If Janin had the conception in its perfect form at the time of his original sketch, he could have obtained a patent for a successful aeroplane long prior to the experiments of the Wrights at Kittyhawk, N. C., in 1903, when they were perfecting a glider without engine power.

This brings in another question of which the plaintiff makes much. The Janin sketch, as well as his model of 1907, indicate an engine in the hull of the boat, resembling a gas engine of some sort, which would have been possible of description in 1907 or 1908, or about the time when Janin was in communication with Daniels as to the details of the gas engines which Daniels was building, but which was substantially unknown in 1899. In 1899 perhaps naphtha, illuminating gas, or oil engines might have been in Janin's mind; but it is not conceivable that he could have intended to represent a steam engine, although

he now says that that may have been all of which he knew. His uncertainty of recollection and indefiniteness of statement as to just what he intended by this representation of an engine makes it difficult to place credence upon his statement that the sketch of 1899 was made at that time, in its present state of perfection.

But, however this may be, he certainly abandoned all ideas of developing his conception of an aeroplane and slept upon that idea until these ideas had been given to the world by other inventors, and until a patent was granted to the Wrights therefor. The testimony shows that he attended aeronautic contests or exhibitions, including some by Curtiss himself, that he studied publications and literature relating to the development of the aeroplane, and was considered a "nut" in regard to such matters. These must all have had an unconscious effect upon his conclusions and ideas, and it is impossible for him now to go back and specify just what idea he had at any particular moment. His testimony indicates this very fact. It may be that the so-called sketch of 1899 is a later and different sketch from the one shown to Hegelstein, who could not testify at the time of the interference, through some quarantine regulations affecting him at about that period.

But, even so, Janin does not lose more than the right to claim the invention of the aeroplane itself, which he evidently abandoned, if he had the conception. The making of the model in the year 1907, or even in 1908, shows the possession of all the ideas set forth in the sketch, and establishes a date prior to anything done by Curtiss. The existence of this model is established by the date of a letter of recommendation produced by the witness Staats, dated September 2, 1909, and no successful attack has been made upon the accuracy of this date.

It must be held, therefore, that the conclusions of the various authorities in the Patent Office and of the Court of Appeals, that Janin had successfully established conception prior to the date of any operative and practical construction or reduction to practice by Curtiss, was correct. But Janin's employment of these ideas in any model or drawing was secret, except as he may have made useless paper disclosures to single individuals, until the filing of his application in the Patent Office, and we must therefore consider the contention of the plaintiff that mere naked conception, not followed by reduction to practice, can be defeated by open disclosure and reduction to practice at a date intermediate between the two.

The plaintiff cites the case of *Laas v. Scott*, supra, as authority for the proposition that Curtiss, if we assume his experiments at San Diego to have been reduction to practice, actually anticipated the filing of Janin's application on January 26, 1911, and therefore prior to his constructive reduction to practice at that time. Here the question of diligence comes in. When two applications are filed in the Patent Office, the junior application may prevail over the senior, if earlier conception, followed by diligence in application, be shown. Lack of diligence or abandonment of the idea may be sufficient to defeat proof of earlier conception. *General Electric v. Steinberger*, supra. But the date of reduction to practice, by model or structure, is not of

itself controlling, when earlier conception and diligence in filing application is present. See *General Electric v. Steinberger*, *supra*, and cases there cited.

Inasmuch, therefore, as Curtiss did not by his San Diego experiments get away in the fundamental idea from the prior art, even though he improved upon it and upon the disclosures of Fabre, and inasmuch as Janin has successfully established conception prior to any of Curtiss' dates, which with due diligence he reduced to practice, so as to be entitled to a finding that his conception had not been abandoned, we must again hold that the decision of the Court of Appeals of the District of Columbia was correct in its finding in Janin's favor.

The only remaining question is the allegation of inoperativeness of the Janin structure as a hydro-aeroplane capable of rising into the air. The plaintiff constructed two full-sized models, which were exhibited at Newport News, in which they sought to show that the Janin structure would not fly from the water. The purpose of these experiments was to demonstrate inoperativeness. Many grounds of criticism have been pointed out in the testimony, indicating that the attempt on the part of the plaintiff was not to succeed, but to demonstrate failure through the use of these models.

It is not necessary to go so far as to hold, with the defendant, that the plaintiff's representatives willfully deviated from the Janin disclosure. The object sought explains their attitude and does not prove a deliberate attempt to deceive. But the fact remains that the tremendously topheavy and large structure attached to the Janin boat did not give an accurate test of the Janin disclosure, and this must be viewed from other standpoints. The models constructed for use in the model tank at Washington more nearly exemplified the behavior of the different pontoons or floats of the issue. As might be expected, a float of the Janin contour and type acted like a fish. It moved through the water easily at low speed, and at high speed continued to cleave the water with a largely disproportionate increase of resistance, as distinguished from the hydroplaning qualities of the model of the Curtiss San Diego plane, and of the model type of navy boat designed by Curtiss. Whether or not the observations and photographs of the Janin model are inaccurate, and whether this model would plane at all, is not satisfactorily shown. In fact, it would seem that the Janin model has little or no hydroplaning qualities, whatever might be its adjustment with respect to its water line and the surface of the water.

This same lack of hydroplaning quality is indicated in the original Janin drawings and even in the Janin application of 1913. Janin had made no experiments. He had no practical knowledge of hydroplaning qualities, and at that time he was still working upon his theory of a flying fish, which moves through the water up toward the surface before shooting out into the air. It seems reasonably certain that a flying fish of this sort could not be made to hydroplane, in the true sense of the word, even with a flat under-surface back to the gills. The experiments conducted in the construction of the flying boat America bear out these propositions, and if Janin anchored his operative aeroplane superstructure to an underbody, which would not hydro-

plane, but would continue to cleave the water, or to bury itself with increasing sucking down tendencies, he would never be able to fly, in the sense intended by the structure defined by the issue in interference.

But Janin discloses in his original patent application, and in all of his subsequent specifications, as well as in his drawings, that he intended to provide his device with a hydroplaning surface. These hydroplaning surfaces were known to the prior art and were matters of common knowledge. Complete demonstration and perfection of detail are not necessary, in order to obtain the right to an invention of the idea illustrated, if a mechanic skilled in the art, following the direction of the patent application and drawings, could reduce it to successful practice.

The patents for the Bell telephone, the Morse telegraph, and the Wright aeroplane show that these structures, when the patents were allowed, were not developed to such form as to be commercially successful or workable. Undoubtedly in 1913, when the final divisional application was made by Janin, the state of the art was such that the underbody surface of the boat could have been made by any skilled mechanic in such form as to get the boat off the water. Has Janin the right, therefore, to take advantage of the knowledge which would have been then possessed, or has he the right to assume that as early as January 26, 1911, his disclosure of a fish-shaped body would have taught the use of hydroplaning surfaces on the underside of his boat, separated from the long tail, round or oval in section, of such proportions that it would have dragged down the device, instead of allowing it to have been tilted up so as to hydroplane and get in the air? Janin says in his patent application of January 26, 1911, that his—

"aeroplane structure is provided with a body portion 1 of elongated formation, and which may be produced with convenience from aluminum or other light and strong material in the shape of the hull of a boat, its forward or bow end portion 2 being tapered and rounded to lessen the resistance of the air and water to its passage therethrough, and its rear or stern end portion 3 being also tapered and formed upon such lines as may seem best adapted for facilitating management and the attainment of high speed."

Janin contends that his failure to show a hydroplaning surface in his divisional application of July 31, 1913, is like his omission of an engine or power-furnishing device in his original application, or like the failure of Curtiss, in his application of August 22, 1911, to show more in the way of an engine than the outlines of four cylinders and a shaft. In fact, examination of the Wright patent for the aeroplane itself shows the presence of no engine whatever to drive its propellers, and as a matter of fact the original Wright aeroplane patent does not even show propellers.

Failure to show in an application for patent an operative or successful means of accomplishing the result claimed in the application is sufficient reason for denying the patent, if the invention is directed to such use of the whole as to require operativeness of the parts covered by the claims. If the claims presented describe the entire de-

vice, then operativeness is one of the necessary elements of the disclosure. On the other hand, the claim may simply show means for accomplishing certain parts of an operation. For instance, an application for a power-driven sawmill patent would not require description (either in the specifications or the claims) of a steam engine to drive the belt or shaft. The device would be patentable without describing the source of power, and could have been patented before the invention of the steam engine.

In an aeroplane, invention might be claimed for the wings alone, or for the method of controlling the rudders and ailerons. Take, for example, the Bleriot patent, *supra*, which does not describe the aeroplane, but assumes that a reference to an aeroplane as a machine of the type then understood and referred to in the patent was sufficient fundamental structure for the application of the claimed invention. It would follow that both Curtiss and Janin were justified, so long as they were filing an application for the use of an engine of any sort known to the world, in leaving to the skilled mechanic, or to the one following the patent, the use of whatever engine he might think most efficient; the only essential being that it be adapted to the purpose.

If an inventor should intend to try out a new kind of steam engine in an aeroplane, and should find that the weight of the engine kept the aeroplane upon the ground, when it had been proved or was known that with a light engine the aeroplane would fly, the patent should not be held inoperative, because it had not described the particular kind of engine which could be used. In the same way, the different parts of a hydro-aeroplane are mechanically interchangeable in so far as they do not affect the functions of the machine covered by the claims of the patent. Neither the Curtiss nor the Janin application would be construed to be limited to the use of a monoplane or biplane, any more than to the use of mahogany as distinguished from black walnut, or some other wood, in making the hull of the boat. But if it is to be a hydro-aeroplane or a hydroplane-aeroplane, in the ordinary sense, it must operate upon the water like a hydroplane, and be able to mount into the air for operation like an aeroplane.

As has been said, Janin made no practical experiments. His knowledge of the art of hydroplaning seemed at the time of trial to have developed no further than a general knowledge that planing surfaces were necessary. He has the present idea that he intended his model to show sufficient planing surface to get on the water. He contends that in 1913 his application presumed such shape for the bottom of the hull as to produce a planing effect. It is evident that this was so at that time, for the reason that he was already in interference with the Curtiss application, which employed simple hydroplaning surfaces as in the construction of its pontoons. The world at that time was well acquainted with the idea of hydroplaning, and with the then obvious proposition that the speed necessary to obtain lift from the airplanes could be reached in any structure having a properly balanced proportion of wings and engine to the size of the boat, by getting the boat up on the surface of the water, where the sucking down would be

decreased, and the speed increased, beyond any conditions possible with a boat driven through the water.

From 1908 on Curtiss had been working to so arrange the proportions of his machine that the hydroplane or hydroplaning surfaces, which he and others knew could be made to skim upon the water, would be sufficient to make possible the starting of his engines, handling of the machine until speed was obtained, the balancing of the machine until in the air, and also the arrangement of his parts so that, upon returning to the water, he could successfully alight thereon at the tremendous speed which he must necessarily have in order to come down to the water without overturning his aeroplane and falling before he struck the water.

Curtiss was seeking to get away from the multiple form of hydroplane, whether arranged like Fabre, with three points of contact, or like Forlanini, with a number of hydroplanes at different depths in the water. Curtiss was also for a time trying to get away from his canoe by the use of hydroplane pontoons. He ultimately came back to the canoe idea, but placed a hydroplaning surface under the canoe. The Curtiss application and the issue in interference describes a canoelike structure as the longitudinal dimension of the hydroplane is considerably greater than its width. But the issue of the interference also fits, and the words of the issue could be made to read upon the original hydroplane structure taken by Curtiss in December, 1910, to San Diego for experiment, in which the width was considerably greater than the length resting upon the water, if, an aviator had become expert enough to so handle his craft as to keep it in balance until he left the water. Dr. Zahm has testified that theoretically this could be done, and a man might be able to accomplish it in practice. But the only practical ideas would be those showing a craft which could be operated even in rough weather and by an operator of ordinary skill. Curtiss was therefore not able to reduce his theoretical ideas to practice, and hence to describe a practical construction, until he obtained the canoe-shaped pontoon with a hydroplaning under surface.

The modern modifications of the Curtiss craft show, so far as the under surfaces are concerned, nothing more than modifications of this hydroplaning bottom canoe idea. The so-called break or step has been found necessary in order to give the advantage of the long rearwardly extending portion of the canoe for the preservation of longitudinal balance, while obtaining the hydroplaning qualities of the bottom, which, when the machine was in ordinary balance, would be in contact with the surface of the water as displaced by the weight of the machine. In other words, Curtiss and other manufacturers of hydro-aeroplanes have added the tail, but at a different level to the original hydroplaning pontoon of the Curtiss application in interference.

This is not a necessary element of the claims in interference. Ability to rise out of the water, either by planing up on the water in order to get up speed, or by acquiring such speed upon the surface as to gain the benefit of the air lift of the wings, was assumed by Janin in all of his structures. His concept presupposes a structure in which such

speed could be obtained. The Patent Office rejected both his application and Curtiss' application, in so far as they attempted to claim a form of device aimed only at reaching this speed. The original English publication of Froude and the Forlanini publications, as well as the many hydroplane patents of the prior art, were sufficient citations upon which to reject any claim of basic invention or discovery by either Curtiss or Janin of a surface available only for speeding and hydroplaning.

The invention consisted in so arranging the other parts of the machine, including the lateral pontoons and the single boat structure, as to make a practical hydro-aeroplane the basis of the issue in interference. Janin stubbornly insists to the present day that his fish-shaped device possesses planing qualities; but any skilled mechanic, with knowledge of the prior art, would, after the year 1908, have so constructed the under surface as to make the boat plane, if he found that the form of bottom which he was using sucked into the water. Janin would have the right at any time to substitute a planing surface under his fish body if he found this desirable, and his structure, in so far as the elements of the issue in dispute were concerned, was operative, unless he refused to use the devices taught by the prior art and anchored his machine, as has been previously stated, just as much as if he had suspended weights therefrom.

The very fact that by a division of his application Curtiss has sought to obtain a patent for the construction of a mere glider shows that the issue in interference was not dependent upon the presence of the precise form of hydroplaning surface which he used in his device described in his application of August 22, 1911, or in his device used at San Diego on January 26, 1911. It must be held, therefore, that the possible and probable failure of the original form of boat bottom described by Janin does not render inoperative the structure of a hydro-aeroplane involving only the elements of the interference issue. His pontoons had planing surfaces located where they would help get the boat on the water.

Given a boat bottom which would hydroplane, the Janin structure was certainly operative as a hydro-aeroplane. Such surfaces were shown by the prior art at all times after Janin had his concept clearly formulated; that is, from 1907 or 1908 on, provided he did not attempt the additional feature of a machine to run on the land. This latter device was clearly separable from his structure for getting into the air from water, flying in the air, and returning to the water, and it must be held, therefore, that Janin had a complete concept and disclosed the elements of the issue in interference, even though he surrounded these with devices which were not practical, and which later had to be discarded.

The decision of the Court of Appeals of the District of Columbia was therefore correct in awarding the right to the invention of the issue in interference to Janin, and upon the present case the defendant should have a decree.

WIRE WHEEL CORPORATION OF AMERICA v. MADISON MOTOR CAR CO.

(District Court, W. D. Wisconsin. September 23, 1920.)

No. 88-E.

1. Patents \Leftrightarrow 32—Presumption of validity from foreign patent strengthened by decisions upholding those patents.

The presumption of validity of a patent from the successive issuance of similar patents in various foreign countries is strengthened by decrees of the courts of foreign countries sustaining the patents in those countries.

2. Patents \Leftrightarrow 32—Presumption from foreign decree sustaining is rebutted by decree holding void.

The presumption of validity of a patent arising from the issuance of foreign patents and from decrees sustaining those patents is rebutted by a decree of the United States court of another circuit holding the patent void, which was sustained by the Circuit Court of Appeals.

3. Patents \Leftrightarrow 328—1,047,702, claim 9, for automobile wire wheels, held valid and infringed.

The Pugh patent, No. 1,047,702, claim 9, for automobile wire wheels, in which the spokes from the inner side of the hub were attached to the opposite side of the rim, held to disclose invention and to be infringed.

In Equity. Suit for infringement of patent by the Wire Wheel Corporation of America against the Madison Motor Car Company. Decree directed for complainant.

F. P. Davis, of Chicago, Ill., and Clarence S. Walker, of Buffalo, N. Y., for plaintiff.

Oscar W. Jeffery, of New York City, for defendant.

EVANS, Circuit Judge. [1] Patent in suit, No. 1,047,702, was issued to J. V. Pugh December 17, 1912, after a similar grant on the same wire wheel had been made by Great Britain on January 6, 1910. Pugh also sought and obtained a patent on the same wheel from the French government, and also from the German government. The presumption of validity arising by virtue of these successful grants is strengthened by the judicial pronouncement of the German and French courts in favor of the validity of the respective patents granted by those governments; and while the state of the record is such that no intelligent conclusions may be drawn from the English litigation, it is nevertheless apparent that the Pugh wire wheel was and is freely recognized in England as the patented product of this inventor.

[2] This presumption, at best rebuttable, is overcome by the decision of Judge Hand holding the patent invalid. The suit which resulted in this decree was well contested, and the decision was affirmed by the Court of Appeals without opinion. 266 Fed. 229. The opinion rendered by Judge Hand in *Wire Wheel Corporation of America v. C. T. Silver* has been published in 266 Fed. 221.

[3] The difficulties that a court meets in determining the issue of fact upon which the validity of a patent depends is well stated by Judge Hand:

"Doubtless it is always a difficult question to say, when any new step is taken in an art, what degree of imagination it required. Possibly judges are

not well qualified to restate to themselves the stage in the technique of the art reached when the step was taken, or try to put themselves in the position of those who took it, yet the settled law requires them to do so, and, if not, novelty and invention would be synonymous. I know of no objective tests which will serve to answer that question, which arises in nearly every case; it must be solved by an attempt to reconstruct the scope and limits of imagination of the ordinary skilled man."

In the last analysis, my decision, or any court's decision, must turn upon the test applied to Pugh's contribution to the automobile wheel art. That he made a contribution no one will deny. Whether that contribution evidences mere mechanical skill, was a solution of an engineering problem, or constituted invention, is the sole question for determination.

While wire wheels were old in 1909, and had been used on light automobiles, Pugh constructed a wheel that was usable on the stock automobile, then rapidly growing in favor. The court is not called upon to decide whether wire wheels are, or were in 1910, better than "artillery wheels," the wheels with wooden spokes. Neither is it to determine whether wire wheels with two sets of wire spokes may not be constructed as strong and as practicable as the wire wheel which Pugh built. Invention may appear in Pugh's wheel, notwithstanding wire wheels with two sets of spokes have been manufactured that resist strain and quite generally give satisfaction.

That there is some demand for, and some value to be found in, the wire wheel, cannot be denied. Whether that merit pertains to the ease with which the wheel may be removed, whether it consists in increased attractiveness in appearance, or in reduction of weight of the automobile below the springs, or in greater adaptability in other respects, is quite immaterial. Any one of them would be sufficient to justify the issuance of the patent, if invention otherwise appeared. What, then, was the problem? What, the solution?

Pugh's problem was not merely to construct a wheel with wire spokes, nor to construct a dished wire wheel. It was to construct a wire wheel that would stand the usage to which an automobile wheel would necessarily be put, and it was to be placed upon the axle of an automobile, the general construction of which had been fixed and determined by long usage. For example, the tread was established; the relative location of the wheel and the steering knuckle and the brake appliances was fixed. The automobile in common use at the time was heavy, and growing heavier. It was used for rapid transportation. Sudden and unexpected jars were so great that the wheels must of necessity be so strong as to carry the load and stand the bumps, and also to withstand the strains and shocks that come from the sides. *Likewise the wheels must be interchangeable with the "artillery wheels."*

That the two wire spoke wheels answered the requirement so far as load was concerned may be readily conceded. That the ordinary bicycle wheel did not meet the strains and shocks from the sides is also apparent, without demonstration. To widen the hub from which the spokes radiated would unquestionably help; but it created a new prob-

lem. Such a hub resulted in a widened tread. This was an insurmountable objection. Pugh therefore had to construct a wheel of the necessary strength in all respects, one that did not widen the tread, one that made possible the close relative position of the wheel and the steering knuckle and the brake, and that took proper care of the strain on the rims, and yet retained the lightness and other desired advantages of a wire wheel.

His problem was not merely to increase the number of spokes and vary the position, as experiment might require. He was not following, but reversing, mechanical and engineering practices and teachings, when he transposed the base and the apex of the "two sets of tension spokes connecting said inner end of the hub with the opposite sides of the rim." Relocation of spokes, or a mere increase in the number of spokes, may not in itself have constituted invention. But to transpose the base of the angle to the rim and the apex to the hub, in such a manner that the "two sets of tension spokes connected the inner end of the hub with the opposite side of the rim," was a new step, and the basis for the next step, which two steps resulted in a dished wheel, that was interchangeable with an artillery wheel, and it seems to me called for inventive ability, rather than mechanical skill.

The transposition of the base and the apex of these tension spokes, and the connection of the rim and hub in the manner described, was not all of Pugh's contribution. This alone would not have secured the desired results. But by extending the hub and connecting its outer end with the rim by a third set of tension spokes, as called for in the third element of the claim, Pugh met the problem of side strain and at the same time increased the efficiency of the tension spokes.

It is true he had before him his own invention of 1905, as well as Hammon's and Harrington's, and Frenier's, and Sharp's, and others; and he knew how the manufacturer had successfully made bicycle wheels. But his problem was a vastly different one. If it were merely a matter of getting sufficient strength to carry a heavy automobile load and resisting side strains and shocks, the Patent Office might well have said that his solution varied from other wheels merely in location and selection of spokes; but, as heretofore pointed out, Pugh was constructing a wire wheel that had to be placed upon an automobile in such a manner as not to interfere with the established tread, or with the effective use of the steering and brake appliances.

It is not difficult, after a problem has been solved, to take patent after patent, pick one feature from one patent, and another from the next, and then say the completed product is so near the patented product that the final step constituted but the work of a mechanic. But invention cannot be so determined. Rather must the mark of distinction fall on him who, appreciating both the means and desired ends, conceives of a relation of elements, old or new, in whole or in part, that will produce the desired results. It is quite immaterial if, after the conception is announced, the skilled mechanic readily understands it, or with slight or no difficulty builds the new device by practices or means well known to his trade.

Pugh's wire wheel, with "a wheel rim so disposed that its center plane is nearest the inner end of the hub, with two sets of tension spokes connecting the inner end of the hub with the opposite side of the rim, and a third set of tension spokes connecting the outer end of said hub with said rim," was absolutely new. It was not at all the development of the bicycle wheel, or of any symmetrical wheel. The changed position of the base and the apex of the tension spokes, whereby the inner end of the hub was connected with the outer sides of the rim on such a wheel, was new. The stay spokes "connecting the outer end of the hub with said rim" may have been old, and its use alone and by itself would be a natural or obvious way of strengthening the wheel against side strains, yet it must be viewed here as an element in a new combination and its function not limited to resisting side strains.

That this conception of Pugh was not the solution of a mere engineering problem, or within the grasp of a skilled mechanic, who attempts to solve a problem as soon as the problem is presented, is, I think, demonstrated by Pugh's own experience. He was an engineer, unusually well acquainted with the wheel-building industry, the originator of numerous inventions, and the owner of many patents. He combined technical training with practical experience, and the rich reward which success entailed furnished him with an urgent inducement that few could appreciate better than he. He sought a practical wire wheel for automobile use.

In 1905 he patented his two-spoke wire wheel. In 1909 he made application for his wire wheel for heavy automobiles. During that period (1905-1909) he met with rebuff after rebuff, and witnessed the too evident failure of his 1905 invention as the wheel for cars in general use. Even when his first application was filed in 1909, the final solution was beyond his conception or his imagination. Then, three months later, he filed his new specifications, disclosing the wheel here under consideration. If the solution of the problem was so difficult for this man, who thus combined experience, patent knowledge, familiarity with the art, engineering knowledge, and familiarity with the demands of the trade, can the court say that his contribution evidenced merely mechanical skill?

It is hardly necessary to refer to the decisions. Inasmuch, however, as my attention has been called to opinions written by myself in *Walker Manufacturing Co. v. Illinois Brass Manufacturing Co.* (C. C. A.) 265 Fed. 279, and *Bone v. Marion County*, 251 U. S. 134, 40 Sup. Ct. 96, 64 L. Ed. —, 249 Fed. 211, 161 C. C. A. 247, the decisions in *Deister Concentrator Co. v. Deister Machine Co.* (C. C. A.) 263 Fed. 706, and *Superior Machine Tool Co. v. Cincinnati Lathe & Tool Co.*, 259 Fed. 273, 170 C. C. A. 341, might well be added.

These cases are cited, not as precedents (for there can be no precedents where the facts are dissimilar), but to illustrate how far the courts have gone to uphold patents where the asserted inventive novelty consists of new arrangements of elements that are old. In passing it might be said that the court did not hold the patent in the *Bone* Case invalid. In the *Deister Concentrating Co.* Case a patent was upheld

where the contribution to the art consisted largely in new locations or positions of elements (riffles and planes in a concentrating table) that were old. In *McCord v. Woods*, 249 Fed. 203, 161 C. C. A. 239, the patent was upheld where the contribution consisted of a selected location of corrugations on a journal box, placed there for strengthening purposes. Reliance was there placed upon the decision of the Court of Appeals for the Second Circuit in *Stilwell v. McPherson*, 218 Fed. 839, 134 C. C. A. 611, where a patent on culverts was upheld that involved strengthening by corrugations.

True, in all of these cases the state of the art at the time of the issuance of the patent was an important and material factor in the determination; but in none of them was such inventive genius displayed as is here shown by Pugh. Entertaining these views, I cannot escape a conclusion that is opposed to the one reached by Judge Hand. Claim No. 9 is valid.

Infringement. Upon the question of infringement there is little to be said. Claim No. 9 reads upon the defendant's wheel. I find nothing that would justify me in narrowing the claim or the construction to be placed upon it so as to defeat infringement.

The decree must therefore be for the plaintiff. Counsel for the plaintiff will draw the proposed decree, submitting it to opposing counsel before submitting it to the court. Provision should therein be inserted that application for a reference may be made at any time after 60 days from the date of the decree.

TWEEDIE v. ROYAL CO.

(District Court, E. D. Missouri, E. D. September 21, 1920.)

No. 5084.

1. Patents ☞328—1,153,977, for boot top, held valid and infringed.

The Tweedie patent, No. 1,153,977, for a boot top or spat, cut so as to produce a spring in the front and heel portion, so as to cling close to the shoe, *held*, in view of its commercial success, valid, and also infringed.

2. Patents ☞36—Commercial success may be considered in determining validity.

In determining the validity of a patent in an old and crowded art, the commercial success of the patented article may be considered.

3. Trade-marks and trade-names ☞68—"Unfair competition" defined.

"Unfair competition" consists in the passing or attempting to pass off upon the public the goods and business of one as being the goods and business of another.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unfair Competition.]

4. Patents ☞316—Question of unfair competition held not necessary to decision.

In an action by patentee to restrain infringement of plaintiff's patent, and also to restrain defendant from using plaintiff's name in and about the sale of articles infringing plaintiff's patent—that is, for unfair competition—the question whether, since the article patented by plaintiff was made

and marketed by a corporation under an exclusive license, the plaintiff had sufficient interest left therein to sue to restrain unfair competition, would not be considered on proof of but one sale by defendant of an article not bearing plaintiff's name, although the sale was made in response to a call for plaintiff's article, where such sale was made for the sole purpose of making the case upon such question, especially since a decree on the issue of infringement found in plaintiff's favor would afford him ample relief.

In Equity. Suit by Charles Tweedie against the Royal Company. Decree for plaintiff.

Carr & Carr, of St. Louis, Mo., for plaintiff.

Fritz von Briesen, of New York City, and Albert E. Hausman and Delos G. Haynes, both of St. Louis, Mo., for defendant.

FARIS, District Judge. This is an action by plaintiff, Tweedie, against defendant, for an injunction to restrain infringement of plaintiff's patent for a boot top, numbered 1,153,977, and dated September 21, 1915, and also to restrain defendant from using plaintiff's name in and about the sale of boot tops which infringe plaintiff's patent; that is to say, for unfair competition.

The art is old. Boot tops of the sort called over gaiters, or "spats," in the trade, are old. But plaintiff contends that in the boot tops made under his patent he has by an improvement brought about an entirely new result; that is, that he has produced an article not known to the trade before his invention. This result he has brought about by such construction of his improved and patented boot top as to cause the lower portion of the front and the heel thereof to hug tightly the shoe and foot on which it is worn. This mechanical result is produced by so cutting the boot top as to produce a "spring" in the front and heel portions thereof. This spring he produces by cutting gores in the two component parts which respectively go to make the heel and toe of his boot top, and which fit over the heel and front of the shoe on which the boot top is worn. The new article so produced by this improved method of cutting is, it is urged by plaintiff, not only a "spat" or over gaiter, but in addition is a novel device, by which a low shoe may, by wearing over same of a Tweedie boot top, be converted, as to every appearance, and for all practical purposes, into a high shoe.

I need not go into the question of infringement. The proof shows conclusively that the article made and vended by defendant is in every respect and appearance a precise replica of the plaintiff's product, made under a patent issued to him on the 21st day of September, 1915, and numbered 1,153,977. Indeed, no very strenuous contention to the contrary seems to be made. The defense largely is that the patent of plaintiff contains nothing new, when regarded in the light of the prior art, and is therefore void for lack of invention.

In an effort to prove this defense, divers patents, articles, pictures, and drawings were offered by defendant. Some of these were of over gaiters, worn by soldiers as early as the time of Frederick the Great; others hark back to the winter days at Valley Forge. Touching all these it may be said, in passing, that the object and use of them were

seemingly more for protection than for artistic effect. None of them possessed the feature and result claimed for the articles made under the Tweedie patent; that is, the production of a new article by the device of producing a spring on the heel and toe, or front, which, when worn, closely simulated a top shoe or boot, and which, when worn on a low shoe, had the effect, both as to comfort and appearance, of converting a low shoe into a high shoe. No over gaiter or "spat," made under any prior patent shown, nor any such over gaiter or "spat" belonging to the prior art, in my opinion produces this result. It is only in the Tweedie boot top, and in that made by the defendant's infringing article, that this new result is shown.

[1, 2] Concededly the art is an old and crowded one. The opportunity, therefore, for muddying the waters by a reference to the multitude of articles made and for decades used therein is ample and to an extent confusing. In such a case it is permitted to take the opinion of the purchasing public, as deduced from the manner in which the article made under the Tweedie patent was received by dealers and consumers. The evidence shows that in a comparatively short space of time the Tweedie boot top practically displaced all over gaiters and "spats" made pursuant to the teachings of the prior art. Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034; Albright v. Langfeld (C. C.) 131 Fed. 473. I conclude there is scant doubt of the patentability of the boot top made under the Tweedie patent. Cases of apposite similarity are Greenwald Bros. v. La Vogue Petticoat Co., 226 Fed. 448, 141 C. C. A. 278; Greenwald Bros. v. Enochs, 183 Fed. 583, 106 C. C. A. 351. It follows that the Tweedie patent is valid, and the defendant has clearly infringed it.

[3] The other phase of the case presents more difficulty. The evidence shows that the defendant in one instance at least, has been selling its products as bona fide Tweedie boot tops; but it is contended by defendant that, since the Tweedie boot top is made and put upon the market by the Tweedie Foot-Wear Corporation under an exclusive license, the plaintiff herein has no interest left therein which he is entitled to protect by a suit in his own proper person as patentee. Unfair competition consists in the passing or attempting to pass off upon the public the goods and business of one as being the goods and business of another. Sayre v. McGill Ticket Punch Co. (D. C.) 200 Fed. 771.

[4] Upon the proof adduced I need not consider this phase of the case. The boot top sold in the single instance presented by the evidence did not bear the word "Tweedie." The case made simply was that a retail purchaser, who asked for Tweedie boot tops was given in lieu thereof boot tops made by defendant, and not by the Tweedie Boot Top Corporation, under Tweedie's license as patentee. The tops in question did not bear any evidence that they were bona fide Tweedie boot tops, other than that they were made in the physical similitude of the boot tops manufactured by Tweedie's licensee under the Tweedie patent. In other words, the fraud was a mere verbal one, consisting in the single instance set forth, perpetrated by a salesman of defendant. The receipt for the purchase price of the boot tops sold as Tweedie's did not recite that they were Tweedie boot tops. There was no sign or

legend, upon the boot tops sold, indicating that they were made by the Tweedie Boot Top Corporation, or that they were made under the Tweedie patent. Such indicia as were shown by the boot tops themselves, absent the false verbal statement of the salesman and the fact of their similarity of manufacture, in fact showed to any purchaser who might look that they were not Tweedie boot tops. Moreover, the sale in question—and it was the only overt act shown—was made for the sole purpose of making the case upon this point which is now before me.

I think, upon the facts, I need not, therefore, go into the somewhat vexing question whether Tweedie as patentee is entitled to enjoin the alleged unfair competition in a suit brought in his own name. A fortiori, since a decree upon the other phase found in his favor will in my view afford him ample relief, the decree upon the phase of unfair competition will be denied upon the facts.

Let a decree, finding the Tweedie patent valid, and finding an infringement thereof, be drawn and submitted, and jurisdiction retained for such other and further orders as may be necessary to an accounting.

UNITED STATES v. QUARITUS.

(District Court, E. D. New York. September 10, 1920.)

1. Indictment and information ⌘42—Information may be filed pending hearings by commissioner.

An information can be filed by the United States attorney while hearings upon the charge are being held before the United States commissioner.

2. Indictment and information ⌘3—Offenses not infamous may be prosecuted on information filed with leave of court.

Offenses which are not infamous, and which do not involve moral turpitude, such as violations of the National Prohibition Law, may be prosecuted on information filed by the United States district attorney with leave of court.

3. Indictment and information ⌘40—Government must show probable cause of guilt to obtain leave to file information.

Before the court will grant leave to file an information, the government must present probable cause of guilt.

4. Indictment and information ⌘40—Leave to file information withheld, where only evidence was obtained by unlawful search.

Where the hearing before the United States commissioner disclosed that the only evidence against defendant which the government had was procured by an unlawful search of the premises, contrary to Const. Amend. 4, leave to file the information will be denied, even though the evidence so obtained showed probable cause of guilt.

Application by the United States for leave to file an information against Harold W. Quaritus, charging him with maintaining a nuisance, in violation of the National Prohibition Law. Application denied.

Leroy W. Ross, U. S. Atty., and John T. Eno, Asst. U. S. Atty., both of Brooklyn, N. Y.

Alexander S. Drescher, of Brooklyn, N. Y., for defendant.

GARVIN, District Judge. The government has applied for leave to file an information against defendant upon the charge of maintaining a nuisance in violation of the National Prohibition Law, commonly known as the Volstead Act (Act Oct. 28, 1919, c. 85, 41 Stat. 305). Prior thereto the defendant, through counsel, made application for leave to be heard when the government should present an information and ask for leave to file the same.

It is asserted, and not controverted, that on or about July 15, 1920, a warrant was issued for the arrest of the defendant upon the charge of unlawfully maintaining a common nuisance, as prohibited by the Volstead Act, and at the same time a warrant was issued for one Trainor, defendant's employé, for having liquor in his possession. The defendant and Trainor were arraigned before Hon. Henry D. Barmore, a United States commissioner, and a hearing was had on July 22d. On August 5th the commissioner rendered a decision, in which he found as follows:

"In this case evidence is that federal prohibition agents entered store and asked for a 'highball.' Defendant Trainor was in charge, and declined to serve same, and stated that he had no liquor. After waiting about the place for a while, said agents, although witnessing no violation of the Prohibition Act and having no evidence or reason to believe that any violation was taking place, undertook to and did, without warrant or authority, go behind bar and search and discover and seize a bottle containing a red fluid, which they believe to be wine. There is no evidence as to its alcoholic content, or that it had any alcoholic content.

"They then made further search, and in a closet opening upon a passageway which connected the saloon with a grocery store or ship chandlery, found a quart bottle containing a colorless liquid, which they assumed to be alcohol, a pint bottle of brown liquid, which they assumed to be whisky, and a jug containing a green liquid, which they assumed to be crème de menthe. No evidence was offered that these were in fact intoxicating liquors. The door to this closet was marked 'Private.'

"The defendant Quaritius, who is the manager of the stores, was not present at this time. Quaritius testified that he is not owner or proprietor, but that his mother is. This evidence is uncontradicted. He further testified that he did not know of the existence of the supposed liquor; that, if there, it must have been there a long time. It further appears that part of the living quarters or dwelling of the family are on this same floor.

"There is no evidence of any selling or keeping for sale, such as would constitute a nuisance."

These facts, as found by the commissioner, are not disputed by the government.

[1, 2] It has been held by this court that, while hearings are being held before a United States Commissioner upon a charge, the United States attorney may cause an information to be filed. *U. S. v. Achen*, 267 Fed. 595, Eastern District of New York, decided March 31, 1920. In that case the court cited, among other authorities, *U. S. v. Maxwell*, Fed. Cas. No. 15,750, in which Judge Dillon said:

"We are of the opinion, therefore, that offenses not capital or infamous may in the discretion of the court be prosecuted by information. We cannot

recognize the right of the district attorney to proceed on his own motion, and shall require probable cause of guilt to appear by the oath of some credible person before we will allow an information to be filed and a warrant of arrest to issue. But with these safeguards there is no more reason to fear an oppressive use of information than there is reason to fear an abuse of the powers of a grand jury. Where the accusation is a grave one, or where the charge seems to be doubtful, the court will refuse leave to file an information and compel the district attorney to lay it before a grand jury. But it is well known that the internal revenue laws have created a large number of minor offenses, many of them involving no moral turpitude, and that the cost of proceeding by a grand jury and the delay are burdensome and inconvenient both to the government and the defendant. In this class of cases, most of which are not defended, great and unnecessary expense will be saved by proceeding by information, and we not only think the practice legal, but one which, in cases of this kind, should, with the restrictions above mentioned, be adopted and encouraged, rather than condemned."

[3, 4] It thus appears that the government must present probable cause of guilt before the court is warranted in permitting an information to be filed. But there must be more than probable cause of guilt. No information should be filed where it clearly appears that the only evidence which the government can offer has been obtained as a result of a violation of the constitutional rights of the defendant. It will not be contended that, if no evidence was presented, except hearsay evidence, the court should permit an information to be filed. No prosecution should be instituted, and the defendant subjected to the inconvenience, the expense, and perhaps the disgrace, connected therewith, aggravated when a trial is had, if it is clearly apparent that the result of such trial can only be a direction of a verdict for the defendant, by reason of the fact that the government must rely upon evidence that is incompetent and cannot be received. The Fourth Amendment to the Constitution reads as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The learned commissioner properly observed in his decision:

"The purpose of this is evident and salutary. It is designed to prohibit and prevent wanton, unnecessary, and burdensome interference with the people in the enjoyment of their freedom and security, without, however, depriving governmental agencies of a valuable and necessary aid in the detection of crime, when proper cause for its employment exists."

As the agents of the government had no reason to believe that any violation had taken place, their search of the premises without a warrant and the seizure resulting therefrom was a clear violation of the Fourth Amendment to the Constitution, and no conviction could be had upon evidence so obtained. The rights guaranteed to the people by the Fourth Amendment, *supra*, cannot be disregarded. As a part of the fundamental law of the land, they were granted as a safeguard against oppression. By this the poor and friendless are protected, as well as the rich and powerful. The Constitution knows no distinc-

tion. It applies to all, and the courts will scrupulously regard its provisions.

In justice to the learned United States attorney, it should be observed that, after careful inquiry, upon ascertaining that no further evidence was available, he applied for leave to withdraw the application. It is believed, however, that, in view of the importance of the question involved, a judicial determination should be had, to the end that any misunderstanding of the meaning of this amendment may be removed. This court will not make an order allowing an information to be filed, where it is apparent that the prosecution cannot prevail. Application denied.

In re O'SULLIVAN.

(District Court, D. Montana. July 28, 1920.)

Attorney and client  4—Admission of alien to bar denied.

Under a rule of the District Court that any one admitted to the state bar may be admitted to its bar, admission denied to an alien where, while the state law provides for admission to the bar of a resident alien, who has bona fide declared his intention to become a citizen, applicant's petition for admission to citizenship, six years after his declaration of intention, was denied by a state court.

On application of Emmet O'Sullivan for admission to the bar. Denied.

A. W. O'Rourke, of Helena, Mont., for petitioner.

BOURQUIN, District Judge. Applicant before the court, in his behalf the usual certificate is filed, his admission to this bar is moved, and that he is not a citizen, but only a declarant, is by one of his sponsors orally stated. The court required an affidavit of status. This filed, it now appears that applicant declared intention on June 3, 1914, and that his petition for naturalization was by a state court denied with prejudice on June 9, 1920. Other allegations are of his military service, of injustice of the state court's order, and of intent to move that the order be vacated.

The state law admits to the bar any resident alien "who has bona fide declared his intention to become a citizen." The court rules provide that any one admitted to the state bar "may be admitted" to this bar. Both require the applicant to make oath to support the Constitution. Premitting consideration of the policy of alien members of the bar, it is clear both law and rules contemplate (if aliens were in the mind of those who drafted the rules) that only aliens whose theretofore declared intention will in due course ripen into citizenship are to be admitted to the bar. If the declaration is annulled, lapses by limitation, as applicant's will within a year, or for any reason cannot result in citizenship, it is no basis for admission to the bar.

Applicant is of these latter categories. His declaration of intention, if not annulled by the state court's judgment, is at least rendered impotent and destroyed as a basis for naturalization. The situation is analogous to Norman's Case (D. C.) 256 Fed. 543, so far as said order

is concerned, and here, as there, such order is a judgment commanding respect. If applicant ever attains citizenship, it will be in accord with the suggestion of Norman's Case, involving a new, if any, declaration of intention.

In view of the premises, the motion to admit him to the bar of this court is denied.

CONSOLIDATED GAS CO. OF NEW YORK v. NEWTON, Atty. Gen., et al.

(District Court, S. D. New York. August 4, 1920. Supplemental Opinion, August 11, 1920.)

1. Gas \S 14(1)—Statutory rate confiscatory; length of test.

A computation of the cost to a gas company of producing and distributing gas, covering a period of 20 months, showing that at the statutory rate the net earnings of the company were not more than $3\frac{1}{4}$ per cent. per year on the value of the property employed, followed by a period of nearly a year in which the price of labor and materials entering into the production had not decreased, *held* a sufficient test to authorize the court to find that the rate is insufficient to afford a reasonable return, and to enjoin enforcement of the statute until it may be shown that changed conditions warrant its restoration.

2. Gas \S 14(1)—Enhanced value of plant to be considered in fixing reasonable rate.

In computing the value of the "rate base" of a gas company, on which it is entitled to earn a fair return, the enhanced value of its permanent property, as land, plant, and machinery, due to existing conditions more or less permanent, which would increase the cost of reproduction, should be allowed.

3. Gas \S 14(1)—Depreciation of plant as element in computing rate base.

Depreciation of plant *held* not a factor in computing the rate base of a gas company, where the cost of reproducing a plant of the same capacity is adopted as the valuation; but excessive cost of future renewals over what it would be if the plant were new must be borne by usual profits.

3 $\frac{1}{2}$. Gas \S 14(1)—Depreciation affects rate base, computed from original costs, only if it affects capacity.

Where the rate base is computed from the original cost of a gas plant, depreciation should be deducted from the original cost in arriving at the cost of a present plant of equal capacity, in so far as it is reflected in a loss of capacity, with an allowance for past renewals to offset past depreciation; but if the capacity has remained the same, depreciation should not be a function of the rate base.

4. Gas \S 14(1)—Right of company to capitalize franchise.

Where the Legislature of a state, in authorizing the consolidation of gas companies, recognized their right to capitalize the value of their franchises, such right *held* not lost because the franchises were subject to the consent of the municipal authorities to open the streets, and the period had expired within which any new mains could be laid in streets already overcrowded.

5. Evidence \S 354(18)—Books of gas company admissible against state authorities.

Books of a gas company, long recognized by statute as a public service corporation, and made subject to regulation of a commission, which has power to supervise and prescribe the form of its records and books, *held* admissible in a suit between the company and the state authorities.

6. Gas \S 14(1)—Violation of contract as bar to equitable relief against confiscatory rate.

A gas company *held* not barred from relief in equity against confiscatory rates imposed by the state, because at times in the past its gas was

slightly below the legal standard, as shown by tests made by the city, but not by its own tests, which were reported daily to the city, and to which no objection was made, and where the variation was not substantial.

7. Gas ⇨14(1)—Sale promotion department as item of cost of distribution.

The cost of a department of a gas company for promotion of the sale of gas and gas-using machines and appliances *held* a legitimate item of expense of distribution.

8. Gas ⇨14(1)—Benefits and pensions to employes as items of cost of production.

Items of expense incurred by a gas company, such as furnishing automobiles for use of its officers, payment of benefits to sick or disabled employes, and pensions to superannuated employes, *held prima facie* a legitimate part of the cost of production, and within the discretion of its officers.

9. Gas ⇨14(1)—Interest paid on deposits of consumers not allowable as item of cost of distribution.

Interest paid by a gas company on deposits of consumers *held* not a proper item to be charged to cost of distribution.

10. Gas ⇨14(1)—Court may make decree enjoining confiscatory rate conditional.

While a court is without power to fix gas rates, its power to grant an injunction is discretionary, and in enjoining enforcement of a statutory rate as confiscatory it may make its decree conditional, and where the State Public Service Commission has no power to fix a rate greater than the one enjoined, it may require the company temporarily to charge no more than a fixed rate, and impound the excess above the statutory rate to await action of the Legislature, the rate fixed pursuant to such action to relate back to the date of the decree.

11. Equity ⇨410(7)—Rulings not required on each exception to master's advisory report.

In a suit to enjoin enforcement of a statute fixing a gas rate as confiscatory, where reference to a master is not on consent, but to make findings of fact, which shall be advisory only, the court is not required to make findings on each exception to the master's report.

In Equity. Suit by the Consolidated Gas Company of New York against Charles D. Newton, as Attorney General of the State of New York, Lewis Nixon, constituting the Public Service Commission of the State of New York, First District, and Edward Swann, District Attorney of the County of New York. Decree for complainant.

See, also, 260 Fed. 244.

This is a suit in equity, brought by a gas company in the city of New York to enjoin the execution by the defendants of chapter 125 of the Laws of 1906 of the state of New York, which imposed on the plaintiffs, among others, a limitation of 80 cents in the rate which it might charge to consumers. The suit was begun in January, 1919, and made defendants the Attorney General of the state, the district attorney of the county of New York, and the Public Service Commission of the First District, who are charged with the prosecution of violations of the statute.

A master was appointed on May 16, 1919, to take testimony, make computations, and report back to the court with all convenient speed. Over 15,000 printed pages of testimony were taken, upon which the master has filed a report. More than 100 exceptions have been filed to the report, and the cause now comes on for hearing on these exceptions.

The suit is in sequence to a former suit under the same statute, begun on May 1, 1906, against the predecessors of these defendants and the city of New York. This was also tried before a master and argued before the Circuit Court, which granted a decree in favor of the plaintiff. *Consol. Gas Co. v.*

New York (C. C.) 157 Fed. 849. The defendants appealed to the Supreme Court, which reversed the decree and dismissed the bill, giving leave to the plaintiff, however, to file a new bill at any subsequent time, when experience might have demonstrated that the rate fixed by the statute was inadequate to a fair return upon the value of its property. *Willcox v. Con. Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034. This decision was rendered on the 2d day of January, 1909, so that the defendant allowed 10 years to elapse, during which it operated under the statutory rate, before beginning this suit.

The bill is of the usual sort in rate cases, alleging that the rate is confiscatory, in that it prevents a fair return upon the property of the company, that the penalties imposed by the statute are so large as to crush it in the event of disobedience, and that it has no means of testing the constitutionality of the act, except by a suit in equity. The jurisdiction of this court and the equity of the bill, if the allegations are maintained, is not disputed, and is amply supported by prior adjudications in similar cases.

The plaintiff is a corporation organized under the laws of the state of New York under chapter 367 of the Laws of 1884, which permitted the consolidation of six gas companies then doing business in New York City, all of which had been in existence for a long time, one of them as far back as 1823. At the time of the consolidation the value of the stock of the six companies as then quoted on the Stock Exchange of that city was close to \$40,000,000. The stockholders agreed upon a plan of consolidation in accordance with the statute, in which they fixed the value of their franchises as \$7,781,000, and the value of their other property at about \$30,000,000. For this, stock in the amount of \$37,785,000 was issued, of which over \$2,000,000 was held in the treasury and the other \$35,000,000 issued directly to the stockholders of the constituent companies. The company began business in November, 1884, and the stock was increased in April, 1900, to \$54,595,000, and later in July of that year to \$80,000,000. At the present time there is outstanding \$100,000,000 of capital stock and \$25,000,000 of 7 per cent. convertible bonds.

The master found the value of the assets of the company, including its franchises, at about \$75,000,000, and its annual sale of gas at the present time about 19,000,000,000 cubic feet. Upon this he found a probable income for the current year of about \$900,000, representing not more than 1.2 per cent. on the value of the property as found. He further found that the necessary rate of return at the present time was 8 per cent., requiring an income of about \$6,000,000 upon the same value.

The master found the net cost of delivering gas to the consumer by the company was 75.18 cents per 1,000 cubic feet. This finding he based upon the full year 1918 and the first 8 months of the year 1919, contenting himself with the statement that the prices of labor and materials since August 31, 1919, had become higher than during the period of 20 months which he had considered.

In view of the voluminous testimony and the great number of issues which are concerned, it would serve no purpose to recite in detail more of the findings or any of the evidence.

William L. Ransom, John A. Garver, Charles A. Vilas, and Jacob H. Goetz, all of New York City, for plaintiff.

John P. O'Brien, James A. Donnelly, and Harry Hertzoff, all of New York City, for defendant corporation counsel.

Wilber W. Chambers and Clarence R. Cummings, both of Albany, N. Y., for defendant Attorney General.

William Hayward, John Holley Clark, Jr., and Ely Neumann, all of New York City, for defendant Public Service Commission.

LEARNED HAND, District Judge (after stating the facts as above). This bill was filed under the leave given in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A.

(N. S.) 1134, 15 Ann. Cas. 1034, to begin a new suit of the same kind after a period of probation should have tested the adequacy of the rate established by the statute. Ten years passed before this was done, and the experience gained meanwhile would, under ordinary circumstances, have been sufficient. However, during that period there occurred the extraordinary rise of prices due to the Great War, which has made the future harder to forecast upon the basis of 10 years' past experience than could have been apprehended in 1909, and as a result we are not in so good a position at the present time to judge of the future effect of the statutory rate as we should normally have been; i. e., the experience of the first 7 of the 10 years is of little present value.

The Proper Period for a Test.

[1] The defendants wish me for this reason to take an average over the whole period, both for cost of production and capital valuation. Now, whatever may be the proper method, that certainly is wrong. The case is not one in which an average can safely be made, because the variations in prices which the whole period covers are not normally recurrent. Averages presuppose that the resulting figure will cover variations, which, though certain, or nearly certain, within the period taken, are impossible of exact prediction in their occurrence. They may therefore be spread over a period precisely as an insurance loss is spread. The recent rise in prices is not of this kind, because there is no reason whatever to suppose that during the next period of say 5 years, which is long enough to justify some present action, the same causes will operate in reverse as have operated in the past. An average would be therefore meaningless. Either the evidence of the last 3 years is sufficient basis for a forecast or it is not. If not, ante bellum values should be used merely for lack of any better; if so, the average of the last 3 years is the proper basis.

It is quite true that, if these prices could fairly be regarded as such temporary aberrations as the rate was meant to cover, this would not be so. Persons who embark their money in such enterprises must take the bitter with the sweet, and the lean years with the fat. Rates, when established, are not intended to make a nice adjustment to all ensuing conditions; they are too long and costly to fix, especially in court. In such cases it is fair to take a period of years as the defendants wish and to compare that with the rate. But if, as I think, we have now fair warrant for supposing that we are in a condition not contemplated at all when the rate was fixed, all such considerations disappear.

Several reasons lead me to believe that present price levels are not merely transitory, though I recognize the danger of any prophecy. Whatever their precise cause, it is universally conceded to be due to the Great War, and by that I mean, of course, not to the prosecution of hostilities, but to the economic exhaustion and inflation of the circulating medium which these involved. In general, it is a safe inference to suppose that Europe will not be able to resume its ante bellum production for a time measured rather by years than by months, and that the recovery of a sound financial condition will take longer. We in

this country are not only influenced by conditions in Europe, but we are subject to our own local inflation and disorganization of industry, from which no one can know when we shall recover. The question is a practical one, and comes, I think, down to this:

The plaintiff is faced with a condition which permits it to receive much less than the return which the statute contemplated, and which the Constitution is thought to insure it. So far as human foresight can see, that condition, though probably not permanent—certainly in its present exaggerated form—is bound to exist over a period of some years, at least in such things as coal, oil, and labor, which are the plaintiff's chief costs. There is, then the certainty of a continued loss for an indefinite, but substantial, time, due to causes which were not in existence and could not possibly have been apprehended 14 years ago, when the rate was fixed. Does this prospect justify the court in abandoning the inertia which it properly feels when the complaint is based upon temporary variations? Is it fair to continue to impose a rate which has clearly ceased to correspond with the underlying presuppositions upon which it was based? I think that the prospect does justify the court, and that the rate has become unfair, at least until the conditions change.

Three reasons justify this assumption now, each of them serving to protect the public against the consequences of a mistake. The first is that at worst the rate will not be finally declared insufficient. As in all such cases, the defendant will have leave at any time to vacate the decree upon showing that the old price levels have been reached, or nearly enough to put again into effect the statutory rate. This does indeed impose a burden of proof upon the state when that time comes, but a denial of any relief now causes certain and irremediable damage to the company for so long as present prices remain. While constant readjustments are impracticable, and for this reason public service companies must endure transitory periods of insufficient profit, high and rising price levels have already lasted a period of 30 months, January 1, 1918, to August 1, 1920; enough, I think to throw the initiative upon the state of showing that conditions have changed, when they do change. The second factor is the present discrepancy between the rate and a fair profit which gives a reasonable assurance that the period and the fall in prices must be substantial before the rate can prove sufficient. It also makes more imperative some relief to the company. The third factor is that it is not in the least essential that the state should have recourse to the unwieldy process of a new suit, which an application at the foot of the decree in effect would be. The Legislature, by an amendment to section 72 of the Public Service Commission's Law of New York (Consol. Laws, c. 48), may at any time give to the Public Service Commission jurisdiction over rates, not only below, but above, the statutory maximum, whenever the statute is in abeyance. Indeed, that might have been thought to be now the law, had the opposite not been declared in *People ex rel. Municipal Gas Co. v. Public Service Commission*, 224 N. Y. 156, 120 N. E. 132. By such a change the whole subject could be regulated by that authority to which, if I may say so, it properly belongs, and a procedure establish-

ed plastic enough to make unlikely the continuance for 14 years of a fixed rate in the face of changes such as have occurred.

So far as I have found in the books, a test of two years is enough. In the Minnesota Rate Cases, 230 U. S. 352, 469-472, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, the rate fixed by the authorities for the Minneapolis & St. Louis Railway, the only one disturbed, was set aside on an experience of only one year. In *Municipal Gas Co. v. Public Service Commission*, 225 N. Y. 89, 98, 121 N. E. 772, a complaint was sustained which alleged the insufficiency of a rate for a period of only two years, 1917 and 1918. In *Darnell v. Edwards*, 244 U. S. 564, 37 Sup. Ct. 701, 61 L. Ed. 1317, the period was thought too short, but it included only six months, and those not including the recent era of inflation. In *Rowland v. St. Louis, etc., Co.*, 244 U. S. 106, 37 Sup. Ct. 577, 61 L. Ed. 1022, a rate was upset upon a showing of only two months, coupled with opinion evidence of its being a fair test. Excepting these cases, I know of no judicial ruling on what length of time is necessary.

The master has taken complete evidence over a period of 20 months, from January 1, 1918, to August 31, 1919. Since that time 11 more months have passed, during which there has been no fall in price levels. The record has some evidence of this down to a later day, but of course, not down to the date of this opinion. But evidence is not necessary in the face of so patent and obtrusive a fact of daily life, and it is quite fair to say that the condition which the master found as of August 31, 1919, has been aggravated during the succeeding year. The period, despite its unusual character, I find to be a sufficient basis for the calculation of the cost of production and the "rate base" for a future time long enough to call for some judicial action.

Computation of the "Rate Base."

[2] I have just said that the present range of prices seems to me applicable, not only to the cost of production, but to the valuation of the "rate base"; i. e., the permanent means of production, and this necessarily involves a decision upon the vexed question as to the values upon which the company is to be permitted to earn its profit. Costs of production involve those items which the company must pay before it begins to see any profit whatever; its economic motive for embarking in and maintaining the enterprise depends altogether upon the return which it can get out of the property which it has bought and erected into an industrial unit. Hence it is the profit, and, strictly speaking, this alone, which matters with the stockholders. It must be owned that much of the discussion shows either a timidity or an inability to grasp any principle in dealing with the "rate base." With deference, it appears to me to be merely an abandonment of any attempt to deal intelligibly with the question to say that cost of reproduction and the original cost are each elements to be considered. That statement can mean nothing whatever, unless it is accompanied by a constitutive rule, which will establish some standard in the ascertainment of which these may be used. It would be understandable to say that the two estimates should be averaged, but such a rule could obviously command no

support, because it would correspond to no relevant considerations of policy. Merely to leave the question with a caution that several elements are to be considered is to abandon any effort to solve it.

The recurrent appeal to a just rate and a fair value assumes that the effort is to insure such a profit as would induce the venture originally and that the public will keep its faith so impliedly given. That, I think, involves a tacit comparison of the profit possible under the rate with profits available elsewhere; i. e., under those competitive enterprises which offer an alternative investment. The implication is that the original adventurer would compare future rates, varying as they would with the going profit, and would find them enough, but no more than enough, to induce him to choose this investment. By insuring such a return it is assumed that the supply of capital will be secured necessary to the public service. As the profits in the supposed alternative investment will themselves vary, so it is assumed to be a condition of the investors' bargain that their profit shall measurably follow the general rates. It is, of course, not relevant here to discuss these presuppositions, since they have now the support of authoritative law.

Certain risks in ordinary competitive enterprises can be reasonably anticipated, and business practice includes them in an amortization account. New processes and machines are constantly appearing which make the old obsolete; ordinary wear and tear makes replacements necessary. The return to make these good is commonly carried in a separate account by all prudent business men, and does not come out of the rate. It is true that individual misfortunes cannot be foretold, and these a given company must bear, just as any single competitive venture would have to bear them. Among these, however, is not a general rise in prices, which, affecting all alike, at least after a time, enables each to raise his price, not only because of his costs in labor and in materials, but to obtain a proportionate increase in his profit, based upon the increased value of his plant and machinery. All competing producers who give the same service must keep invested an increased number of dollars in capital to do so. The risk of the depreciated dollar is not one which industry in general will bear; it is, indeed, no risk at all.

Moreover, a profit based upon the enhanced value of the capital adds nothing in truth at all to the company's wealth. Though its capital be measured in more dollars, and so, too, its profit, that profit is still paid in the fallen dollar, and has no greater buying power than it had before. The increased valuation of the capital will for the years of the depreciated dollar leave the company exactly as it was; it will merely prevent its being compelled to share its putative fair profit with its customers, which by hypothesis it should not be asked to do. The company gains nothing; the customers lose nothing.

Indeed, all this is so much in the primer of economics that it is inconceivable it should be misapprehended as to working capital for instance, and the contrary view has crept in, I think, only when one thinks of the more permanent kinds of capital, and instinctively assumes that the rate will apply after that capital has resumed its former values, if it ever does. There is, in short, a tacit assumption that the

valuation must last as long as the permanent capital. There is no warrant for that assumption, because precisely the same reasons which compel the "rate base" to be raised, after a rise in price, compel it to be reduced after a fall. There is a natural enough reluctance to a continuous reappraisal of plants, and properly so. It must, of course, appear that the variation in prices is not transitory, and the period of probation before a company is allowed relief is precisely to insure against that possibility. The chance of loss during that period such companies must endure, and there is an inevitable "lag" in readjustments in each direction. But, once it appears that the new price levels are not transitory, it is no answer to the company's complaint to say that at some future time prices may fall. When that time comes, if it does, the property must again be revalued; but meanwhile they are entitled to some protection, and since these have become questions for the courts, to the protection of the courts.

The rule of the present reproduction cost, which is a necessary consequence of the foregoing argument, appears to me to have been either expressly or implicitly recognized in all the cases in which the Supreme Court has passed on these matters. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 41, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134, *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 35 Sup. Ct. 811, 59 L. Ed. 1244, *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 10, 29 Sup. Ct. 148, 53 L. Ed. 371, *The Minnesota Rate Cases*, 230 U. S. 352, 434, 454, 455, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, *San Diego, etc., Co. v. National City*, 174 U. S. 739, 757, 19 Sup. Ct. 804, 43 L. Ed. 1154, *San Diego, etc., Co. v. Jaspar*, 189 U. S. 439, 442, 23 Sup. Ct. 571, 47 L. Ed. 892, *Darnell v. Edwards*, 244 U. S. 564, 568, 37 Sup. Ct. 701, 61 L. Ed. 1317. It is true that its application has not distinctly arisen since the recent rise in prices, but it is not possible that it should have general application, and yet not cover this, its most glaring illustration.

I am, of course, aware that the present cost of a plant, and especially of a putative standard plant, is hard to prove; but that is no answer. It may in fact be the case, usually it is, that the safest basis for estimate is the evidence of what the actual plant cost, with its additions, which are not renewals, or a cover for renewals. The mere opinions of experts are a doubtful reed; we need not lean upon them; but the question of evidence is one, and of what it shall show is another. I am aware, also, that in the case of railways the principle of reproduction cost presents most baffling problems, perhaps fatal to its application;¹ but these arise from the fact that the valuation of a substituted service in the case of railways is impossible, without already presupposing the existence of a railway, so much do railways affect the whole life of the community. In the case of the land used by a gas company, the valuation may theoretically be said to involve a similar begging of the question, for without gas a modern city would be another place. Nevertheless, land and building materials and ma-

¹Gerard C. Henderson, 33 Harv. Law Review, pp. 902, 1031.

chinery have a value independent of the existence of this or that or any gas company. No "gas value" is involved, as was "railway value" in the Minnesota Rate Cases, *supra*. All the component elements are purchasable, and the cost of the standard plant can be ascertained with fair accuracy. The single element of the cost of tearing up the streets must, however, on authority be omitted. *Des Moines Gas Co. v. Des Moines, supra*.

Depreciation.

[3] The defendants insist upon the element of depreciation, based upon an allowance each year of that proportion of the total value which a year bears to the whole life of the plant. The Supreme Court (*Knoxville Water Co. v. Knoxville, supra*; *Minnesota Rate Cases, supra*) has recognized that some depreciation is a proper element in estimating the "rate base," but has not as yet authoritatively settled on what principle it shall be calculated. It seems to me hardly possible in the case at bar to avoid taking a position with regard to that principle.

If the proper standard for a "rate base" is the present cost of a substitute plant of equal capacity, as I believe, depreciation can be a function of it only in case the allowance for renewals to the plant under consideration will in the future be greater than that of the assumed standard. If the rates allowed in the future include only an allowance for renewals of a new plant, the company will have to abate something from its normal profits because of its extraordinary renewal charges. Theoretically it makes no difference whether this problem is met by giving the plant a smaller value at present because of its future greater renewal charges, and then allowing a higher rate for renewals, or by giving it its present value, based on capacity, and letting it bear its extra renewals out of its normal profits. Were the plant sold, the future abnormal renewals would be reflected in the sale price, being discounted at once; but that would be because the parties must at present clear their accounts once and for all. The seller would be unwilling at once to abate from his price, and later to allow the buyer from time to time for his unusual renewals. In the case of a public service company, where the authorities may always require the plant to be kept up to standard, there is an obvious advantage in declining to attempt a repeated adjustment between the actual renewals necessary and normal renewals, as would be necessary if the present prospect of such allowances were now discounted; it is the better practice to allow the plant to bear its own extra renewals and to insist that it shall always be kept up. Therefore it appears that, so far as concerns the future, the age of the plant should not be a function in the "rate base."

[3½] On the other hand, in computing the "rate base" from the original cost, depreciation is of vital consequence. Practical men will prefer to ascertain the cost of a present plant by experience, when they can, rather than by estimate, just as the master here has done. In so arriving at the cost of a present plant of equal capacity, it is clear that the original cost of the plant in question must be abated by depreciation, so far as that is reflected in a loss of capacity. In such a calculation, however, there must figure past renewals as an offset to past depreciation.

tion, and, if in fact the capacity has remained the same, depreciation should not be a function of the "rate base" at all. In such a case the inquiry as to depreciation should be confined to changes in "price levels."

Franchises.

[4] If this case were *res integra*, I should not hesitate to refuse any valuation to the company's franchises. On principle the case is very clear. A franchise is a right to keep mains in the streets and furnish gas to the inhabitants of the city, and it is granted upon condition that the rates shall be controlled. If the franchise gets a value because the rates have not been controlled, the "reasonable expectation" of their continuance is without basis, and that is the only possible ground for a vested interest in such rates. The inaction of the authorities in the past gives no prescription, and without such prescription the franchise can have no capital value, unless the very point is assumed. That the franchise has a kind of value is, of course, true enough; it alone protects the "tangibles" from becoming junk; but as a part of the "rate base" it should never figure. This was all stated in *Consolidated Gas Co. v. New York* (C. C.) 157 Fed. 849, and not denied in the Supreme Court; but each court thought that the incorporation under the statute of 1884 constituted a recognition by the state of some capitalizable value to the franchises of the company, and the Supreme Court fixed that at \$7,781,000, the original sum. That was in 1909, 25 years after the company had been organized, and when its business had grown very substantially. I own that I am not clear whether or not the Supreme Court meant to declare that this value should exist perpetually as a means of drawing a profit of 6 per cent. or more; but it is clear enough that, if it was worth that sum in 1884 and 1909, on any conceivable theory it is worth as much in 1920. Therefore it appears to me that the master did all that he could under the circumstances in adding that sum to the "rate base," at least until the Supreme Court shall indicate some contrary rule.

The defendants, however, urge that the franchise rights of the company have changed since 1909. Their contention rests upon circumstances which are more detailed than it is necessary to set down here, but the substance of which is as follows: The constituent companies, consolidated in 1884, held a number of legislative grants to furnish gas in New York and to lay mains in the streets. These were all substantially similar in this respect: That the consent of the municipality was necessary before the streets could be opened. In the case of each franchise the municipality gave its consent to the opening of the streets for a limited period only, and before 1909 that period had expired in the case of all but three; i. e., the "Anthracite," the "Harlem," and the "Knickerbocker." Of these, the last two affected only such territory as lay north of Seventy-Ninth street in New York; that is, the district last populated. In 1913 the consent to dig up the streets given under the "Anthracite" franchise also expired, so that at the present time the company has no such rights south of Seventy-Ninth street. North of that street it has such rights as the municipal consents under the "Har-

lem" and "Knickerbocker" franchises still give it. Not only does the "Anthracite" franchise still exist, shorn of the consent to dig up for new mains, but the company has several other franchises of the same character, under which consents were originally given to dig up the streets, which had long since expired before 1909, and, indeed, with one exception, before 1884.

Therefore the change in the company's rights since 1909 comes to this: That it now has no more rights to dig up the streets south of Seventy-Ninth street, which it had until 1913 under the "Anthracite" franchise. Its right, however, to maintain its existing mains and to furnish gas to its customers is not affected by the expiration of that consent. *New York v. N. Y. Mut. G. L. Co.*, 207 N. Y. 647, 100 N. E. 427. The change in the value of the franchises turns upon the value of the right which existed in 1909, but exists no longer, to lay new mains in the streets below Seventy-Ninth street, if the municipal authorities consented. Obviously that question cannot be answered. Not only does this record show that the streets are already so full that no other mains could in any case be laid, but the original right was not absolute, depending as it did upon the exercise of the discretion of the municipal authorities before it could be enjoyed. It seems to me a fanciful conclusion to attribute any value to the right to require by mandamus (*Ghee v. Nor. Un. G. Co.*, 158 N. Y. 510, 525, 53 N. E. 692) the exercise of such a discretion in a territory where, under the record, no intelligent authorities would in any event grant such a right or could be required to do so. The substance of the right remains, and has been expressly so adjudicated in an analogous case. Perhaps the Supreme Court may choose to modify its original ruling upon the whole subject, but it would be a most unreal distinction to base such a modification upon the slight differences which are shown in this record. I shall therefore accept the valuation as settled in the earlier case and by the master here.

Rate of Profit.

Another preliminary question is that of the proper rate of profits. In *Willcox v. Con. Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034, the rate of 6 per cent. was accepted as a proper return. In *Denver v. Denver Water Co.*, 246 U. S. 178, 194, 38 Sup. Ct. 278, 62 L. Ed. 649, the same rate was impliedly accepted. In *Lincoln v. Lincoln Gas, etc., Co.*, 250 U. S. 256, 39 Sup. Ct. 454, 63 L. Ed. 968, the court indicated that changed conditions of investment might change the rate. Eight per cent. was mentioned, though probably not as intended to cover the case of a sure monopoly such as this was described to be in *Willcox v. Con. Gas Co.*, supra. The evidence in this record indicates that 8 per cent. is the going rate at the present time, and that stands uncontradicted. For many months past the United States, certainly the most solvent debtor in the world, has paid either 6 or nearly 6 per cent., and other governments higher. As the facts develop in this case, I need not find any rate, except to say that less than 6 per cent. would be insufficient. I have made findings based upon both 6 per cent. and 7 per cent.

If the rate is to correspond with the market, 7 per cent. would scarcely seem too high, and at least so much appears to have been taken as the standard in *Lincoln v. Lincoln Gas Co.*, supra, the last declaration of the court.

The Admissibility of the Books of Account.

[5] Most of the evidence and testimony in the case at bar necessarily depended upon the records of the plaintiff contained in books of account of all descriptions, supported by vouchers, books of original and secondary entry. These were proved only to the extent of showing their general character and that they had been kept in the usual course of the company's business. The same applied also to the Astoria books; that company being treated as though it were an operating unit of the plaintiff. Indeed, these books the defendants themselves offered in evidence.

The defendants objected to the reception of all other books on the ground that they were not properly proved. Probably the proof was inadequate, even under the present-day laxer rules, had they been used in an ordinary case, as for example, to prove transactions recorded in them on which obligations of a third person depended. The case is not such. This is a suit between the authorities of a state and a company long since recognized as performing a public service and under the regulation of the state. Article 4 of the Public Service Commissions Law of New York puts the entire conduct of such companies as the plaintiff minutely within the regulation of the Public Service Commission. Section 66 gives the commission general supervision over all such, power to investigate the quality of their services and to fix its character, to prescribe the form of the records and books it shall keep, to examine its officers and those records, to keep informed as to its doings and its property, to require a detailed annual report, including its receipts and expenses, and any other important facts it may wish, to enter upon its property and examine its books and vouchers, to compel the production of any such, to subpoena its officers, and to compel it to keep its accounts of separate businesses separately.

Books kept in accordance with orders lawfully promulgated by the commission under such powers are on a different footing, in a suit based upon the action of the state and against its officers, from even the same books, if attempted to be used elsewhere. They have a public character, derived from the supervision which can be and is exercised over them. The authorities are not, of course, bound by them in any event; but, prepared as they are, under their direct and constant supervision, they can scarcely be put in the category of the usual *ex parte* entries about whose admission the cases are concerned. The state, having had so much hand in their creation and such continuous power of examining them, should not be entitled to demand a verification first hand of every item by common-law proof, before they become *prima facie* competent. The guaranty of their truth is sufficiently established by the scrutiny to which they are always subject, and the penalties which follow upon a disregard of the commission's orders. Section 73. It would, indeed, be an incredible burden to require every item to

be separately established, and even these defendants have not gone so far as that; but, if the books are not *prima facie* competent, they might call for such proof, nor can I reject them without putting the company upon their mercy.

Documents prepared in an analogous fashion came before the court in *Rowland v. St. Louis, etc., Co.*, 244 U. S. 106, 108, 37 Sup. Ct. 577, 61 L. Ed. 1022, and *Northern Pac. Ry. v. Keyes* (C. C.) 91 Fed. 47, 58. In each the court received them, though in disregard of the strict rules of the common law, because of the opportunity afforded the authorities to check their accuracy by a recourse to the original records, and, if necessary, to the entrants who actually made them. In neither case did it appear that the company was under such stringent supervision as has been established in New York. Here, as in *Rowland v. St. Louis, etc., Co.*, *supra*, it may be said that the company—

“exhibited its work sheets and data to the [defendants], that the returns were made by the employes in the course of their business, and that if the [defendants] had desired to question any of the data they could have called for further verification.”

Nor, indeed, were these books admitted until Teele had made a thorough checking of all the items by their vouchers for the period of a month or more, submitting them in this way to an honest test of their accuracy. The “purely negative attitude” of the defendants is not consonant with that desire “not to seek an unjust advantage from the difficulties of stating the company’s case” which we are told must be imputed to a state in such affairs. *Rowland v. St. Louis, etc., Co.*, *supra*.

I do not forget that in some respects, altogether inconsequential, so far as I can see, the books did not strictly conform with the orders of the commission. These variations were in good faith, and threw no doubt upon their veracity. They could have been easily corrected, had the Public Service Commission thought it necessary to correct them.

The Plaintiff’s Failure to Supply Candle Power.

[6] At the outset of the case the defendants insist that the plaintiff may not get equitable relief because of its violation of the statute requiring it to furnish gas of 22 candle power. While the requirement seems to be accepted by all competent persons as unnecessary and wasteful, it must of course be regarded as a duty imposed upon the plaintiff while it remains upon the statute book. A persistent and deliberate disregard of it might, I should think, bring this case within that somewhat indefinite rule which turns out of a court of equity a suitor who has himself been unjust in the very matter of which he complains. The situation here is short of that. In the first place, there is some question whether the readings made by the city employes charged with the duty are to be taken as against those of the plaintiff itself; indeed, on that subject, the master has found against the defendants. Apparently the tests are not absolute, and men may honestly differ as to their results; but I have not felt it necessary either to examine the method or to determine the issue upon the evidence for the following reasons:

The defendants prove many violations under their own tests, which were taken 10 times on substantially every day during the years 1916, 1917, 1918, and 1919; the master declining to go further back, and rightly, in my judgment. The importance of the failure to come up to the standard best appears from the averages. In 1916 and 1919 the average of all 10 monthly averages was never below 22 for any month; in 1917 the month of November averaged (taking all 10) 21.80, and in December, 21.99. It thus appears that through all this time the city's own charts show that the average for each month was up to standard, unless 1 per cent. is to count. The year 1918, was, indeed, quite different. From May 1st to November 1st the United States had commandeered the oil in two of the plants for making toluol, and the standard collapsed, falling in October to 14.92 (average of all 10 observations). For the other months of 1918 the averages are as follows: January, 20.61; February, 20.52; March, 21.63; April, 21.51; December, 20.98. These are the only months which need count, and the default amounted to 6.3 per cent., 7 per cent., 2 per cent., 6.3 per cent., and 5 per cent., respectively.

But I think that the defendants are in no position to take these figures against the company anyway, because of the conduct of the business between them. The company also made its own tests and sent the results daily to the city, which retained them and took no action. Except for January and February, 1918, and the period of the commandeer, the company showed averages equal to the standard. Their average for January was 21.36, and for February, 21.27, about 3 per cent. off. Now, it must have appeared to the company, and may well have been the case, that the acquiescence in these tests indicated either that the city was not confident of the superiority of its own tests, or that they meant to make no complaint of such slight variations. The standard is not useful anyway, and it was to every one's interest not to have the company use more oil than was absolutely necessary, for oil is extremely expensive. In any case, such a plea comes now with the illest grace to defeat a suit so vital to the company, after such acquiescence. The issue of the correctness of the company's tests was certainly waived, and the whole defense boils down to the deficiencies in the months of January and February, 1918, as to which "*de minimis non curat lex.*" It is not quite true to say that the whole thing does come down to that, because the defendants do even assert that the company should be charged with the defaults during the commandeer. More hardly seems necessary than to alude to such a sorry plea in a court of equity.

Gas Unaccounted For.

Into all the calculations there must come the loss of gas occasioned by condensation, leakage, and perhaps other causes. It becomes necessary to know by how much the plaintiff's production must be taken to be larger than the sales passing through the customers' meters. While it is quite possible to tell this with accuracy for the whole system of which the plaintiff is a part, it is impossible to do so for the plaintiff separately, owing to the interchangeable connections of the mains. The loss of the system as a whole has been reported yearly to the

Public Service Commission, and represents the difference between the gas made and the sum of gas recorded by customers' and company's consuming meters. The years 1917 and 1918 were abnormally cold and showed an unusual loss of this kind. Obviously they are not a fair specimen of the normal loss occurring from these causes. The average for the whole system over the period of 13 years during which the statistics were given to the authorities was 5.31 per cent., and, unless there are some disturbing factors, this is a valid starting point, which the company must accept. The only disturbing features suggested here are the poorer quality of coal and oil, and I take against the plaintiff any doubt which those factors may raise. I accept the average of 5.31 as a proper allowance for the system as a whole, at least in a rate case.

The allowance to the company is certainly less than this figure, but how much must remain in doubt. The estimated average as reported by the plaintiff to the Public Service Commission for the years 1906-1918, inclusive, was 4.09, and there is a strong presumption that this is correct. Nearly the same result may be reached by another method. It appears to be accepted that 3 per cent. is the proper allowance for all waste but main leakage, which varies inversely with the density of the customers per main mile. Now, taken grossly, the company has about double the density per main mile of the other companies. We may then apportion the sum of 2.31 per cent for main leakage correctly by dividing the main mileage of the company in half and using the resulting sum for the total mileage. Assuming the total output to be 33 billions, of which the company will furnish 20 billions, the systems' loss from main leakage is 762.3 millions, of which the loss attributable to the company is 28 per cent. or over 223 millions. This is about 1.12 per cent., which, with 3 per cent., equals 4.12 per cent. of the gas made, which is surprisingly close to the average reported by the company itself. I shall therefore take 4.1 per cent. as the proper figure for gas unaccounted for.

Price Paid by the Company for Oil.

Oil is the principal ingredient in the manufacture of water gas, and has of late been rising sharply in price. As it figures so largely, the defendants have made a strong attack upon the contracts made and the prices paid by the plaintiff, and this had best be decided before the account is stated. The company has always bought its oil from the Standard Oil Company of New Jersey, which has a common director with itself, who is on the plaintiff's executive committee, to which were referred all oil contracts. It may be assumed that there is also some common stock ownership. The position, at least of the learned corporation counsel, is that, owing to this community of interest, the company has favored the Standard Oil Company of New Jersey in its contracts, necessarily throwing upon the stockholders of the company a heavy loss, unless it can in turn impose it upon the public. As this charge is equivalent to a fraud in the conduct of the company by its directors, it deserves scrutiny.

Between November 1, 1905, and December, 1919, the company made in all nine contracts for the purchase of oil, not only on its own

behalf, but for its constituent companies, all of whose needs it supplied. The result was that it was a very large purchaser of oil, making contracts for over 100 million gallons at a time. There is no reason to question the propriety of its course, provided it bought honestly and with proper care to get as good a price as possible. There were in New York a number of independent small companies buying oil at the same time, and the best evidence, as it appears to me, of the proper price to be paid, can be gathered from the prices at which they bought. Other contracts were put in evidence, made in New Jersey, Philadelphia, and one in Boston, and these, too, are relevant, especially those in New Jersey. In New York, during the 14 years in question, in all 77 contracts were made, besides those of the plaintiff. These were all for much smaller quantities, and it might naturally be expected that they should be at higher rates; but this is not necessarily true, because the substance is a by-product of not unlimited supply, and it has lately come into other uses, which have increased the demand. It seems doubtful whether a large contract, commanding a substantial part of the supply for a period of one year or more, must be at lower prices than a small one. That is the one conceivable reason for questioning the prices obtained by the company, and it appears to me an insufficient one, especially in the light of the very large Philadelphia and New Jersey contracts. A comparison may be made of each contract of the company by taking the average of all others in New York made within 6 months, on either side of that taken, and the following table is so computed, except in the case of the last two contracts, which were at too short intervals to permit that course; the second being a modification of the first:

	Company's Rate.	Average Rate of other N. Y. Companies.	
Nov. 1, 1905	4.29	3.062	(2 contracts)
Jan. 5, 1909	3.	2.78	(6 contracts)
Jan. 1, 1911	3.	2.742	(3 contracts)
July 1, 1913	5.035	5.462	(5 contracts)
July 1, 1914	3.035	3.62	(9 contracts)
Nov. 13, 1916	5.	4.8	(6 contracts)
Dec. 4, 1917	6.5515	6.785	(6 contracts)
Dec. 18, 1918	7.5721	7.528	(6 contracts—November and December, 1918)
March 28, 1919	6.0824	5.904	(3 contracts, two in March at 6.081 and one in June at 5.75)

It is, of course, plain that this table may be misleading, because the price varied much within a year. It may be corrected by a comparison within a month on either side of the contracts without change of result. This shows that at least for the last 7 years the company always bought at about the going rate. It is clear beyond peradventure that, based upon New York prices, the charge is utterly baseless that the company was paying more than the market, so far as there may be said to have been a market.

Nor was the New Jersey price substantially different from the New York price. This price is evidenced by four contracts between the Gulf Refining Company and the Public Service Gas Company of New Jersey, for very large amounts. The first of these was on June

1, 1910, and the prices varied between 2.48 and 2.82, according to place of delivery. At that time the prevailing price in New York was about 2.45; the company making no contract for seven months thereafter, by which time the New York price had risen. The next was on May 25, 1913, between 4.50 and 5 cents. The New York price ranged from 5 to a fraction more. The next was on August 5, 1914, at prices between 3.05 and 3.55; the New York price being between 3.25 and 3.50. The last was on June 21, 1919, at prices between 5 and 5.85, when the New York price was from 5.75 to 6.08.

The Philadelphia contracts were five in number. The first was September 30, 1912, at 3.95. In September of that year the New York price was 4.18, in November 4.5, and in December 3.1875. The second was on October 21, 1913, for 4.45; the nearest prices in New York were January, 1914, 4.25, and July 1st, 5.035. The third was on August 5, 1914, at 3.05; and the fourth on September 24, 1914, at 3. The New York price on June 1st (company's) was 3.035, and on September 10th, 3.5. The last two contracts were on September 23, 1919, and October 21, 1919, at 5. The nearest New York prices were June 24th, 5.75, and December, between 7.05 and 7.55. Of these five, the last alone shows any marked divergence, accounted for by a very sharp rise in the last month of 1919. While the Philadelphia prices are on the whole lower than New York, there is no divergence which may not be accounted for by differences in transportation.

The single Boston contract was on September 29, 1916, for 3.625 to 3.995. At that time the New York price was 4.75 to 5, about a cent more. This alone, of all the contracts offered, appears to show a very substantial divergence, which is not accounted for.

The upshot of it all is that, unless all the other New York companies were paying too much for oil, the plaintiff was not, and that, as compared with the eastern towns of New Jersey and Philadelphia, New York was not, on the whole, paying enough more to justify any inference. The charge of a sinister connection between the company and the Standard Oil Company of New Jersey appears, therefore, to be without the slightest evidence. The proper price for oil in calculating the future cost of production is hard to fix. At the end of 1919 in New York, as based upon three contracts made in December, it was about 7.25 cents. The master has accepted a price of 6.9 plus lighterage as of the date of his report. He has allowed in his calculations, as of the first 8 months of 1919, 6.8; that being the actual price paid by the company. I have no doubt that this was an honest price, made in a genuine effort to do the best possible, and it is certainly less than could have been got later in that year. It is a most conservative figure for reckoning costs for the future, so far as can now be seen, and I accept it.

Substitution of the Coke Oven System.

The defendants urged that, in view of the increased price of oil, a proper distribution between coal gas and water gas would not be 22 per cent. to 78 per cent., the actual practice, but half and half, and that in producing coal gas another system should be adopted, known as the "coke oven" system, advocated by Mr. Little, their ex-

pert, who made an elaborate calculation of the cost under that method. This involved a new plant, and it cannot be successfully maintained that the plaintiff is now obliged to erect one at the cost of \$8,000,000. Indeed, the defendants do not say so, but that they should have built such a plant long since, during the era of low prices. It is not, however, in my opinion, necessary to consider whether the plaintiff should build or should have built such a plant. The cost of production of such gas might still be a proper test of the production costs with which they should be credited, even though they cannot meet it. In short, their plants and methods might become obsolete through progress in the arts, and, if so, on a competitive basis they would have to bear the consequent loss. It would be a risk which is inherent in the industry, and one which, so far as it is covered at all, must be covered in the general allowance for replacements, or in the generally higher rates of profit which the industry should carry.

It becomes necessary, therefore, to consider the possibility of using the coke oven system at the present time in New York. In the first place it must be remembered that the purchase of such gas from others is out of the question. Some suggestion was made that this could be bought from the Seaboard By-Products Company of New Jersey, but that is too extreme to deserve any comment. Leaving out those companies who purchase "coke oven" gas, there are few who use it, about 12 in all, most of them in the Mississippi Valley, out of a total of 1,000 companies in the United States. Therefore I should doubt very much the propriety of using it as a test of normal cost, even where the conditions made it apparently feasible.

Ignoring this, however, the conditions are not feasible in New York. Little made his cost \$199. In so doing he gave an enrichment cost of \$.0553, on an assumed candle power of 16. Mr. Little's figure for enriching the House A coal gas, which he assumed to be 16 candle power, was \$.0678, and was in fact, as Sangster's report shows, \$.1155. I think he has got his enrichment cost much too low. It is fair to assume that his error in the figures for House A, both in candle-power and cost, enter here, and, if so, that cost must be raised \$.06, making a total cost of \$.259.

Little's whole theory presupposes that a part of the residual coke should be sold at a price of \$7 a short ton, and that the remainder should be credited at \$6 upon the company's water gas production cost. He knew nothing whatever about the price at which coke could be sold in New York, except what was told him, and his information was erroneous. In 1919 the Seaboard Company was selling it continuously to the plaintiff at \$6.55 a long ton, delivered alongside, and the cost of delivery was certainly 50 cents and perhaps 65 cents. The price to the Seaboard Company was not more than \$6.05 to \$5.90 per long ton, or \$5.40 to \$5.27 per short ton. Little figured 172,499 tons at \$6, and 485,310 tons at \$7, and his error is \$.128 or \$.146 (he appears to have been mistaken in admitting that the difference was $17\frac{1}{2}$ cents). His price would become in the neighborhood of 40 cents; i. e., within $1\frac{1}{2}$ cents of the coal gas price. Considering that his labor cost is only about one-half that of House A, and that his assumed coal price of \$5.28 does not agree with Sangster's figures, even when

reduced to short tons, it is quite apparent that his conclusion of 20 cents for coke oven coal may not be taken as a basis for a substitute price. Furthermore, here, as elsewhere, he assumes an output of 82½ per cent. of total capacity in a year, which is greater than the actual output, even for the 3 winter months.

Mr. Doane had been for many years concerned with the coke market in New York and its environs, and up to 1915 had made more or less continued efforts to obtain a market for so much as the company did not use. After that time it became cheaper to use than to sell it; but his judgment, based upon his experience, is that it would be impossible to sell such large quantities as would be produced by the coke oven process. As a fuel it has great advantages, but the people are not used to it, and it requires different handling from anthracite coal, for which it is a substitute. In Doane's efforts he found this an effective barrier to its introduction. My conclusion is that, while the testimony is, as the master says, impressive, it would be unfair to assume that the coke oven system will be more economical, and that it is too uncertain anyway to justify taking its cost of production as a standard here; its results are too indeterminate. As to the so-called "chamber oven" system, it is too experimental yet to be taken as a substitute cost.

The other question is of the proper proportion of coal gas to water gas production. While the constituent oil of water gas remained a by-product, for which the demand was slack, there were great economies in its manufacture. Not only did it take very much less coal, but the plant was decidedly cheaper, and there was no problem in disposing of the residual coke. With the discovery of new uses for this oil, itself a residual, and the ability to extract gasoline from it, the price has greatly risen, and it is a doubtful question how long it can continue to be used. While the statute imposes a 22 candle power standard, both sides agree that a certain amount of water gas is a necessity, for the coal gas must be enriched, and this requires oil. Mr. Little gave the proportion of half and half as ideal, where such a standard obtained, though the practice of the plaintiff has been about 22 per cent. to 78 per cent. He said, however, that he was not aware of any such plant, and in December, 1919, when it was decided to add to the Astoria plant, a water gas unit was selected. This was after this case had progressed for many months, and the plaintiff knew that its practice was under criticism. It was, moreover, in the face of a sharply rising cost of oil. Ignoring the supposititious desire to play into the hands of the Standard Oil Company, which seems to me wholly apocryphal, for the reasons I have given, I can see no motive for it but an honest belief that, weighing all considerations, the chances still favored water gas manufacture.

Not only is the fixed capital item a factor, but the cost of coal is advancing with that of oil. Furthermore, it has been extremely difficult to get a proper supply of coal at all, and that difficulty still remains. It is due to transportation troubles, which we all hope will be solved in the near future; but solved they are not yet, and they must continue for a season to enter into the forecasts of a manufacturer who at any cost must be assured of a regular and sufficient sup-

ply of his raw materials. No one can, of course, prophesy what relation the costs of coal and oil will be in the future, and for the present I see no reason to revise the judgment of the plaintiff's officials in choosing this plant. As in other cases where the matter rests in their discretion, I think that a presumption exists that it is well exercised until the contrary is shown. I have therefore made all calculations on the present proportion of production, though the alternative of half and half is set forth alongside. It makes no difference in the final result.

Cost of Production in 1918 and 1919.

Having disposed of these preliminary questions, it becomes possible to consider the cost to the plaintiff of making gas, so as to compare it with the rate. That cost is made up of four items: The cost of production in the gas house, the cost of distribution, taxes, and storage and replacements. The difference between the sum of these and the income is profits, and should be compared with a fair return upon the capital invested. I shall start with the cost of manufacture in the plant.

The master accepted for a standard the cost of manufacture taken from the books of the Astoria Company for the first 8 months of 1919. This is a plant over 10 years old; but it may, I think, be safely taken as a proper standard. Certainly Mr. Little thought that for coal gas House A, and for water gas House C, were suitable. He thought House B, not economical, because of the absence of certain labor-saving devices, though the item for labor was greater for House A in his estimates, but of House A he made no complaint.

I shall therefore take the analysis of the costs at House A for coal gas and House C for water gas, as taken from the Astoria books for the full year 1918 and for the first 8 months of 1919. Sangster, the defendants' accountant, was given full opportunity to examine these, and to check their accuracy, and his tables I use. His results must be accepted as true and valid, except in so far as any of the practice in that house can successfully be criticized. I know of no such possible criticism, unless it be the amounts of materials used and the extent to which the houses were driven. The second point comes up for consideration later, and upon the first I shall say but little. The amount of coal and oil necessarily vary with the quality of each. Every one agrees that the quality of coal has fallen off in recent years; it is urged that at Astoria the amount of coal is inordinate. Now, Mr. Woods' estimate of bituminous coal for coal gas was indeed only 200 pounds and that was ample before 1916; but in 1918 House A in Astoria used by Sangster's tables 207.6 pounds, and in 1919 nearly 211.5. These figures seem too large, and would have been so in the earlier years; but Mr. Little himself thought Wood's estimate too low at the present time, and insisted that 207 pounds was necessary, substantially the Astoria practice in 1918, and near enough to that of 1919 not to justify suspicion.²

²The correction would be so little that I think it not worth while making, certainly in 1918, the only year when the profits are at all near the rate. Thus coke, a residual, varies with the coal used, at least so Sangster says in his

The bench and boiler fuel accounts in either year was a very small proportion of the cost of materials, and any saving, if saving there should have been, would hardly figure appreciably.

As respects water gas, the necessary amount of oil to be used is not in much dispute, at least so I understand it. It is true that the average in the Manhattan plants has gone up from 3.80 gallons in 1913 to 4.1 in 1919; but that is less than 8 per cent. increase, easily accounted for by a change in quality. It is noteworthy that in 1915, long before this suit was in contemplation, the quantity used in the Manhattan plants was 4.06, substantially what it is now at Astoria.

As respects generator fuel for water gas, Sangster gives for House C 35.3 pounds in 1918 and 36.43 in 1919. These are higher than either Woods' estimates or the practice on Manhattan, but by less than 9 per cent. in 1918. The item is only 10 cents in that year, and if Manhattan results were accepted it would make a difference of .9 of a cent in the price. Whether Astoria got worse coal, or what was the reason, I do not know. I have corrected the water gas price by .9 of a cent for each year to allow for this, which seems to me the only correction necessary on any of the items.

Taking, then, House A as such a standard, and accepting Sangster's analysis of its actual expenses, we may start with a total cost of production at the plant meter for coal gas of \$.4155. Sangster's figure for water gas at House C is \$.44746, which I take at \$.43846.

Taking the average of \$.4155 and \$.43846 on the basis of 22 per cent. for coal gas and 78 per cent. for water gas, the final figure is \$.4334. If the proper proportion between coal and water gas be half and half, this figure would be \$.4270. Allowing a loss of gas on the average of 4.1 per cent. the cost in the consumer's meter is for these two figures, respectively, \$.4519 and \$.4452.

Little's figure for ideal coal gas production at House A in 1919 is \$.28 and for water gas at House C \$.396. The difference is in part taken up in the cost of materials and in the number of employes; his estimate of labor being prepared upon hypothetical standards of what a proper plant should require. As to the cost of materials, the chief difference is the price of oil. Thus the difference for oil alone is \$.03149, making the cost of water gas \$.4275, if so corrected, as against \$.43846. The apparent difference is much more marked in the coal gas made in House A, but most of it is in oil, repairs, and the like. For example, there is a difference of \$.0477 in the cost of enrichment alone, which certainly should be taken on the basis of the actual amounts paid for oil and the necessary amounts used. Again for electric power, superintendence, and repairs he allows only \$.0255 in all (as I figure the several items), as against actual expenses of \$.08309, a difference of \$.0576.

Thus, with only these corrections, which are inevitably proper from any aspect, his ideal coal gas cost for 1919 becomes \$.3853 and his

report. The difference between the coal cost and the coke returns for House A in 1918 was \$.05648. If I take 200 pounds for that year, the credit would be 96.6 per cent. of that, or \$.05456, a difference of \$.00192; 22 per cent. of this, with correction for waste, is only \$.00046 for the difference in joint cost. The similar figure for 1919 is \$.00183.

water gas \$.4275. Taking these figures in the two proportions mentioned, and making allowance for 4.1 per cent. loss, his figures would be, respectively, \$.4358 and \$.4238. These differ from the figures for 1919 by \$.0161 and \$.0214.

Some part of this is probably accounted for by the fact that in Little's figures he considered House A as running at 100 per cent. per day for 310 days and House C at 100 per cent. capacity for 365 days. If this was erroneous, the fixed charges on each house were divided by too high a figure, and the result was too small per 1,000 cubic feet. I have already noticed a difference in the case of some of these items, but it will obtain in all those whose gross amount, unlike materials, does not vary directly with production. Among these labor is one, at least in House A, with inclined retorts, since the same crew will make a varying output at the same wages. This, Wood says, is not so in House B. It is quite clear that the supposed optimum of Little is far beyond any practical possibility and should not be taken as a standard. All the plants necessary for the daily "peaks" with reserve must be kept up all the time with some part of their complement, and it is not fair, when seeking a standard, not to credit any particular plant with so much idle time as all the company's plants must collectively bear.

Under the heading "Present Capacity and Reserve" I have considered this matter, and show that it is impossible to say that the company has too much capacity. It is, of course, always possible to show that a given plant was worked less than the average—e. g., the Fourteenth street and Forty-Second street plants—and that its costs should not, therefore, be accepted as a guide; but that is not the case with either House A or House C. In 1918 the company's total production, leaving out Fourteenth street and Forty-Second street and gas bought, was 17,599,323 thousand cubic feet. Its daily rated capacity was 84,000 thousand cubic feet, a total for 365 days of 30,660,000 thousand cubic feet. The production was 57 per cent. plus of rated capacity. During that year the production of House A was 52 per cent. minus of capacity, and of House C 61 per cent. minus. For the 8 months of 1919 the total was 58 per cent. plus,³ for House A 76 per cent. plus and for House C 58 per cent. minus. Thus it appears that, taking both years together, these houses were kept at about normal production.

I think it would be impossible to say whether this would account for the whole difference between Little's figures, corrected for materials, and the actual results at House A and House C. That would require accurate knowledge of what is the difference of complement between full and part capacity production. However, it is clear that there would be some difference, and that in any case Little's figures, necessarily based upon purely hypothetical conditions, may not fairly be taken against the actual practice, which came so near to them in results.

If I take Sangster's figures for 1918, I find the cost of coal gas at House A was \$.31537; the cost of water gas at House C, \$.39843.

³Without deducting Fourteenth street and Forty-Second street, which I do not find, but which is too small to change the result.

Taking the proportions at 22 per cent. to 78 per cent., and half and half, and allowing 4.1 per cent. for loss, I get \$.3964, or \$.3723, respectively, for these figures.

Distribution Expenses.

These expenses are made up from the books of the company, which I have already held to be good prima facie proof. Various items are challenged, which must be taken up seriatim:

(a) *Repairs to Meters and Appliances.* These are not done directly by the company, but by the Standard Company, a subsidiary, whose stock is owned by the plaintiff. They are billed to the plaintiff, and all items are scrutinized and checked by one of its officials. Presumably the charges include a profit, based upon the assumption that the companies are independent, for so the accounts read. In the case of mains and services the plaintiff does the work for the other companies and charged a profit of 5 per cent. I have not been able to find what the Standard's profit is on this work, but it is scarcely necessary in the case of so small an item. If I assume that the profit was 10 per cent., as it is on the sales of gas between companies, there would result a deduction of \$29,322 for 1918 and \$24,120 for 1919. I shall so take it.

(b) *Repairs to Mains and Services.* These were done by the company, for itself and all other companies. No profits are included, and the item should be taken as it reads.

[7] (c) "*Promotion Expense for Gas Appliances*" (d) "*and for Gas Utilization.*" These items include the cost of maintaining these departments, which the company organized some years ago to push the sale of gas and of machines to burn gas. Their propriety is challenged largely because the sales have not increased much. The truth appears to be that the constantly increasing use of electricity for illumination has driven out gas more and more, until to hold its sales the plaintiff must promote the use of gas for heating and cooking. It has succeeded in a slight increase of sales, and its officers attribute their ability to do even so well to these departments. I have no doubt that they are right; but, whether right or wrong, their decision is not now open to question. They were under a duty to keep up their sales so far as they could, and to push the use of gas in any new ways which the public would use it. Even under municipal management, advertisement, when not pushed to the useless extreme which competition too often engenders, is a necessary function. In its proper sense it means, not the creation of a factitious demand by the familiar processes of repeated suggestion, but genuine information in such form as to reach the public.

(e) *Salaries and* (f) *Supplies at General Office.* The salaries of the general officers should be apportioned, as the master recognized and the defendants claim; but it is very hard to find any satisfactory theory on which to allocate them. Obviously it is impossible to learn what part of his time each officer gave to gas or "non-gas" business. The method suggested of dividing in accordance with the income has few advantages, except that it is an intelligible theory, and has at least some relation to the facts. I shall adopt it, but only because

I am taking all doubts against the plaintiff. The same applies to the transfer, accounting, and cashier's departments. In the engineering, commercial, purchasing, and chemical departments there can be no ground for any allocation at all. All this work presumably went for gas manufacture, and so much of it as was expended for other companies appears to have been charged against them in the books. Mr. Woods did not apparently keep exact track of his time, but the portion of his salary to be allocated is very trifling. I shall accept those items.

The rest of the charge it is hopeless to attempt exactly to apportion. I shall assume that it was shared between all the foregoing departments in the proportion of their salary accounts, and I shall deduct one-third of that part attributable to the general offices, transfer, accounting, and cashier's departments. The result of this, as I make it, is \$77,122 for 1918 and \$53,837 for 1919.

(f) *General Office Supplies and Expenses.* I apportion these, very roughly it is true, by deducting that percentage of the whole which the deduction from the preceding item bears to the whole item; that is, I deduct \$23,509 for 1918 and \$15,361 for 1919.

(g) *Charges to United States for Officers' Services.* This item does not appear on Exhibits 364 and 365, from which I calculate the cost of distribution. I need not consider it.

(h) *Legal Expenses.* I think these should follow general officers' salaries. I deduct \$14,183 for 1918 and \$13,300 for 1919.

(i) *Insurance.* The insurance item covers, not only some property not used in the gas business, but the Fourteenth street and Forty-Second street plants, which, as will appear, I am eliminating from the "rate base." These items should come out, and the means of adjusting the item on that basis has not been pointed out. The defendants claim a deduction based upon the income which has been earned by the insurance funds and upon the insurance participation certificates. These certificates are issued to the plaintiff merely as evidence of the surplus in any year of the premiums over losses. It does not appear that subsequent premiums may be paid by their redelivery, but possibly this is true.

In view of the fact that the insurance premiums include property not used for gas purposes, I think I should accept the defendants' demand on this item, \$17,148 for 1918, \$17,481 for 1919.

[8] (j) *Mutual Aid Society* and (k) *Superannuation.* Under these two items are charged those payments, now very common among large corporations, by which the employees receive insurance for sickness or distress or a pension when aged. There can be no question of their propriety in substance, nor can I, with deference, agree with *Kings County Lighting Co. v. Lewis*, 110 Misc. Rep. 204, 230, 180 N. Y. Supp. 570, that the charges may not be made during the years when the disability existed. The method to be adopted is fairly open to the discretion of the officers, and in the end it makes very little difference how it is distributed among consumers. The question is whether it is in fact paid and represents a reasonable amount.

In the latter question the master peremptorily shut off any inquiry in the case of superannuation. He assumed that the discretion of

the officers was not subject to review, and in this he was in error, because, if that discretion had been wanton or extravagant beyond reason, it could not stand. However, all the details were contained in certain bundles of papers which the defendants themselves put in evidence, and which showed what each allowance had been and to whom made—at least so I understand, though the exhibits have not been submitted here. I cannot see that the cross-examination, which the master stopped, could have added anything of substance. The officers examined would scarcely have admitted that they considered the allowances too great, and the only available proof would have been by showing that in other companies such allowances were so much smaller than those actually allowed as to make them extravagant. This the defendants did not offer to show, and no doubt could not. I do not think, therefore, that the master's erroneous ruling should throw out this item.

(1) *Automobiles*. The plaintiff uses 20 passenger cars in its business, of which 7 are detailed for the use of its officers. The point was raised that this number was too many, and the superintendent in charge of the department was called by the defendants, apparently to establish the point. The resulting examination really goes very little into that issue, and was directed for the most part to the method in which the accounts were kept. The master allowed very few questions upon that, and of this the defendants complain. I cannot see that the examination shut off was of any consequence upon the relevant issue; at least, the defendants stated no reason to the master justifying his so supposing.

As to the necessity of having 7 cars, I will rule here, as elsewhere, in the absence of some evidence showing that they were unnecessary, or that the officers abused their powers by using them for personal purposes, that their judgment must stand *prima facie*. As in analogous situations, given the discretion, its exercise must be shown to have been injudicious. I allow the item.

[9] (m) *Interest on Consumers' Deposits*. In whatever way figured it seems clear that this is in no sense a proper item in the cost of distributing gas to the consumer. I am not trying to learn what were the revenues of the company in the past, but to establish a basis for the cost of distribution in the period to be covered by a decree. I disallow this item, \$40,905 for 1918 and \$33,601 for 1919.

(n) *Defensive Emergency Service*. This was certainly an exceptional expense caused by the troubled period of the war. It offers no just basis of inference for the costs of distribution in the future. I disallow the item, \$100,251 for 1918 and \$11,654 for 1919.

(o) *Miscellaneous General Expenses*. Under this heading the defendants challenge a number of items, which are too many and too small to deserve much notice. All of them are proper enough on their face, except the general item of "Miscellaneous Expenses," \$27,280 for 1918 and \$8,654 for 1919. In 1918 about \$9,000 seems to have been connected with emergency defense. I will deduct \$10,000 in 1918 and in 1919 \$4,500, two-thirds of what apparently represented Kenney's emergency defense services in 1919.

In 1919 there is an item of \$46,320, which comprises the expenses of this litigation. It can hardly be considered a normal charge for each year, and should be spread. I may assume one such suit in 10 years. As we have two years to consider I will deduct \$41,688 from 1919 and add \$4,632 to 1918.

The sum of these deductions is as follows: For 1918, \$317,808; and for 1919, \$215,542. The total costs of distribution for 1918 were therefore \$3,249,337 and for the first 8 months of 1919 \$2,370,309. The rate per 1,000 cubic feet for 1918 was \$.1802, and for 1919, \$.1934. A question arises, as to this item, whether the spread should be taken at the actual production during the years in question or at the supposed production in the future, say 20,000,000,000. A few of the constituent factors, like repairs to mains, would seem to be pretty certainly constant, whatever the production. The greater part of them, however, will vary generally with the amount of business done, and in view of the severe treatment which I have given to many of them it seems to me only fair to take the spread at the actual output. There can be little doubt that at any prices now in sight the sum allowed is inadequate.

(p) *Maintenance of Conduits from Astoria.* Connected with the subject of distribution costs is the expense of keeping up the conduits from Astoria. There are two tunnels running between Long Island and New York, one called the "Astoria tunnel," from the Astoria plant to the Bronx, which cost \$5,178,614.58; the other further south, and from the New Amsterdam Company's plant to Manhattan, and called the "Ravenswood tunnel." These are each used to conduct gas from the Astoria plant to the plaintiff's mains; the plaintiff being the sole consumer of Astoria gas. The lower or Ravenswood tunnel is used to convey coal gas which has been enriched by oil at Ravenswood; it is small and cost \$700,000. However, to reach it the gas must pass through mains on Long Island valued at \$844,422.71.

All these conduits are formally owned by the East River Gas Company and are used by others than the Astoria Company. The several corporations have adopted a figure of 57 plus per cent. as representing the plaintiff's proper share of these conduits, based upon their relative requirements. They have also adopted somewhat arbitrarily the figure of 3½ per cent. as proper for the renewals and repairs necessary for upkeep; the figure being taken from calculations made by the company's engineers by an average over a number of years. There was no apparent motive in fixing it at that amount, except a desire for an honest apportionment of charges between them, even though it were for bookkeeping purposes. Had the defendants wished to meet this proof, the actual vouchers were available for them to do so. The estimate under the circumstances seems enough to make a prima facie case, but against any possibility of error I will take it at only 2 per cent.

However, it appears to me a closer estimate not to take the full valuation of the Astoria tunnel and leave out the Ravenswood and the connecting lines. It is better to treat the whole system of conduits between Astoria and New York as one and to take a percentage of the whole. Past experience indicates 57 per cent. plus, but I shall give my

reasons in considering the "rate base" for taking it higher and allowing \$4,400,000 as the proper allocation. At 2 per cent. the repairs figure \$88,000, which on a spread of 20,000,000,000, which it is proper to take on this item is \$.0044. With the other distribution cost, the total is \$.1846 for 1918 and \$.1978 for 1919.

Taxes.

The company has calculated its own taxes, and both sides start with that calculation as a basis (Exhibits 205 and 355).

(a) *Gross Earnings Tax.* The first item, New York state gross earnings tax, is apportioned in accordance with the division of income between gas and "non-gas" business. This is fair, and I do not understand it to be challenged.

(b) *New York Special Franchise Tax.* The next item is the special franchise tax. This is a tax based upon the value of the property in the streets, together with the right to use the same as a public utility. It is, of course, plain that, if franchises proper are not to figure in the "rate base," so much of this tax as is figured on franchise as against the value of the mains and the like is improperly levied. The state should not at once levy taxes on the basis of a supposed value in the franchise and refuse to recognize that value as property on which any income may be earned. But, at least while the state continues to do so, it must be content to allow the sums paid to be a credit in the account.

The only question, therefore, is of the proper allowance for the franchise tax. In 1918 these were assessed at \$384,297, and in 1919 \$190,658. There would be no difficulty in allowing these sums, were it not that the assessments have always resulted in contests in which the company has never but once paid the full assessment. It therefore becomes necessary to conjecture what the proper credit should be, and obviously the only basis is past experience. Between 1906 and 1914 exclusive settlements have been made on the average at the rate of less than 64 per cent. But in 1915 the full amount was paid, and in 1916, 1917, and 1918 the amounts already paid are a little less than 70 per cent., and it can scarcely be assumed that nothing more will ever be paid during these years, and it would probably be unfair to credit the company with only 70 per cent. in the future in fixing a rate. Nevertheless, I shall do so for the purpose of this case, and allow the item in 1918 at \$269,000 and in 1919 at \$133,460.

(c) *Real Estate of Corporations Tax.* This is a tax levied upon the "tangible" property in the streets of New York, and, if the special franchise tax is valid at all, this property has already been once assessed and taxed. There is, indeed, an apparent injustice in disregarding a tax levied by the state in a case to which the state is in effect a party, yet there is an equal apparent injustice in crediting the plaintiff with a tax which it insists it will never have to pay, and which it will not pay if it pays a special franchise tax. In such a dilemma the burden of proof must determine the issue and the item must be disallowed.

(d) *Real Estate Taxes.* Only those taxes on property held to be used and useful should be credited. Referring forward to my calculation of the "rate base," I deduct the following items:

	1918	1919
Block 982, lot 13.....	\$ 8,425.20	\$ 5,521.60
Block 988, lot 1.....	35,813.00	23,470.67
Block 1089, lot 1.....	57,938.00	39,053.33
Block 1090, lot 23.....	1,433.70	957.00
Block 1107, lot 7.....	9,440.00	6,186.67
56 per cent. of block 985, lot 7.....	2,814.56	1,844.60
5 per cent. of block 989, lot 1.....	528.05	346.05
10 per cent. of block 1457, lot 6.....	1,699.20	1,113.60
One-third of block 3236, lot 1.....	8,016.00	5,804.00
	<hr/>	<hr/>
	\$126,107.71	\$84,297.52

(e) *Personal Taxes.* The defendants' challenge as to personal taxes extends only to 1918, and rests upon the fact that the personal tax for that year was assumed to have been levied on gas property only, because that was done in 1919. The inference appears to me legitimate. I allow the item.

(f) *United States Government Taxes.* This item is not challenged.

(g) *Interest on Taxes.* The plaintiff very ardently argues that it should be allowed a credit of interest accruing on unpaid taxes. Except in the case of special franchise taxes, it is hard to see any justification for such a credit. Nor does the case seem to me different as to them either. The only theoretical credit that I can see is the difference between the interest due upon so much as they will in the end pay and the value of the money in their hands meanwhile. In the first place it is impossible to tell what they will pay; if it were not, I should credit them with it; and in the second it would be a mere conjecture what was the value to them of the money in their hands.

The allowable taxes on the plaintiff were therefore for 1918 \$831,-645.08, and for 1919 \$468,092.97.

(h) *Astoria Taxes.* (1) *Real Estate.* In 1918 the Astoria company paid \$264,700.15, and in 1919 \$307,819.36, which should be prorated for 8 months at two-thirds, or \$205,212.90. (2) *Personal Estate.* 1918, \$11,157.41; 1919, \$7,666. (3) *Special Franchise.* 1918, \$321.73; 1919, \$210.92.

(i) *Conduit facilities.* As has been seen, the total investment in these conduits was \$6,722,037.29, of which I credit the plaintiff with 65 per cent. for reasons given later. Taking taxes at 2½ per cent. on an assessment at say two-thirds of its value, or \$4,500,000, the tax will be \$112,500, of which 65 per cent. is \$73,125 for 1918 and \$48,-750 for 1919.

(j) *New Astoria Plant.* There must for the future be figured an increased Astoria tax, based upon the new plant now in process of erection, all of which I am allowing for reasons which will appear. The cost of that plant will be \$4,500,000, and if I take the assessment at two-thirds, there will be added to the assessment \$3,000,000, on which the tax at 2½ per cent. will be \$75,000 for 1918 and \$50,000 for 1919. The total taxes, therefore, will be as follows:

	1918.	1919.
Consolidated Gas Company.....	\$ 831,645.08	\$468,092.97
Astoria (present plant).....	276,197.29	213,089.82
Astoria (new plant).....	75,000.00	50,000.00
Conduits	73,125.00	48,750.00
	<u>\$1,255,967.37</u>	<u>\$779,932.79</u>

Taxes can hardly be thought to vary in proportion to production, and the proper spread should be the supposed sales to be effected within the period of the decree. I have taken these at 20,000,000,000 throughout. The tax factor is therefore for 1918 \$.0628, and for 1919 \$.0585.

Federal Income Tax.

The company has hitherto escaped any federal income tax, because the United States authorities have accepted its statement that it has no net income. However, this case proceeds on the supposition that an income must be allowed it, and into the calculation of a fair profit that factor must surely enter, if the company is to be upon a level with freely competing industries. At present under the Revenue Act of 1918—section 230a (2) (Comp. St. Ann. Supp. 1919, § 6336 $\frac{1}{2}$ nn)—the tax upon corporations is fixed at 10 per cent., and would amount to the following sums. Assuming a capital of \$64,000,000 without franchises, and \$72,000,000 with franchises, and profits at 6 per cent., or 7 per cent., the results are as follows:

	Six Per Cent.	Seven Per Cent.
Including franchises	\$432,000.00	\$504,000.00
Excluding franchises.....	387,000.00	448,000.00

On a spread of 20,000,000,000, these figures would become for each 1,000 feet of gas, as follows:

	Six Per Cent.	Seven Per Cent.
Including franchises0216	.0252
Excluding franchises0192	.0224

These figures must clearly be allowed. In fact, the calculation should be higher, since the tax will be levied upon the income without any deduction for the tax itself, but that is a small variation.

Renewals and Replacements and Gas Storage.

The company has carried on its books an account each year called "Renewals and Replacements," which is in fact an amortization account. Into this is put the loss arising from the abandonment of old plants, arrived at by subtracting the salvage of the plant from its cost on the books, together with the cost of withdrawal. It is possible to obtain a long average of these charges by taking the amount of gas reported sold from December 31, 1907, to December 31, 1918, and using it as a divisor for the sums so carried on the books over the same period. The quotient is \$.0373, which the master has taken at \$.03. In these cases the conclusiveness of the master's report does not obtain (Knoxville Water Co. v. Knoxville, supra), and I shall use the more exact rate.

I figure the cost of gas storage, based on the years 1918 and 1919, at \$.0097. The sum of these items is \$.047, which I accept.

Present Capacity and Reserve.

As a preliminary to considering the "rate base," and indeed as an inevitable element in deciding whether or not I should include the Fourteenth street and Forty-Second street plants, it becomes necessary to take up the company's capacity and reserve, compared with its present demands. If it should appear that any plant is necessary for the reasonable future, that plant must be included, as it is to-day, at least at its value in modern cost of reproduction. If, on the other hand, it appears that there is a reasonable doubt about that necessity, it should be excluded.

The rated daily capacities of the present plants of the plaintiff (including Astoria) are as follows:

Fourteenth Street	5,000	(coal)
Twenty-First Street	28,500	(water)
Forty-Second Street	4,500	(coal)
Ninety-Ninth Street	5,500	(water)
Astoria House A.....	10,000	(coal)
Astoria House B.....	10,000	(coal)
Astoria House C.....	30,000	(water)

Total93,500 thousand feet

On January 31, 1920, its send-out was 99,243 thousand feet. It is certainly not unreasonable to calculate its maximum send-out at 100 million in the future. The defendants concede that the reserve should not be less than 5 per cent. The plaintiff believes that much more is necessary. If I put the total requirement at 105 million feet, I shall be probably shaving too close for safety, even at the present demand. The master's allowance of 15 million cubic feet out of the 30 million now building at Astoria gives only $8\frac{1}{2}$ per cent. reserve, if the Fourteenth and Forty-Second street plants are included. If they are not included, the capacity is insufficient. It is clear, therefore, that either those plants must be included or more of the new Astoria unit.

The defendants urge that this is the wrong way to approach this subject, there being a whole system which may treat its reserve as one, and I will consider the capacity on that assumption. On January 31, 1920, the maximum of the system was 166,488 thousand feet. Allowing only 5 per cent. reserve, the requirements are 175,000 thousand plus, which the system just has. Its resources at present are as follows:

Consolidated and Astoria (as above).....	93,500
New Amsterdam	36,000
Standard	10,500
New York Mutual	24,000
Central Union.....	11,800

175,800 thousand

If the two plants on Fourteenth street and Forty-Second street are to be disregarded, the system has no reserve at all. The defendants must therefore either allow these two plants or some part of a new plant, because it is obviously already time to build. But when building a reserve, economy and prudence require a forecast of the future. The construction of a 30 million plant at Astoria decided on in December, 1919, was proper caution; some addition was needed; less would not have been economical. If this be added, and the two old plants are disregarded, the system has a reserve of 18 per cent., and the plaintiff as a member must bear its proportion of that amount; i. e., it must have a capacity of 118 thousand. As it has by hypothesis only 84 million left, it will be obliged to use 16 million for its actual demands, and the balance of 14 million will be less than its share of the reserve. In short, if the two plants are to be disregarded, the whole cost of the new plant must be part of the "rate base."

I do not mean to decide that with the new plant the system has too large a reserve in $23\frac{1}{2}$ per cent., which it will have. I only mean that, since it was good policy when building to build so large a unit, the utmost that can be demanded under the most exacting theory is that, if the old units are to be disregarded, the whole of the new unit must be credited. The only question open is whether the old units ought not also to be included. As I am not fixing a rate, I need go no further in this case than to take the doubt against the plaintiff.

Mr. Little made some elaborate calculations to show that the plants were not worked to capacity, but it is all irrelevant. Even if Astoria could make 57 million feet a day and Twenty-First street 33 million, and Ninety-Ninth street 6 million, the company could not fill its present demands. And if the system as a whole be considered, and these, as I think wholly conjectural, hypotheses be accepted, the total capacity of the system becomes only 177,300 thousand cubic feet, with Fourteenth street and Forty-Second street excluded. This is a reserve above last year's demands of only 10,812 thousand cubic feet, or 6 per cent. plus. It is absurd to suppose that the time had not come, viewed even under Mr. Little's assumptions, in which new building must be done.

For these reasons, in accordance with my plan of resolving all doubts against the plaintiff, I have excluded Fourteenth street and Forty-Second street. I include the whole of the new Astoria plant. It is to be remembered that in so doing the "rate base" is reduced much below what it would be if the new unit had been coal gas plants, which would have cost twice as much. If the proportion of coal gas to water gas had been in this way changed to about 45 and 55 per cent., it would have involved capitalizing this unit at \$9,000,000 or \$10,000,000 at least. The addition of \$5,000,000 to the "rate base" so involved would add \$.015 or \$.0175 on a spread of 20,000,000,000, according as the rate be taken at 6 per cent. or 7 per cent. This makes the difference in distribution of coal and water gas count for less than 1 cent even on prices in 1918. It adds a reason for disregarding the theoretical division suggested by Mr. Little.

"Rate Base."

It is possible now to calculate the "rate base," which is composed of the following items: Real estate, plants, conduits jointly used, office buildings, the present Astoria plant, the Astoria plant now building, working capital.

If the plants be taken at their cost, there is logic in insisting, as the defendants do, that the land shall be taken in the same way; but I have, for the reasons already given, refused to do either. The value of the plants is, it is true, calculated upon the basis of cost, but not in any sense because I think cost the test; only because it is clear that at present anyway an estimate based upon cost is a most conservative one, and because it has the great advantage, as I have said, of avoiding conjectures based upon the opinions of experts.

(a) *Land Used and Useful.* The real estate of the Fourteenth street and Forty-Second street plants will come out of the "rate base" along with the plants themselves, for the reasons which I have just given under the heading, "Present Capacity and Reserve." This involves the following deductions:

Fourteenth Street:

Block 982, Lot 13.....	\$326,000
Block 988, Lot 1.....	390,000
Block 991, Lot 1.....	180,000
Block 991, Lot 47.....	56,000

Total\$952,000

Forty-Second Street:

Block 1089, Lot 1.....	\$ 900,000
Block 1090, Lot 23.....	82,500
Block 1107, Lot 7.....	375,000

\$1,357,500

I shall take up seriatim the other pieces challenged:

Block 985, Lots 7, 19 and 20. This space appears to have been used for storage, and to be deemed necessary by the officers of the company, who think that they have no other available space. There is no sufficient reason to impeach their judgment. Nevertheless the westerly half of lot 7 is occupied at present by two small holders and a boiler house. It is hard to see any use for them, and no prospective use is suggested. I strike off \$100,000 at an estimate, or 56 per cent.; the western half must be the more valuable.

Parcel 2, Lot 1, Block 989. This easterly parcel contains a boiler plant and pumping station used in connection with two holders, one of the plaintiff, for 32 million feet, and the other of the New Amsterdam, for 5 million feet. It seems that this should be prorated in that proportion between the two. The book cost to complainant seems to have been \$20,643.84. I strike off three-eighths of \$20,643.84, or \$7,740.

Lots 29 and 30, Block 952. Lot 30 is an old machine shop used for storage purposes, 70 by 60 feet. In the summer of 1918 there was little

in it. Lot 29 is vacant and used for storage. The company asserts that its storage facilities are small. I do not think there is any sufficient reason to upset the discretion of the officers in retaining these lots.

Part of Lot 6 of Block 1457. This is a very small matter, but the lot seems for long to have remained unused, and an apportionment may be proper. I will strike off \$15,000 for this lot; some estimate must be made, and it will inevitably appear arbitrary under the circumstances.

The Westerly 300 Feet of Lot 2 of Block 1157. This was formerly the site of six small holders; the westerly end of the lot being occupied at present by two 4,000,000-foot holders. This is an expensive piece of real estate, and it is not likely that the company would hold it unoccupied, if it had no genuine prospective use for it. There is at most a great difference of competent opinion as to the relation between the maximum output and holder capacity, and the officers of the company were not obliged to accept the figure of 75 per cent. suggested by Hine. Little figured it at 150 per cent. of maximum capacity, which the company has not. The property has been unused for only two years, and I think the time has not yet come when the company must make up its mind whether it will sell it or put up new holders. I decline to interfere with their judgment as to this property.

Lot 18 of Block 1683, Lot 2 of Block 1712, and the Easterly 281 Feet of Lot 5 of Block 1705. The first of these, so far as the evidence shows, is used for a training school. Lot 2 of block 1712 is most essential, as it gives access to the East River. The larger part of this property is used for the Astoria Company, and, in view of the way in which the case has been treated, there is no reason to distinguish between it and the plaintiff. The easterly part of lot 5, block 1705, is used for various purposes, part of them being in use by the National Coal & Coke Company. As the revenues of this company are charged against the plaintiff, no injustice is done in allowing the whole property as in its "rate base." Strictly, perhaps, the item should be set off, but the difference is too trivial for notice.

North End of Lot 1 of Block 3236. Upon the south end of this lot is built the 10,000,000-foot Kingsbridge holder. This purchase was made after considerable public feeling had been manifested in that part of the city, and as a concession to the citizens by the company, which was properly made. It was necessary at the time to buy the whole tract, and the portion now criticized is in the market. I think it unreasonable to require the company to attempt any residential development of the northern part, owing to the character of the land itself. It is true, however, that they have kept it unused for 10 years without sale. It seems to me that a time has come when the sale should be made, at least as an alternative to keeping it a part of the property on which gas profits can be made. If I take off one-third of the value, say \$70,000, I shall certainly not be unfair to the defendants.

These are all the prices questioned of those which the master allowed. The total deductions for the sum he awarded, of \$9,531,275, are as follows:

Fourteenth Street	\$ 952,000
Forty-Second Street	1,357,500
Block 985, Lot 7.....	100,000
Block 989, Lot 1.....	7,740
Block 1457, Lot 6.....	15,000
Block 3236, Lot 1.....	70,000
Total	\$2,502,240
	\$9,531,275
	2,502,240
Leaving a balance.....	\$7,029,035

(b) *Reproduction Value of Plants, estimated from their cost.* The books of the company show the cost of all its plants and the summaries in evidence go back to 1884, when it was organized. I have taken only those plants which remain open on the books and not all of these. The figures as of December 31, 1918, are as follows:

Stations	Book Value.	Part of Plant Condemned.
21st St. station (plant).....	\$3,816,273.52	
44th St. station.....	2,004,996.31	\$1,290,412.67
63d St. station.....	401,204.48	
65th St. station.....	817,105.37	
99th St. station (plant)	1,158,402.97	
111th St. station.....	1,085,862.26	
Kingsbridge holder.....	912,299.04	
132d St. station.....	475,896.74	
132d St. testing station.....	7,450.00	
14th St. holder as adjusted.....	584,485.20	
Engineering item.....	323,907.59	
Total	\$11,587,883.48	\$1,290,412.67
Deduction for part of plant condemned.....	1,290,412.67	
	\$10,297,470.81	

Hine's figure for these items is \$9,979,935.72, which varies in substance only as to the 111th street station. That difference arose from his exclusion of blocks 1704 and 1712 and 1683 as not used and useful, in which I do not agree with him, as I have said.

The books also have corresponding figures for meters, mains, and services, constituting the whole fixed plant of the company. The whole account for plants, etc., can therefore be stated as follows:

Plants	\$10,297,470.81
Meters, etc.....	6,631,454.32
Mains	11,027,266.54
Services	1,272,241.74
Total	\$29,228,433.41

This calculation makes no allowance for depreciation, although the method by which the present value is reached is from original cost, which, as I have said, should always bear that factor in mind, even though it need not necessarily include it, when the plants have been kept up. Depreciation Maltbie and Hine figure at \$6,507,400, and the

answer at once occurs that it is from any point of view more than met by the increased costs of present reproduction. Such, indeed, is the evidence so far as mere opinions and calculations of experts can justify a conclusion. Besides, there is a check, curiously conclusive at least to me, upon the cost of the plants. As I have said, the Astoria plant of 30,000,000-foot water gas, now building, will cost \$4,500,000, to be completed by December of this year. The contract was let in December, 1919, and forms a good test of what the costs then were for such units, better, probably, than the opinions of witnesses. It is a fair inference from that contract that the cost in such large units was not less than \$1,500,000 per 10,000,000 feet capacity, and so Addicks takes it. The capacity of the only two water gas units on Manhattan is 34,000,000, making at such rates a cost of \$5,100,000. The book cost is a little short of \$5,000,000, a surprisingly close parallel. Therefore, judged upon the basis of their present capacity, I may assume that the reproduction value of the Manhattan plants is at least their book value. It is, of course, true that in so doing I have not made any discount because they are old. I have taken the standard to be the cost of fixed capital sufficient to render the service in question and for the reasons already given. Maltbie figured a "straight-line" depreciation of \$3,500,000 for all plants and holders. This was necessarily a conjecture, based upon the supposed life of the plant; it has no application while the plant is kept up. It is quite true that there is no such check upon holders and stations as in the case of plants; but, on the other hand, so far as opinion evidence can show, it appears without contradiction that to reproduce these would now cost a great deal more than their book cost.

The other elements of depreciation are for mains, about \$1,500,000, and services and meters, \$1,500,000. Any depreciation in the mains appears to me quite fanciful. Little said that the life of a main, when properly buried, was indefinite; the only question is of obsolescence and repairs, and I should suppose that obsolescence would occur only after it got too small for its requirements. It might, of course, be possible to show that all necessary mains could now be laid for less than the book cost; but the plaintiff has shown the contrary by Miller, and it is not contradicted.

As to meters and services the case is not so strong, because, even if their life be 75 years, as Little thinks, no one knows the age of all those in use. Moreover, the depreciation of \$1,500,000 is only about 12 per cent. of their cost. However, the same rule applies as before. The plaintiff proved the cost and the necessary repairs to bring the whole plant up to its original condition. It proved that the cost of reproducing fixtures of equal capacity was more than the book cost. That made a case in my judgment which was proof against any theory of "straight-line" depreciation. The allowance for repairs might be attacked on the ground that the condition of the plants and fixtures in fact required inordinate repairs, but that was not done. In accordance with the principle which I have tried to demonstrate, I decline to make any allowance for depreciation.

(c) *Conduits Jointly Used.* I have already given my reasons for taking all the conduits used by the Astoria company rather than the Astoria tunnel alone. For the rate base the figure is 57 per cent. of \$6,723,037.29, or \$3,832,131.25. However, since the Fourteenth street and Forty-Second street plants are excluded, it is hardly fair to count only 57 per cent. of the value of these conduits as allocatable to the plaintiff. I must assume that all the gas used by it will come through one or the other of these conduits, except what can be made at Twenty-First street and Ninety-Ninth street. This would very substantially increase the proportionate use of the tunnels, but it would be hard to say exactly how much. In taking the valuation at \$4,400,000, which is 65 per cent. plus, I should be within a safe estimate, and I so take it. I am supposing the Astoria capacity to be raised from 50 to 80 million cubic feet a day.

(d) *The General Office Building and the Fifty-Seventh Street.* In 1914 the company erected a very large office building in New York as a place of business, not only for itself, but for its allied companies, including the Edison Company. This is 19 stories in height, and contains, besides offices proper, many adjunct rooms, such as an auditorium, a restaurant, telephone booths, and other conveniences, not only for the needs, but for the rest and pleasure, of the tenants. Its cost was \$2,542,615, and the value of the land was \$410,000, making an investment of \$2,952,615 in all. In view of the fact that the greater part of this building was not used for gas purposes, it became necessary to apportion the space between the company and its other tenants. Estimates were made as of various dates, the last being July 1, 1919. At that time the company's occupation was claimed to be 113,785 square feet (including its share of the common conveniences), out of a total of 294,445, 38 per cent. of the whole. The question, as I view it, is only how much of the investment can properly enter into the rate base. Dr. Weber did, it is true, figure the total rentals of the property and charge them against the plaintiff; but that would not be gas income anyway. I need only find the amount of the building properly allocatable to gas business for use in the "rate base." Strictly speaking, a portion of the upkeep should also be credited to costs of distribution; but that is either included in another item or has been omitted. It can hardly be of much consequence. I shall therefore consider only the apportionment in determining the "rate base." As such, in view of the fact that the company has claimed only about 35 per cent. of the whole, the time and testimony spent upon it were hardly justified; at that percentage it would only bring into the "rate base" a little over \$1,000,000.

Some allowance, of course, must be made; the defendants wish me to strike out 80,000 square feet actually occupied, leaving only about \$255,000 in the "rate base," which is most unfair. Still the impossibility of precise allocation in any event, the estimate at best resting in supposition, requires a rough estimate. It is agreed that the Edison Company has 1,600 employes in the building, and the plaintiff 800. The total space, including that assigned for the common conveniences, assigned to the Edison Company, was 123,631. If I divide this in half,

and then add something, in view of the fact that the higher paid employes of both companies get a larger space in any event, I can safely allot 70,000 square feet to the plaintiff. This would leave 43,785 square feet of the building unoccupied, on the theory that the plaintiff's employes might be less spread out than they are. But the building was rightly built for the future, and I shall assume that the space so theoretically vacant will be occupied in the future in the same proportions as that now occupied. I find, also, that that extra space was prudently built in 1914. In short, I shall deduct it from the total space, and so give the plaintiff a percentage of 28 upon the whole investment; i. e., \$846,732.20.

The Fifty-Seventh street building was built as another office in 1918, and is used only by the company. The question was debated, and advice taken upon it, whether it should be a high building or not, and after consulting competent real estate brokers it was decided to build a low building. The defendants complain because that advice was followed. I decline to harry the company with such factious vexations; their discretion may or may not have been right, but there is no ground to say that a clear error was made.

As to the site, the company had the right to build upon a thoroughfare, not on a side street. The public convenience justified it in having its quarters where they would become generally known; it might also have an eye out to the advertisement from such a location. Municipal authorities wisely select such streets for their enterprises. I allow the sum: Land \$400,000; building \$294,718.47. The total of these is \$1,541,450.57, to be added to the rate base.

(e) *Present Astoria Plant.* The present Astoria plant was begun in 1906, and there had been expended up to October 31, 1919, \$15,497,615 upon land and fixtures. This sum must come into the "rate base," unless some part of it is not necessary for gas purposes. The defendants challenge the amount of land purchased, contending that less would have been enough, because much of it is not now in actual use. In 1914, however, when the Astoria company applied for leave to issue \$14,500,000 of securities, the Public Service Commission granted that leave, and it appears that the engineers of the commission had tested all expenditures by the vouchers to the extent of 75 per cent. Section 69 of the Public Service Commissions Law authorizes issues only in case the expenditures have been "reasonably required" for the purposes of the company. People ex rel. D. & H. Co. v. Stevens, 197 N. Y. 1, 90 N. E. 60, was decided before the amendments of 1910, and it was clearly stated in People ex rel. B. L. H. & P. Co. v. Stevens, 203 N. Y. 7, 21, 22, 96 N. E. 114, that the commission might withhold its consent to expenditures not in the nature of permanent capital.

There can be no question, I think, that the Public Service Commission could have refused to consent to the issue because all the land was not necessary, and that it is too late now to take a contrary position. At that time the fixed capital account was but a little above the issue authorized. I shall therefore take it that, viewed in the light of prospective requirements and the advancing cost of land, the whole

area is reasonably necessary. I therefore allow the sum as of October 31, 1919.

(f) *Astoria Plant Now Building.* The value of the Astoria plant now building is concededly \$4,500,000, and for the reasons already given I include it.

(g) *Working Capital.* For working capital I take \$2,000,000, not because I mean to fix any such sum, but as a conservative compromise between the plaintiff's figure of \$3,800,000 and Maltbie's of \$1,480,000. It is in fact probably much too low, and it is clear that, in spite of his subsequent testimony, Little meant originally to say that there was a fairly constant proportion between working capital and production. His figure of 20 cents, which at that time he gave as a minimum, is twice what I have taken here.

(h) *Recapitulation.* The "rate base" so figured, without any allowance for franchises, is as follows:

Land	\$ 7,029,035
Plants	29,228,433
Conduits jointly used.....	4,400,000
Office buildings.....	1,541,450
Present Astoria plant and land.....	15,497,615
New Astoria plant now building.....	4,500,000
Working capital.....	2,000,000
	<hr/>
	\$64,196,533

This "investment" therefore comes on a basis of 19,000,000,000 feet to a capitalization of \$3.36 per 1,000 cubic feet, or \$3.63 with franchises included. This is certainly too small. Little swore that in 1914 it was the consensus of engineers that a water gas plant would cost \$2.80; and that the present costs would be double that amount, or \$5.60. Coal gas plants are much more expensive. It is more than probable that the plaintiff's whole investment is therefore properly valued at \$130,000,000 at present prices, or twice what I have valued it at. But I go along with the master, since the result is in any case the same, in adopting the piecemeal method of valuation. That might be improper, if a rate were to be fixed.

Account Stated of the Plaintiff with the Rate.

I am now in a position to state the account of the plaintiff with the rate, taking the revenues as \$.7991 for gas sold and \$.073 for other gas revenue, \$.8721 in all; \$.073 is higher than either in 1918 or the first 8 months of 1919. It is \$.0002 lower than the 12 months ending October 31, 1919.

1918.

Cost of production.....	\$.3964
Cost of distribution.....	.1846
Taxes0628
Renewals and storage.....	.0470
	<hr/>
	\$.6908
Revenues	\$.8721
Expenses6908
	<hr/>
Available for profits.....	\$.1813

(267 F.)

1919.

Cost of production.....	\$4519
Cost of distribution.....	.1978
Taxes0585
Renewals and storage.....	.0470

\$7552

Revenues	\$8721
Expenses	7552

Available for profits.....\$1169

Upon a supposititious 20,000,000,000 spread, the income on 1918 costs would be \$3,626,000, which must bear a federal income tax of 10 per cent. The net would be \$3,263,400. On 1919 prices the net income would be \$2,104,200.

I may now determine in percentages the possible earnings of the plaintiff upon four different hypotheses: The costs of 1918, with and without including franchises, and the costs of 1919, under the same alternatives.

	1918	1919
Excluding franchises.....	5.08%	3.28%
Including franchises.....	4.53%	2.92%

Such is the final result, and so it appears that, even though the "tangibles" of the company are valued, not on the estimates of experts, but on their cost, except in the case of the land, the company will not much more than earn upon them 5 per cent. on the basis of 1918 costs, or $3\frac{1}{4}$ per cent. on the basis of 1919 costs. If the franchises are added, the earnings will be $4\frac{1}{2}$ per cent. on the basis of 1918 costs and 3 per cent. on that of 1919. As the 1919 prices have now obtained for over a year and a half, it is fair to say that, in a long enough future to call for some relief, the company cannot earn more than $3\frac{1}{4}$ per cent. on its "tangibles" alone. I doubt very much indeed whether on the present value of the "tangibles," as gathered from estimates of the most competent persons available, which is really the only way in which it can be reached at all, the company can earn more than $1\frac{1}{2}$ per cent., though such estimates are of course somewhat speculative.

This result was indeed to be expected. It is scarcely possible that a rate fixed in 1906 to give a fair return, and presumably no more than a fair return, should to-day be adequate. In the figures I have used I think it clear that everything has been pared down unsparingly, and I take this occasion to say what I have already alluded to more than once already. It would be most unfair to accept any of these figures in fixing a rate. The attitude of a court is very different; it does not try to do justice between the company and the public, but only to see whether the actual rate can by any possibility still be a fair rate. In so doing it must take everything in favor of the rate. It would be the height of injustice, if, in view of that attitude, its conclusions so reached were treated as a fair basis for fixing a new rate. Furthermore, I have not hesitated to cut more ruthlessly in this case than if the result had been closer.

I conclude that the statutory rate has become unfair, and violates the Fourteenth Amendment while present prices continue. The defendants must be restrained for the present from enforcing it, and such a decree will pass.

Exceptions to the Master's Report.

I am somewhat embarrassed as to how to deal with the exceptions filed. I have not found it necessary to consider in most cases what were the actual facts, but only whether with every allowance they could support the rate. Nor do I think it necessary to go through all the multitudinous exceptions and make a finding on each one. I decline to do this, because in *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371, the Supreme Court has said that in rate cases a master's findings, even when confirmed, will not have the effect they usually do, but will at most be persuasive. This I think relieves me of the necessity of passing on each exception, since it would be without legal force. The two opinions of the master and myself show the extent of our agreement and difference, and so far as the findings have any persuasive effect, when I agree with them, that appears. In general they may be regarded as overruled, in so far as my opinion varies from his, and otherwise sustained.

Form of Decree.

Strictly the decree should merely enjoin the defendants from enforcing the statute and leave the plaintiff to fix such rates as it may choose, collecting them until the state takes some further action. That result I am unwilling to accept, because it relieves the company from any regulation meanwhile, and exposes the public to its estimate of what a fair rate should be. On the other hand, owing to the *casus omissus* in the law, by which the Public Service Commission has no authority to fix rates above the statutory maximum, I cannot avoid this result, unless I fix a rate myself, or provide what I shall describe in a moment. No one suggests that I have the power to fix a rate, and obviously I have not. It is a prerogative of the Legislature, delegated usually to the Public Service Commission.

But, as an injunction is discretionary, it is possible to annex equitable conditions to it, and this I should do. The Legislature will meet on January 1st, and can readily give power to the Public Service Commission, or can fix a rate itself, and it appears to me that the proper course is to anticipate that action; that is to say, I think conformity with the state law is best secured by making the rate, when fixed either by the Public Service Commission or the Legislature, relate back to the date of this decree. This is a very simple thing to do, because the moneys collected in excess of 80 cents must in any event be impounded pending an appeal, and the appeal can hardly be determined until after the Legislature has had an opportunity to act. I have therefore provided that the special master appointed by the statutory court, who is to receive all moneys over 80 cents shall hold the same until a new rate is fixed, but not later than March 1, 1921, and shall distribute them as though that rate had applied from the date of the decree.

Moreover, in spite of the plaintiff's liability, so established, ultimately to account for any sum now collected, I think that there should be some limit placed upon the sum now to be collected as security.

This sum is the utmost that the plaintiff can ever receive for the period and it should cover any rate which is within reasonable expectation. Just as, when deciding whether an actual rate is invalid, a court must take all doubts in favor of the rate, so, when fixing a security, it should take all doubts in favor of the plaintiff's claims. In neither case has its finding any proper relation to the rate which in justice might be established by the authorities; it is concerned only with limits.

Now the master found that the company's profit was not more than \$.0473 on a capitalization of \$75,000,000. This would mean on a spread of 19,000,000,000 an income of about \$900,000. At 8 per cent. the net income should be \$6,000,000, requiring a gross profit of \$6,700,000, in order to pay income taxes. In short, on a spread of 19,000,000,000, the rate would have to be \$1.10 in order to make the profit which the master thought the company should get.

The company's figures are higher. They claim costs of manufacture in 1920 of \$.56, and distribution costs of \$.23, and taxes of about \$.09. This, with the amortization charge of \$.035, comes to \$.915, and shows a loss of \$.0421, or, on a spread of 19,000,000,000 of about \$800,000. It does not very definitely appear what the plaintiff claims for its "rate base." It has put in proof that its property is worth \$150,000,000, and urges that sum; but I am not clear that it means to demand 8 per cent. on that capitalization. At 8 per cent. that would require a net income of \$12,000,000, and a gross, before federal income taxes come out, of about \$13,300,000, which, with a loss of \$800,000, would be \$14,000,000. On a spread of 20,000,000,000 this would mean an advance of 70 cents, not 30 cents, as resulted from the master's findings.

I believe that it is reasonably clear that such an advance will under no circumstances be allowed, and I think it best to accept the master's "rate base" provisionally, with the single exception of adding the full amount of the new Astoria plant. This makes a base of \$77,000,000, and requires an income at 8 per cent. of \$6,160,000, which, with income taxes, means \$6,800,000, and which, with \$800,000 loss, is \$7,600,000. At a spread of 19,000,000,000 this is 40 cents, making the rate \$1.20, instead of \$1.10. It appears to me that it is within the bounds of possibility that the rate may be fixed so high when it is, and since the plaintiff must eventually account with the future rate in any event, I think it fair to protect it against the possibility that it may be so fixed. Any hardship to the public appears to me answered by the plaintiff's inability for any period to escape the jurisdiction of the state authorities.

I have provided that, if the state does not act before March 1, 1921, the plaintiff shall have all the fund, and shall be free to charge what it pleases. Such inaction would indicate that the state was contented to leave the matter in that form, if the decree were affirmed. If so, I should, of course, no longer interfere with the plaintiff in its pursuit of its rights. While that possibility is in fact too remote to be really

very practical, nevertheless the decree must provide against all possible contingencies.

Stay Pending Appeal.

The decree itself fixes most of the questions which will arise pending the appeal. The stay need only provide in addition for the possible period beyond March 1, 1921, before the appeal is decided. Of course, it should not attempt more than to subject the sums impounded to the mandate of the Supreme Court; that court will have before it all the case, and can make such final decree as it chooses.

I file herewith decrees in accordance with the foregoing.

Supplemental Opinion.

The plaintiff now moves to modify the decree of August 4, 1920, in three particulars: First, the provision for depositing the excess over 80 cents impounded; second, the "retroactive" effect of the new rate when fixed; third, the absence of findings. It also moves to amend the stay by a provision seeking to expedite the appeal.

Provisions for Deposit of Moneys Impounded.

The plaintiff urges with force, I think, that to impound all the moneys over 80 cents for a period perhaps of a year will cause loss both to itself and to the consumers. It suggests that it have the right to substitute adequate securities. The best that the special master can get on the deposits is probably $3\frac{1}{4}$ per cent.; the plaintiff, if required to finance its temporary requirements, must pay much more—it says 14 per cent. In any case it will sustain a loss which will profit no one but the banks, so far as appears. I see no advantage in insisting upon impounding the moneys, if adequate security can be otherwise provided. I shall therefore modify the decree, by allowing the plaintiff to deposit with the master, in lieu of cash, Liberty bonds taken at their market value, or any other bonds which are a proper investment by savings banks in New York. These may be deposited with the special master originally, or money already deposited may be drawn out from the banks upon substituting such bonds. The special master will be charged with the duty of calling upon the plaintiff for more bonds whenever their value equals that of the cash for which they are a substitute.

In order to avoid repeated calls for such security, I have therefore provided that the plaintiff shall in each case originally deposit 103 per cent. of the cash, and that when their market value is equal to the cash he shall call upon the plaintiff to deposit additional bonds up to 103 per cent. of that cash. The interest upon these bonds accruing during the period of his possession shall be a part of the fund. Also I will allow the plaintiff to substitute surety company bonds for cash, or to withdraw cash by giving such bonds, on the following conditions: No single company shall give a larger bond than \$500,000, or more than one bond. The bond must secure, not only the cash for which it is substituted, but interest at 7 per cent. during the period of its existence, which is to be part of the fund. The plaintiff must be a party to all such bonds, and the surety company one of those

recognized by the rules of this court. Provision must be made for the possibility of delays and extensions of time.

I have required a substantial rate of interest, because the plaintiff will be in effect using the consumers' money. On the one hand, the consumer profits by getting more than he could from the banks; on the other, the plaintiff profits by being relieved from high rates of interest. The rate at which the plaintiff has sold its bonds is 7 per cent. and on short financing the rates are much higher. I think that 7 per cent. should be the rate, even though the plaintiff must pay a premium to get the bond; it will recover back all that the consumers are not eventually entitled to. In result, if I take the plaintiff at its word, the opportunity will remain favorable to its acceptance. Such bonds ought not to exceed two-thirds of the total payments required.

The Conditions Imposed upon the Injunction.

[10] The second point urged is that I have exceeded my jurisdiction by imposing as a condition upon the continuance of the injunction that the fund deposited as security shall be distributed retroactively in accordance with the new rate then promulgated. The argument is that by so doing I have in effect assumed the power of the New York Legislature, and during this period have substituted a rate of my own making where no rate existed. Of course, if I were to try to impose any such rate by any sanction other than the inducement offered by the injunction, this would be clearly true; it is equally clear that the only sanction is the injunction. If the plaintiff were absolutely entitled to an injunction as soon as the rate became confiscatory, it would also be true that the conditions I impose are unlawful. The plaintiff is not, however, absolutely entitled to an injunction; it is an equitable remedy, and may be refused, except on equitable conditions. *Walden v. Bodley*, 14 Pet. 156, 164, 10 L. Ed. 398. The rule is of course most ancient and of the widest application. It has in effect been imposed in very similar circumstances. *State R. R. Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Cummings v. Nat. Bank*, 101 U. S. 153, 25 L. Ed. 903; *People's National Bank v. Marye*, 191 U. S. 272, 282-288, 24 Sup. Ct. 68, 48 L. Ed. 180.

Norwood v. Baker, 177 U. S. 269, 291-294, 19 Sup. Ct. 187, 43 L. Ed. 443, a special assessment case, is perhaps to the contrary in effect, but only because the authorities were free to make the proper assessment. It is analogous to the situation here, if the Public Service Commission had now jurisdiction to make a rate. In the other cases the taxpayer who assailed the validity of the rate was obliged to pay the proper amount of the tax, in advance, as a condition of relief. In one sense these cases go further than the decree already entered herein, since they involve an assessment and levy by the court itself. In another, perhaps, they do not go so far, because there is now no law applicable to the plaintiff.

If the plaintiff is right, I cannot limit the rate charged in anyway. Once the statute is in abeyance, its rights are unregulated altogether. This is contrary to the practice, at least in this district, of fixing a rate *pendente lite*. The court must have as little jurisdiction to as-

sume legislative prerogatives on application for temporary injunction as on final decree. If the plaintiff's argument is good at all, it requires me to free it from all limitation as soon as the statute is found confiscatory. That argument proves too much.

There is no doubt that, viewed as power alone, I might absolutely fix a rate as a condition of granting any injunction, and it makes no difference whether that rate lasted six months or six years. Any other and lower rate fixed by the state would of course in effect supersede it, but the condition of the injunction would continue to be legal. If the plaintiff chose to disregard it, it would suffer nothing but the loss of the injunction. It would then have to deal with the state authorities. That rate would be as good if fixed in a final decree as if fixed *pendente lite* or pending an appeal. But the question of power is one, and the propriety of its exercise another. I recognize that the condition I have imposed is new, but it seems to me the minimal interference with the functions of the state as the rate-making body. The jurisdiction to suspend rates is at best somewhat invidious, and should be limited so far as possible to constitutional requirements as they now exist. Generally there is in existence a body which can at once assume jurisdiction; that will in such cases serve, but here it will not. Given this circumstance, no better way occurs to me to limit the interference of this court with the action of the lawful authorities.

The plaintiff, however, appeals a little in misericordiam: it says that, having suffered several lean years, it should be allowed a short period of milk and honey. The presupposition is that the rate, when fixed, will be inadequate. Perhaps so, but it is scarcely an argument to which as a judge, and especially a federal judge, I ought to listen. Within the limits which the Supreme Court has laid down, I suppose the Legislature of New York may grant rates which will give questionable inducement to public service companies. They have the power, and, if its exercise prove impolitic, judges have nothing to say. The new rate, when established, must be enough under the rules, or it will be again invalid; short of that, it will stand. One may say, if one likes that form of statement, that it must be presumed adequate till the contrary appears. I decline to change this feature of the decree.

Incorporation of Findings in the Decree.

[11] I have already considered this question, but the plaintiff is very insistent that some disposition should be made of the exceptions. In *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622, the decree did not dispose of the exceptions, and Justice Story ignored the defect. In *Kelsey v. Hobby*, 16 Pet. 269, 276, 10 L. Ed. 961, the court held that, where the matter was not of an exact sum due and all the evidence was in the record, it was not improper to confirm the report as a whole. A distinction should be drawn between the case at bar and one like *Kimberly v. Arms*, 129 U. S. 512, 523-525, 9 Sup. Ct. 355, 32 L. Ed. 764, where the reference was of all the issues on consent and to hear and determine, when the findings are well-nigh conclusive. In the case at bar the reference was not on consent—though without

objection—and it was only advisory in any case.⁴ In such cases “the report has no legal sanction, and no further weight than such as attaches to it by reason of the fact that it may embody the researches and conclusions of an intelligent master.” Street, Fed. Eq. Prac. § 1516. It is therefore really of no consequence to dispose of the exceptions for these reasons, and quite independently of the fact that this is a rate case.

However, the point is doubtful, and rather than leave it open to any difficulty on appeal I have in the amended decree confirmed specifically all those findings which I mean to confirm, and have declared that the other parts of the report are to be deemed superseded by my opinion. This can leave no doubt whatever as to what parts of the report I mean to stand. Unless I were to make findings in the declaratory part of the decree, which is never necessary (Street, Op. Cit. § 1964), I could not do more than refer to the opinion, which I have done.

I would not be understood to disagree with the master in so far as I have not confirmed his report. Our difference resulted from the fact that I bore much more heavily than he against the plaintiff. This might not have been a feasible disposition of the case, had the result been more doubtful. I have generally, though not always, felt justified in making conclusions not based upon the actual facts, but upon the least allowance which could fairly be taken for the various items. Obviously a difference between my results and the master's does not indicate that I should not agree with him, but only that I followed a different plan in dealing with the case. As it is always proper for the court to make its own findings (Henderson, Chancery Practice, 487), it becomes unnecessary to do more. As now drawn, I think the decree is certainly open to no procedural challenge.

Stay Pending Appeal.

I have introduced the provision suggested by the plaintiff in the stay. Perhaps it is not important, but it may help expedite the appeal. I file herewith an amended decree and an amended stay.

⁴The order read that the special master was “to take all of the testimony and evidence respecting the issues herein, make all needed computations, and fully find the facts; but nothing herein contained shall be construed as meaning that the special master's findings of fact shall be final, but only that he shall find the facts for the purpose of aiding the court and making his recommendations.”

Ex parte HENKES.

(District Court, D. Kansas, First Division. November 28, 1919.)

No. 2022.

1. War ⚡32—Record of court-martial in time of war should show that retired officers were in active service.

Under Manual for Courts-Martial, § 2, cl. 9, subd. B, permitting assignment of retired officer to court-martial duty in time of peace with his consent, and in time of war if employed on active duty in the discretion of the President, the record of a court-martial in time of war, which showed that it was composed of retired officers, should also show that those officers were on active duty in the discretion of the President.

2. War ⚡32—Record of court-martial must show on face every fact essential to jurisdiction.

A general court-martial is a court of limited and special jurisdiction, and a record of conviction by such court must show on its face every fact essential to the jurisdiction of the court.

3. Evidence ⚡386 (1)—Evidence outside record not admissible to show that retired officers on court-martial were in active service.

On habeas corpus proceedings by one in custody under sentence of court-martial, outside evidence is inadmissible to show that the retired officers who composed the court-martial in time of war were employed on active duty in the discretion of the President, which fact was not shown by the record.

4. Army and navy ⚡39—Officer convicted under special article of war cannot, on same specifications and proof, be convicted under general article.

An officer, who was convicted on three specifications for violation of the Ninety-Fifth Article of War, the penalty for which is dismissal only, cannot, on identical specifications and the same proof, be adjudged guilty of violating the Ninety-Sixth Article of War, making punishable all disorders to the prejudice of good order and military discipline at the discretion of the court, and sentenced to imprisonment as well as dismissal.

5. Criminal law ⚡196—Offenses are the "same offenses," whenever evidence which would sustain one would sustain the other.

Offenses are the same, so that punishment for both is double jeopardy, whenever evidence adequate to one will sustain the other, though one contains more of criminal charge than the other, and the offenses have different names.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Same Offense.]

Habeas Corpus. Petition by David A. Henkes for writ to secure his discharge from the United States Disciplinary Barracks at Ft. Leavenworth. On demurrer of petitioner to the response of the commandant of the United States Disciplinary Barracks. Demurrer sustained.

Lee Bond, of Leavenworth, Kan., for petitioner.

Fred Robertson, U. S. Atty., of Kansas City, Kan., for respondent.

POLLOCK, District Judge. This is an application for writ of habeas corpus. The facts, briefly stated, are, as follows:

Petitioner, for many years prior to our entrance into the late war, was a captain in the regular army. His father was born in Germany; his mother in this country. On account of his lineage petitioner had an aversion to engaging actively in a war against a nation of his kin-

(267 F.)

dred. Hence, on May 26, 1917, he tendered his resignation, not stating therein his actual motive for so doing. Acceptance of this resignation was recommended by his superior officer, to whom it was tendered. On the same day petitioner wrote to the Honorable Secretary of War a letter, giving his true reasons for tendering his resignation, as follows:

San Antonio, Texas, May 26, 1917.

From: Capt. D. A. Henkes, 16th Inf.
To: The Secretary of War, Wash., D. C.
Subject: Resignation.

1. In the event that the reasons stated in my letter of resignation are not deemed sufficient, I feel it my solemn duty to further state the following:

2. Further service as a commissioned officer must sooner or later take me to Europe, and there bring me in conflict with those who are my relatives and friends, although for the time being legal enemies. My father came from Germany. My mother was born here shortly after the arrival of her parents. We have many other relatives and friends there. I cannot force myself to the conviction that I am capable of making war on my kindred upon their soil in a manner that would become my duty and station. I earnestly request that I may not be required to undergo this ordeal. I seriously doubt my ability to withstand it, and would avoid in the interest of my country, family, and friends what at least appears the probable consequences.

3. As an only alternative, if my services will not be dispensed with, I would suggest duty in another field. However, I most earnestly believe that it is to the manifest interest of the government that my services as a commissioned officer of the army be terminated by the acceptance of said resignation.

4. I sincerely regret to feel called upon to avoid the usual methods of communication. The subject and emergency appears to admit of no alternative, and I trust my efforts may be pardoned.

D. A. Henkes.

Later, on June 29, 1917, when en route overseas with his command, petitioner wrote another letter, addressed to the Adjutant General of the Army, as follows:

United States Expeditionary Force, France,

June 29, 1917.

From: Captain D. A. Henkes, 16th Infantry.
To: The Adjutant General, War Department, Washington, D. C.
(Through Military Channels.)
Subject: Resignation.

1. On May 26th I forwarded a letter tendering my resignation as an officer of the army. Reasons other than those specifically stated were alleged. These were verbally stated to the authorities approving resignation, viz.: My battalion commander, the Department Quartermaster, and the Commanding General, Southern Department. Believing it my duty to also acquaint my immediate superiors and the War Department of these reasons and of the situation in which I am placed, the following is submitted:

2. Further service must sooner or later bring me in conflict with those who are my relatives and friends, although for the time being legal enemies. My father came from Germany. My mother was born in the United States shortly after the arrival from Germany of her parents. Other relatives and friends remain there. My wife came from Austria. Near relatives of hers live there. I cannot force the conviction that I am capable of making war on my kindred upon their soil in a manner as becomes my duty and station. I request that I may not be required to undergo this ordeal. I seriously doubt my ability to withstand it, and would avoid, in the interest of my country, family, and friends, such consequences as at least appear probable.

3. If my services will not now be dispensed with, I request duty in another field, or such duty as will not require me to actively participate against my

own blood or personally direct others in doing so. I trust that my bequest may not be construed as disloyalty to my own country, or that same is inspired by a consideration of personal safety. I am willing to take transport duty in the submarine zone, or other duty of a similar nature, all of which I will perform to the best of my ability. However, I believe it but just that one so situated and whose services may be judged by a question of loyalty should not be placed in a position of trust or authority. I therefore beg that my services as a commissioned officer be now terminated by the acceptance of my resignation.

D. A. Henkes.

On October 10th, after having served with credit and distinction in the field, and after having been importuned to recall what he had expressed in the former communications, he wrote a further letter to the Adjutant General, as follows:

American Expeditionary Force, October 10, 1917.

From: Capt. D. A. Henkes, 16th Infantry.

To: The Adjutant General, War Dept.

(Through Military Channels.)

Subject: Resignation.

1. Pursuant to the provisions of Par. 79 A. R., I hereby tender my resignation as officer of the army, to take effect at earliest date.

2. My reasons have heretofore been stated, particularly in letter dated June 28 last, and are a matter of record. I do not now find occasion to add to or alter the views already expressed. The underlying facts are unalterable. These and the attendant circumstances have impelled me to the belief that my first duty became one of tendering my resignation as an officer of the army. That duty having been performed, I trust that those in position of authority and greater responsibility may see fit to recommend acceptance.

D. A. Henkes.

Thereafter he continued with his command in the field in France until he was ordered to and did return to this country. Whereupon he was placed under arrest, was charged, tried, and convicted by a general court-martial under the Ninety-Fifth and Ninety-Sixth Articles of War, and was sentenced to be dismissed from the service, and to be confined at hard labor for a period of 25 years. That sentence was reviewed, and the place of his confinement at hard labor designated as United States Disciplinary Barracks, Ft. Leavenworth, this state. While being so confined, he petitions for his discharge on writ of habeas corpus.

The commandant having petitioner in his custody has filed his response to the petition for the writ. To this response petitioner demurs. The case has been argued, and stands submitted for decision on said demurrer.

The grounds on which petition for the writ are based are as follows:

A court-martial is a court of special and limited jurisdiction; therefore the proceedings of such tribunal must disclose on their face the court was legally constituted as provided by law, and empowered to try the case and render judgment or impose sentence thereon, or the same is a nullity. That the proceedings against petitioner in this case as disclosed by the record made on the trial are void for two reasons, viz.: (1) The court was composed of retired army officers, who under the law were disqualified to sit in judgment on his case; (2) petitioner, as shown by the record, was first charged in three specifications drawn under the Ninety-Fifth Article of War, and on the same

identical specifications was again charged under the Ninety-Sixth Article of War, but was tried and convicted on all of the six specifications on the same identical evidence, and was punished under both Articles of War for the same identical offense.

May this be done?

[1] Coming, now, to the question of the composition of the general court-martial by which petitioner was tried, convicted, and sentenced, it is found section II, clause 6, page 6, of the Manual for Courts-Martial, certified by the Judge Advocate General of the Army under authority of the Secretary of War, provides for the composition of courts-martial, as follows:

"All officers in the military service of the United States and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial. * * *

"(a) General courts-martial may be composed of any number from 5 to 13 inclusive. A general court-martial shall not consist of less than thirteen officers when that number can be convened without manifest injury to the service."

Clause 9, section II, subdivision (b), page 7, provides as follows:

"A retired officer may be assigned with his consent to active duty upon courts-martial in time of peace [Act April 23, 1904, 33 Stat. 264], and if employed on active duty in time of war in the discretion of the President [section 24, Act of June 3, 1916, 39 Stat. 183], he is eligible for court-martial duty. At other times he is not available for such duty, except that when placed in command of a post under the Act of August 29, 1916 [39 Stat. 627], or when assigned to recruiting duty, he may act as summary court-martial when he is the only officer present."

Turning now to the record made on the trial of petitioner, it is found to disclose the composition of the court in this case to have been as follows:

- (1) Col. William S. Patten, retired.
 - (2) Col. George N. C. Cale, retired.
 - (3) Col. Edwin P. Brewer, retired.
 - (4) Col. Tredwell W. Moore, retired.
 - (5) Lieut. Col. Edward E. Hardin, retired.
 - (6) Lieut. Col. Edward R. Morris, retired.
 - (7) Lieut. Col. James A. Goodin, retired.
 - (8) Maj. Charles C. Dwyer, retired.
 - (9) Capt. William N. Wheeler, retired.
 - (10) Capt. Otto A. Nesmith, retired.
- Maj. Jackson, A. Dykman, J. A. O. R. C., Judge Advocate.
First Lieut. John C. Livingston, retired Assistant Judge Advocate.

As the record made at the trial does not on its face disclose the members of the court were at the time it was convened "employed in active duty in the discretion of the President" under Act June 3, 1916, it follows, on the face of the record made, the court was not composed as by law provided, unless said record may be supplemented by evidence aliunde to show the fact, if it be a fact, the members of the court, although retired officers, were at the time in the discretion of the President on active duty. It is the insistence of the government this may be done. Petitioner denies this contention.

[2] In *Deming v McClaghry*, 113 Fed. 639, 51 C. C. A. 349, Judge

Sanborn, for the Circuit Court of Appeals, this circuit, states the rule applicable to courts-martial as follows:

"The legal presumption is that courts of general jurisdiction have the power and the authority to make the adjudications which they render, and that their judgments are valid. But no such presumption accompanies the sentences of courts of inferior or limited jurisdiction. It is indispensable to the maintenance of their judgments that their jurisdiction shall be clearly and unequivocally shown. A court-martial is a court of limited jurisdiction. It is a creature of the statute, a temporary judicial body authorized to exist by acts of Congress under specified circumstances for a specific purpose. It has no power or jurisdiction which the statutes do not confer upon it. The Articles of War specify the officers who are empowered to convene these courts (articles 72, 73, 74, 81, 82), the officers who may compose them (articles 75, 76, 77, 78, 80), and the persons and charges which they are empowered to try (articles 77, 78, 80, 81, 82, 83). It necessarily follows that the jurisdiction of every court-martial, and hence the validity of each of its judgments, is conditioned by these indispensable prerequisites: (1) That it was convened by an officer empowered by the statutes to call it; (2) that the officers whom he commanded to sit upon it were of those whom he was authorized by the Articles of War to detail for that purpose; (3) that the court thus constituted was invested by the acts of Congress with power to try the person and the offense charged; and (4) that its sentence was in accordance with the Revised Statutes. The absence of any of these indispensable conditions renders the judgment and sentence of a court-martial *coram non iudice*, and absolutely void, because such a judgment and sentence is rendered without authority of law and without jurisdiction. *Runkle v. U. S.*, 122 U. S. 543, 546, 7 Sup. Ct. 1141, 30 L. Ed. 1167; *Mills v. Martin*, 19 Johns. 7, 30; *Wise v. Withers*, 3 Cranch, 331, 2 L. Ed. 457; *Ex parte Watkins*, 3 Pet. 193, 207, 7 L. Ed. 650; *Dynes v. Hoover*, 20 How. 65, 80, 15 L. Ed. 838."

The general rule in regard to courts of limited and special jurisdiction, such as courts-martial, is stated in *Grignon's Lessee v. Astor et al.*, 2 How. 319, 11 L. Ed. 283, as follows:

"The true line of distinction between courts whose decisions are conclusive, if not removed to an appellate court, and those whose proceedings are nullities, if their jurisdiction does not appear on their face, is this: A court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in its proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment, save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities."

The general rule is again stated by the Supreme Court in *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959, as follows:

In proceedings had under special statutory authority, "where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon their record."

In *Cyc.* vol. 11, p. 696, the rule is stated as follows:

"Where the statute confers special authority not within the general jurisdiction of the court, to be exercised not according to the course of the com-

mon law, sufficient matter must appear of record or on the face of the proceedings to show the case to be within such special jurisdiction. * * * A court of special, limited, or inferior jurisdiction must by its record show all essential or vital jurisdictional facts of its authority to act in the particular case, and in what respect it has jurisdiction. This rule also applies to jurisdiction over special statutory proceedings exercised in derogation of, or not according to, the course of the common law. So the necessary jurisdictional facts must affirmatively appear by averment and proof to bring the case within the jurisdiction of such courts," etc.

These general propositions are well supported by the adjudicated cases, as was distinctly announced by Mr. Chief Justice Waite, delivering the opinion for the court in *Runkle v. United States*, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. Ed. 1167.

A reading and consideration of the record made by the general court-martial trying petitioner, found in this case, disclosed it was composed of ten members, each at the time being a retired army officer; that two of said members were excused from sitting. Hence the trial was actually proceeded with by eight retired army officers, each by the law disqualified to be a member of said court, unless theretofore "in the discretion of the President employed in active duty." Whether so employed, however, the record made in this case is utterly silent. As it is a record of a court of special and limited jurisdiction, it seems to be conclusively settled its jurisdiction must affirmatively appear on the face of the record, and in the absence of such affirmative showing its judgment is a nullity.

[3] As from the record made by such a court it must affirmatively disclose on its face the jurisdiction and power of the court, it follows, when the record made discloses want of jurisdiction in the court as composed, evidence dehors the record may not be admitted to supplement the same. It follows, on this ground, the demurrer to the response must be sustained.

[4] However, there is another ground of challenge to the record made in this case, requiring consideration in the event the court was lawfully composed. Petitioner was charged on three specifications drawn under the Ninty-Fifth Article of War, was also charged on three specifications in identical language framed under the Ninty-Sixth Article of War, and was adjudged guilty and sentenced on each, all, and every of said specifications to be dismissed from the service and to be confined at hard labor for 25 years. Under article 95, the sentence of dismissal alone could enter against him. Under article 96, both dismissal and confinement are permitted. The Ninty-Sixth Article of War is a re-enactment of the old Sixty-Second Article of War. It is never resorted to, unless the offense charged falls under no other article. It has been termed the "drag-net Article of War," and the specifications, under both charges in this case, being identical in language, the proofs in support of the charges being identical, it must be thought, the court, having charged, tried, convicted, and sentenced petitioner under the specific provisions of the Ninty-Fifth Article of War, it was without further power to charge, try, convict, and punish him under the general provisions of the Ninty-Sixth Article of War.

This would appear from the language of the Ninty-Sixth article, which reads as follows:

"Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

Hence the record so made discloses petitioner to have been twice placed in jeopardy for the same identical offense. In *Re Carter* (C. C.) 97 Fed. 496, it is said:

"Where an offense is specifically provided for in any of the Articles of War prior to the sixty-second, the grant of jurisdiction to a court-martial to try and punish such offense is conferred by the particular article which mentions it, and not by the general language of the sixty-second article, providing for the trial and punishment of all offenses not capital, and all disorders, though not mentioned in the preceding articles."

[5] It is a general rule, if two indictments set out like offenses and relate to one transaction, yet if one contains more of criminal charge than the other, but upon either there would be a conviction for what is embraced in the other, the offenses, though of different names, are within our constitutional guaranty the same. *Fox v. State*, 50 Ark. 528, 8 S. W. 836; *State v. Cooper*, 13 N. J. Law, 361, 25 Am. Dec. 490; 1 Chitty, Crim. Law, 455.

Offenses are the same, whenever evidence adequate to the one indictment will equally sustain the other. *United States v. Lee*, 4 Cranch, C. C. 446, Fed. Cas. No. 15586; *United States v. Miner*, 11 Blatchf. 511, Fed. Cas. No. 15780; *Holt v. State*, 38 Ga. 187; *State v. James*, 63 Mo. 570; *Wright v. State*, 17 Tex. App. 152; *In re Nielsen*, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118; *United States v. Chouteau*, 102 U. S. 603, 26 L. Ed. 246; *Coffey v. U. S.*, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684. In *Ex parte Lange*, 18 Wall, 163, 21 L. Ed. 872, Mr. Justice Miller, delivering the opinion for the court, said:

"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there never has been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense."

It follows the demurrer to the response must be sustained.
It is so ordered.

**INGRAM DAY LUMBER CO. v. UNITED STATES SHIPPING BOARD
EMERGENCY FLEET CORPORATION.**

(District Court, S. D. Mississippi, S. D. July 19, 1920.)

1. Removal of causes \Leftrightarrow 21—Suit not removable because against governmental agency.

A suit involving less than \$3,000 is not removable on the ground, alleged in the petition for removal, that the liability sought to be enforced was incurred by defendant as agent for the United States.

2. Courts \Leftrightarrow 289—Federal court has jurisdiction of suit against Emergency Fleet Corporation; "law regulating commerce."

Shipping Board Act Sept. 7, 1916 (Comp. St. § 8146a et seq.), is a law regulating commerce, and under Judicial Code, § 24, par. 8 (Comp. St. § 991), a suit against the United States Shipping Board Emergency Fleet Corporation, created under section 11 of said act (Comp. St. § 8146f), is cognizable in a federal court, regardless of the amount in controversy.

3. Shipping \Leftrightarrow 3½, New vol. 8A Key-No. Series—Emergency Fleet Corporation subject to suit.

The United States Shipping Board Emergency Fleet Corporation is by the law of the District of Columbia, under which it is organized, made subject generally to civil suits, and whether in the transaction out of which a suit arose it was acting solely as a governmental agency, and is therefore under the law exempt from personal liability, is a question of fact to be determined on the proofs.

4. United States \Leftrightarrow 125—Suit against Emergency Fleet Corporation not suit against.

That the United States is a stockholder in the United States Shipping Board Emergency Fleet Corporation does not render a suit against it to enforce a contract made by it a suit against the United States.

At Law. Action by the Ingram Day Lumber Company against the United States Shipping Board Emergency Fleet Corporation. On motion by plaintiff to remand to state court, and motion by defendant to dismiss. Both motions denied.

White & Ford, of Gulfport, Miss., for plaintiff.

Julian P. Alexander, U. S. Dist. Atty., of Jackson, Miss., for defendant.

HOLMES, District Judge. The suit was filed in the chancery court of Jackson county, Miss., by the Ingram Day Lumber Company, a corporation organized under the laws of the state of Wisconsin, against the United States Shipping Board Emergency Fleet Corporation, organized under the corporation laws enacted by Congress for the District of Columbia, in pursuance of section 11 of the Shipping Act (Comp. St. § 8146f), providing that the same shall be chartered under the laws of the District of Columbia. Service of process was obtained by attachment against the lands in Mississippi of the defendant, as a nonresident corporation, under the provisions of a state statute so permitting. The suit seeks to recover a balance of \$906.26 alleged to be due the plaintiff for shipbuilding material delivered to the defendant under an express contract for the payment of stipulated prices.

Within the time and in the manner provided by the removal statutes a petition and bond were filed by the United States Shipping Board Emergency Fleet Corporation, praying for the removal of the cause to the United States District Court for the Southern District of Mississippi, and alleging the following grounds of removal, which I quote:

"(1) That this is a suit of a civil nature, at common law or in equity, and arises under the laws of the United States.

"(2) That the matter in dispute does not exceed the sum or value of \$10,000, and the District Court of the United States has original jurisdiction over said suit.

"(3) That the defendant, the United States Shipping Board Emergency Fleet Corporation, is a corporation duly incorporated and organized under the laws of Congress enacted for the District of Columbia by the Act of March 3, 1901, chapter 854, in pursuance of the Shipping Act of September 7, 1916, and by virtue of the executive order of the President of the United States, dated July 11, 1917, issued in pursuance of the emergency shipping fund provision of the Urgent Deficiencies Act of Congress, approved June 15, 1917, was at the time of, and in the transactions out of which this controversy grew, and still is, the appointee of the President of the United States and the representative of the United States, and that this is a suit against the United States."

Motion is made by the plaintiff to remand said cause to the chancery court of Jackson county, Miss., on the ground, among others, that the same is not removable, as the suit is not one of which the District Court of the United States has original jurisdiction.

With said motion to remand is filed an answer to the defendant's petition for removal, denying that the Fleet Corporation was organized under the laws of Congress enacted for the District of Columbia by the Act of March 3, 1901, chapter 854, in pursuance of the Shipping Act of September 7, 1916, and alleging that the defendant is an ordinary corporation organized under the general laws of the District of Columbia. The answer also denies that by virtue of the executive order of the President of the United States, dated July 11, 1917, issued in pursuance of the emergency shipping fund provision of the Urgent Deficiencies Act of Congress, the defendant was at the time of and in the transactions out of which the controversy herein arose the appointee of the President of the United States, and denies that this suit is one against the United States. It alleges that the material, the price of which is here sued for, was delivered, at the request of the defendant, to various firms, corporations, and individuals building ships on their own account. It denies that the United States was in any way connected with the transactions involved in this suit, or that it had any dealings with, or seeks any redress against, the government of the United States, but only against the defendant as an ordinary corporation.

Motion was filed by the United States attorney for the Southern district of Mississippi to dismiss the cause, on the ground that this suit is in effect and in fact a suit against the United States without its consent, and that neither the state court nor this court had or has any jurisdiction in the premises. By agreement of counsel the motions of plaintiff to remand and of defendant to dismiss were heard and sub-

mitted at the same time for decision. They will be taken up in the order named.

1. On Motion to Remand.

The removing defendant, the United States Shipping Board Emergency Fleet Corporation, was incorporated under the laws of Congress enacted for the District of Columbia. Act March 3, 1901, c. 18, subc. 4, § 605 et seq. (31 Stat. 1189, 1284, 1285, c. 854). The incorporation of this defendant was pursuant to the United States Shipping Board Act of September 7, 1916, c. 451, § 11, 39 Stat. 731 (Comp. St. § 8146f), which provided that the Shipping Board, if in its judgment necessary to carry out the provisions of the act, might form, under the laws of the District of Columbia, one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States. The capital stock of such corporation authorized to be formed was not to exceed \$50,000,000, and the Shipping Board was authorized on behalf of the United States to subscribe to, purchase, and vote not less than a majority of such capital stock, and to do other things in regard thereto necessary to protect the interests of the United States and to carry out the purposes of the act. It was further provided that the board, with the approval of the President, might sell any or all of the stock of the United States in such corporation, but at no time should the United States become a minority stockholder therein. The act also provided that at the expiration of five years from the conclusion of the European War the operation of vessels on the part of any corporation in which the United States might then be a stockholder should cease, and the corporation stand dissolved. The date of the conclusion of the war was to be declared by proclamation of the President.

It will be noted that only in case the United States should "then" be a stockholder in such corporation should its operations cease and the same stand dissolved. It was clearly contemplated by the act that the United States might sell all its stock to private individuals, in which event the corporation might exist perpetually under the laws enacted for the District of Columbia. In case, however, of the dissolution of the corporation at the expiration of five years from the termination of the European War, provision was made for the disposition of its vessels and other property on the best available terms after the payment of all debts and obligations and a deposit of the proceeds thereof in the treasury of the United States. All stock in such corporation owned by others than the United States at the time of the dissolution was required to be taken over by the board, at a fair and reasonable value, and paid for with funds to the credit of such board. In case of disagreement such value was to be determined by appraisers, one to be appointed by the board, one by the person interested, and a third by the two so appointed; the finding of such appraisers to be final and binding upon both parties.

Section 607 of the Act of March 3, 1901, under which the defendant was incorporated pursuant to the provisions of the above Shipbuilding Act, provides that a corporation so organized—

"shall be a body politic and corporate in fact and in name, by the name stated in such certificate, and by that name have succession and be capable of suing and being sued in any court of law or equity in the district, and they and their successors may have a common seal and make and alter the same at pleasure," etc.

Being so organized, it seems too clear for disputation that the defendant corporation is in general capable of suing and being sued, regardless of whether part or all of its stock is owned by the United States. *Bank of United States v. Planters' Bank*, 9 Wheat. (U. S.) 904, 6 L. Ed. 244; *Panama R. Co. v. Curran*, 256 Fed. 768, 168 C. C. A. 114.

The first ground in the petition for removal is that this suit arises under the laws of the United States. It is well settled that suits brought against corporations of the United States, created by and organized under acts of Congress, are suits "arising under the laws of the United States."

Under paragraph 1 of section 24 of the Judicial Code (Comp. St. § 991) the District Courts have original jurisdiction of all suits of a civil nature at common law or in equity, "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and (a) arises under the Constitution or laws of the United States." In the case of *Union Timber Products Co. v. United States Shipping Board Emergency Fleet Corporation* (D. C.) 252 Fed. 320, it is held that an action against the Fleet Corporation upon an alleged contract for the building of ships, which it was not allowed to build, is an action arising under the Constitution and laws of the United States, and is not subject to remand from the federal District Court to the state court. Numerous authorities are cited, but the amount there in controversy does not appear. This is decisively important. It is to be presumed that it was in excess of \$3,000, the jurisdictional amount. But the amount in controversy in this case is not sufficient to give the District Court original jurisdiction on the ground that the suit arises under the laws of the United States.

The next ground of jurisdiction which we shall consider is the allegation of the defendant in its petition for removal that it is a corporation organized as previously outlined, and by virtue of an executive order of the President of the United States, dated July 11, 1917, issued in pursuance of the emergency shipping fund provision of the Urgent Deficiencies Act of Congress, approved June 15, 1917, was at the time of and in the transactions out of which this controversy grew, and still is, the appointee of the President of the United States. In other words, the allegation is equivalent to a plea of nonliability, on the ground that the defendant was acting as the agent of another, and not for itself, and that therefore the liability, if any, is that of another, and not of the defendant. Act June 15, 1917, c. 29, 40 Stat. 182, authorized the President:

"(a) To place an order with any person for such ships or material as the necessities of the government, to be determined by the President, may require during the period of the war, and which was of a nature, kind and quantity usually produced or capable of being produced, by such person."

The act further provided that compliance with such orders should be obligatory and should take precedence over all other orders and contracts placed with such person, and in case of failure of any person to comply therewith or to give the United States preference in the execution thereof, the President was authorized to requisition the same. There was also a provision for compensation to be determined by the President, but if the amount of such compensation, so determined by the President, was unsatisfactory to the person entitled to receive the same, such person was to be paid 75 per centum of the amount so determined by the President, and "shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code." The act further granted authority to the President to execute the powers through others, and clearly contemplated that he might do so through the defendant, as follows, to wit:

"The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: Provided, that all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct."

Pursuant to that part of the act just quoted, on July 11, 1917, the President issued the following executive order:

"By virtue of authority vested in me in the section entitled 'Emergency Shipping Fund' of an act of Congress entitled 'An act making appropriations to supply urgent deficiencies in appropriations for the military and naval establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

"And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels, or parts thereof, or charters therein, and the operation, management and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by the said board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

"[Signed] Woodrow Wilson."

[1] This suit arises ex contractu for the purchase price of ship-building material, and the allegation in the petition for removal is that the defendant was acting as the agent of the United States under

the law and executive order just quoted. If this allegation is true, the liability is that of the United States government, and not of the defendant. On the motion to remand, this allegation in the petition for removal must be taken as true, and the question is: Does it furnish sufficient grounds for removal?

The right of removal is purely statutory, and I fail to find in the removal statutes any provision permitting the agent or delegate of the United States to remove to the District Court a suit in which it is sought to hold such agent or delegate personally liable on any act or transaction arising out of such agency (where the requisite amount is not involved). Of course, if the agent who is sued can show that he was not acting, or pretending to act for himself, and did not bind himself personally, but bound only his principal, such facts would constitute a legal defense to the suit.

Section 33 of the Judicial Code (Comp. St. § 1015) permits any officer appointed under or acting by authority of any revenue law of the United States when sued or prosecuted on account of any act done under color of his office, or of any such law (or any officer of either House of Congress), to remove such civil suit or criminal prosecution to the United States District Court; but there is no right of removal in a case not otherwise cognizable in the District Court, where a suit is brought against an agent instead of against the principal, on the ground that the principal, if sued, would have to be sued in the federal court. Therefore, of and by itself, the mere allegation that the defendant in this case was acting in the transaction out of which the suit arose as the agent of the United States, and that the suit ought to be against the United States, is not sufficient to remove to the federal court on that ground alone a case (of the amount here involved) in which it is sought to hold that agent personally liable on a contract.

[2] But, although the reasons alleged as grounds for removing this case to the District Court are insufficient, yet, in support of said reasons, the removing defendant alleges facts which, if true, are sufficient in my judgment to give the District Court original jurisdiction. Those facts have been heretofore set out, and are to the effect that the defendant is a corporation incorporated in pursuance of section 11 of the act approved September 7, 1916 (39 Stat. p. 728, c. 451). According to its title and the general provisions, this was an act to establish the United States Shipping Board, for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine *to meet the requirements of the commerce of the United States* with its territories and possessions and with foreign countries, to regulate carriers by water engaged in the foreign and interstate commerce of the United States, and for other purposes. This act only applies to interstate commerce and in section 33 (Comp. St. § 8146pp) it is expressly provided that it shall not be construed to apply to intrastate commerce. Under section 11 of said act, it is provided:

"That the board, if in its judgment such action is necessary to carry out the purposes of this act, may form under the laws of the District of Columbia one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States." Section 8146l.

The entire act is distinctly and exclusively a law regulating interstate commerce. Any suit against any corporation formed under said section 11 is clearly a suit arising under a law regulating commerce.

Paragraph 8 of section 24 of the Judicial Code (Comp. St. § 991) confers upon the District Courts original jurisdiction, regardless of the sum or value of the matter in controversy, as follows:

"Eighth. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court."

The Commerce Court was abolished, and its jurisdiction transferred to the several District Courts, by Act Oct. 22, 1913 (Comp. St. § 992). Under the paragraph just quoted it seems very clear to me that any suit against the United States Shipping Board Emergency Fleet Corporation is a suit arising under a law regulating commerce, and is therefore cognizable in the federal courts, regardless of the amount in controversy.

From these considerations it follows that the motion to remand should be overruled.

2. On Motion to Dismiss.

[3] It has been shown that in general the defendant is capable of suing and being sued. It claims in this case that in the transaction out of which the suit arose it was acting as the agent of the United States; but this is denied by the plaintiff. This court cannot take judicial cognizance of the nature of the transaction out of which this suit arose. Neither can it know, without proof, what is stated in some of the cases, that all of the stock of this concern is owned entirely by the United States, and that it is operated solely and exclusively as a governmental agency. Under the law, part or all of its stock is susceptible of private ownership, and it may engage in general commercial pursuits, as any other private corporation. It may act for itself, or as agent of another. It may act as agent of a private individual, or as delegate of the government. The capacity in which it was acting in the transactions giving rise to this suit is a question of fact, and not of law. If, on the proof, the facts should show that, in the transactions out of which this suit arose, the defendant was acting as the delegate of the President under the executive order above quoted, I think this would be a sufficient defense. Huffcut, in his work on Agency, 2d Ed., par. 203, at page 254, says:

"The rules governing the liabilities of a private agent are not generally applicable to public agents. There is a strong presumption that a public agent does not intend to bind himself personally, or to become a party to the contract. Even a contract under seal, made in the name of a public agent, will be construed to be the contract of the government, and not of the agent, where, in case of a private agency, such a result would be impossible; a fortiori, if the contract be not under seal. But the presumption in the agent's favor may be overcome by clear proof of an intent to render himself personally liable"—citing *Hodgson v. Dexter*, 1 Cranch, 345, 2 L. Ed. 130; *Knight v. Clark*, 48 N. J. Law, 22, 2 Atl. 780, 57 Am. Rep. 534; *Macbeath v. Haldimand*, 1 T. R. 172; *Walker v. Swartwout*, 12 Johns. (N. Y.) 444, 7 Am. Dec. 334; *Savage v. Gibbs*, 4 Gray (Mass.) 601; *Parks v. Ross*, 11 How. 362, 13 L. Ed. 730; *Clutterbuck v. Coffin*, 3 M. & G. 842; *Auty v. Hutchinson*, 6

C. B. 266; *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; *Brown v. Bradlee*, 156 Mass. 28, 30 N. E. 85, 15 L. R. A. 509, 32 Am. St. Rep. 430.

In *Hodgson v. Dexter*, *supra*, Chief Justice Marshall says:

"It is too clear to be controverted that, where a public agent acts in the line of his duty and by legal authority, his contracts, made on account of the government, are public and not personal. They inure to the benefit of, and are obligatory on, the government, not the officer. A contrary doctrine would be productive of the most injurious consequences to the public, as well as to individuals. The government is incapable of acting otherwise than by its agents, and no prudent man would consent to become a public agent, if he should be made personally responsible for contracts on the public account."

[4] As to the other ground of dismissal, to wit, that this is in fact a suit against the United States, I do not think this ground is supported by the record, which says clearly it is a suit against the United States Shipping Board Emergency Fleet Corporation (a distinct legal entity), organized as above set forth. True, the United States may have a dual relation to it: (1) That of stockholder and corporation; (2) principal and agent. It has no other connection or relation to the government, and certainly it is not the United States, which has not been made a defendant in this case in any manner known to the law. As said in *9 Wheat. (U. S.) 908 (6 L. Ed. 244)*:

"The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank in the sense of the Constitution. So with respect to the present bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter."

Under paragraph 20 of section 24 of the Judicial Code (Comp. St. § 991), this court would have jurisdiction of a claim upon a contract of the nature and for the amount here involved; but there is a well-defined statutory proceeding for instituting suits against the government upon claims of such a nature, and that proceeding has not been followed here. It is clearly contemplated by the emergency shipping fund provision of the Urgent Deficiencies Act approved June 15, 1917, that any suit based upon any claim for material furnished shall be brought in the manner provided for by section 24, par. 20, and section 145 of the Judicial Code (Comp. St. §§ 991, 1136). In addition thereto running through the entire National Defense Acts are the uniform provisions that suits shall be brought against the United States as provided for by the sections just quoted. See 39 Stat. p. 1193, par. "d" (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115^{1/16c}); 40 Stat. p. 182, c. 29, passed June 15, 1917, amended by Act April 22, 1918, c. 62, 40 Stat. 535 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115^{1/16d}); 40 Stat. p. 535, c. 62, § 3, April 22, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115^{1/16dd}); 40 Stat. p. 438, c. 19, passed March 1, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8146t).

A cursory review of these acts will demonstrate the clearly expressed intention of Congress for suits of this character to be brought

against the United States. Preliminarily let us note that the Shipping Board was established before we entered the war (September 27, 1916), and was an act regulating commerce. The corporations authorized to be formed by said board to carry out the purposes of the Shipping Act were to be formed under the Code of Laws enacted for the District of Columbia, which was a still older act (March 3, 1901).

After our entry into the war, the first act showing an intention by Congress for suits by persons dissatisfied with the compensation allowed them for war materials to be brought against the United States, was under the naval emergency fund provision of March 4, 1917, wherein the President was granted authority to order ships or war materials from any person. Provision was made for compensation to be determined by the President, and if the amount so determined was unsatisfactory to the persons entitled to receive the same, such persons were to be paid 50 per cent. of the amount and to be entitled to sue the United States to recover such further sum as added to said 50 per cent. would make just compensation, in the manner provided for by section 24, par. 20, and section 145 of the Judicial Code. 39 Stat. p. 1193, par. (d).

In Act June 15, 1917, making appropriations to supply urgent deficiencies on account of war expenses, the President was authorized to order ships or materials, etc., and to determine the compensation therefor. In case of dissatisfaction, the person dissatisfied was to be paid 75 per centum of the amount so determined by the President, and to be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such sum as will be just compensation therefor, in the manner provided for by section 24, par. 20, and section 145 of the Judicial Code. Then follows authority to the President to act through such agencies as he might determine, and provision that all money turned over to the United States Shipping Board Emergency Fleet Corporation should be expended as other funds of said corporation. It is further provided that all ships acquired hereunder by the United States should be managed, operated, and disposed of by the President. 40 Stat. pp. 182, 183.

It is important to remember this provision in connection with the provision in section 9 of the Shipping Act (Comp. St. § 8146e) with reference to the liability to arrest of merchant vessels, and in so doing we shall see why there is a distinction between suits against vessels operated by the President and materials ordered by the President. We shall observe that the law itself makes the distinction, by providing liability of vessels to arrest, and by further providing that suits for materials ordered by the President shall be against the United States under the quoted provisions of the Judicial Code. (Since writing this paragraph, my attention has been called to Act March 9, 1920, authorizing suits against the United States in admiralty in certain cases. This act, however, does not affect the question in this case.)

In Act March 1, 1918, Congress itself delegates certain powers to the Fleet Corporation with reference to the purchase of land, houses, and buildings. For the property so acquired it is provided that the Fleet Corporation shall determine and make just compensation, and,

if the amount so determined is unsatisfactory to the person entitled to receive the same, such person shall be paid 75 per centum of the amount so determined, and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make such an amount as will be just compensation for the property or interest taken, in the manner provided by section 24, par. 20, and section 145 of the Judicial Code. 40 Stat. c. 19, p. 438.

By Act April 22, 1918, the President was authorized to acquire certain transportation systems for the transportation of shipyard and plant employés, and to exercise the powers vested in him through the several departments of the government, and through such agent or agencies as he should from time to time determine. The compensation for the property so acquired was to be determined by the President, and, if not satisfactory to the persons entitled to receive the same, such persons were to be paid 75 per centum thereof, and to be entitled to sue the United States to recover further sums, in the manner provided by section 24, par. 20, and section 145 of the Judicial Code. 40 Stat. c. 62, p. 535.

In every act where the President or the Fleet Corporation is authorized to acquire materials, ships, or other property, provision for compensation is made, to be determined either by the President or the Fleet Corporation, and, if dissatisfied with the amount so determined, the person entitled to receive the same is expressly given the right to sue the United States in the manner provided by section 24, par. 20, and section 145 of the Judicial Code. It would be impossible to express more clearly the intention of Congress that, in every case where the United States acquired materials or other property, the party entitled thereto was to receive just compensation, to be determined by the agent of the government, and in case of dissatisfaction suit therefor should be brought against the United States as provided in the Judicial Code. In other words, when the Fleet Corporation is acting as the agent of the United States, suit is to be brought against the United States, and not against it. There is no more reason to bring suit against the Fleet Corporation, when it was acting as the authorized delegate of the government in the purchase of materials, than there would be to bring suit against the President when he was acting in a similar capacity.

By a provision of the Sundry Civil Appropriation Act of July 1, 1918, the Secretary of the Treasury was authorized and directed to cause an audit to be made of the financial transactions of the United States Shipping Board Emergency Fleet Corporation, under such rules and regulations as he should prescribe. 40 Stat. 651 (Comp. St. Ann. Supp. 1919, § 8146fff). This was simply a provision by a principal to have audited the financial transactions of its agent.

As the pleadings have not yet been completed in this case, I believe it would simplify matters, and be of much assistance to counsel in making up the issues of fact and taking the evidence thereon, if I should make a brief summary of conclusions reached after an examination of the statutes and decisions. In doing this, some of the utterances will necessarily be dictum, as I do not know, but can only surmise, what the real issues will be when the pleadings have been filed; but my object

is merely to assist counsel in framing the issues and producing the evidence. Up to this time no evidence has been introduced; consequently, on the motion to remand, I take as true the facts as shown by the bill, including the petition of the defendant to remove, whereas, on the motion to dismiss, I take as true merely the facts set up in the plaintiff's bill of complaint.

Summary.

1. The Fleet Corporation, when acting for itself, is capable of suing and being sued as an ordinary corporation.

2. Any suit against it, regardless of the amount or value in controversy, must be in the federal courts, because it was organized under a law regulating commerce.

3. When acting as the delegate of the United States, or the appointee of the President, in the purchase of materials or ships, it is not liable in its corporate capacity; but such suit must be against the United States.

4. Ships purchased or constructed by it for the United States are to be operated by the President, and when operated through the agency of the Shipping Board are liable to arrest under section 9 of the act establishing such board.

5. Property acquired by the Fleet Corporation with the funds and as the agent of the United States, even though held in the name of said Fleet Corporation, is the property of the United States, and exempt from state taxation. *U. S. v. Coghlan* (D. C.) 261 Fed. 425.

6. The property of such corporation, even though the United States may be interested therein as a stockholder, may be subjected by legal process to the payment of its debts; but property of the United States, which it holds as a government agent, and which simply stands in the name of the Fleet Corporation, is not liable for the debts of such corporation.

7. If the relation of the government to the corporation is merely that of stockholder, then the corporation is liable for its acts, because its transactions are those of the corporation, and not of the government. *Panama R. Co. v. Curran*, 256 Fed. 768, 168 C. C. A. 114, is an illustration of this principle.

8. But, if the relation is that of principal and agent, then the corporation, when it acts within the scope of its authority, is not liable, because such authorized acts are the acts of the government, and not the corporation. *Ballaine v. Alaska N. Ry. Co.* (U. S., Intervener) 259 Fed. 183, 170 C. C. A. 251, is illustrative of this principle.

Since writing the above I have read Act March 9, 1920, authorizing suits against the United States in admiralty in certain cases. This act was evidently intended to meet the decisions in the *Lake Monroe*, *The G. A. Flagg*, *The Florence H.*, and similar cases. 258 Fed. (D. C.) 77; 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. 962; 256 Fed. (D. C.) 852; 248 Fed. (D. C.) 1012; and *Ex parte Whitney Steamboat Co.*, 249 U. S. 115, 39 Sup. Ct. 192, 63 L. Ed. 507. Under this statute, in lieu of a proceeding in rem against government-owned vessels, provision is made for libels in personam against the United States in ad-

miralty cases, even though sounding in tort. In the case at bar the United States has not intervened to claim the real ownership of the property attached, nor has it been made a party, so that a personal judgment might be rendered against it.

In conclusion, I might say that the law of this case will arise out of the facts. "*Ex facto jus oritur.*" Some of the facts, like the existence of the war and the executive order of the President, the court can take judicial knowledge of; but the determinative fact, as to whether in this particular transaction the defendant was acting for itself as a private corporation, or for the United States as a public agent, the court can only know from the evidence, because under the law and its charter it might have been acting in either capacity. In *Commonwealth Finance Corporation v. Landis* (Emergency Fleet Corporation, *Garnishee*) 261 Fed. (D. C.) 440, it is said, at page 442:

"The Fleet Corporation may be acting as such agent of the United States, or may not be so acting, or it may so act in some of its activities, and not in others. If follows from this that, when it is acting as the United States, and as to such of its property and assets as are in the actual use of the United States, neither it as such agent nor such property can be drawn into or jeopardized by disputes between private parties. It would also follow, however, that in so far as it is acting as a private corporation, and in so far as its property and assets are and are used as its private property, it is not immune from the liabilities and responsibilities which are imposed by law upon litigants."

Later in the same opinion it is said:

"This proposition necessarily involves the thought that there is a question to be determined" (N. B.—A question of fact) "and this again necessarily carries the further thought that the corporation is not immune from process, because otherwise nothing other than such immunity could be determined. It may be that, if any one of these plaintiffs secures a final judgment against this corporation, he will be unable to enforce payment of the judgment because of the fact that there is no property out of the sale of which the judgment can be paid, other than either property of the United States or property which is in use by the United States for military purposes. The futility or hopelessness of execution process does not, however, deprive a litigant of judgment process."

An order will be entered overruling the plaintiff's motion to remand and the defendant's motion to dismiss.

UNITED STATES v. BERNSTEIN et al.

(District Court, D. Nebraska. June 8, 1920.)

1. War ☞4—Food control amendment enacted under war powers.

The amendment of October 22, 1919, to the Lever Act, prohibiting unreasonable charges for necessities, was enacted under the war powers, since no peace has been proclaimed, though actual hostilities have ceased.

2. War ☞4—Acts under war powers subject to constitutional restrictions.

Measures enacted under war powers must stand the test of constitutional limitations, and they fall, if rights guaranteed by the Constitution are thereby infringed.

3. Constitutional law ☞278(1)—Eminent domain ☞2(1)—Fixing price for sale is depriving of property.

The right to freely sell commodities in course of trade is inherent in ownership, and is ultimately and actually the property, so that the amendment of October 22, 1919, to the Lever Act, forbidding unreasonable charges for necessities, violates Const. Amend. 5, by depriving of property without due process of law and without compensation.

4. Criminal law ☞13—Food control amendment does not define offense.

The amendment of October 22, 1919, to the Lever Act, which forbids unreasonable charges for necessities, without defining what is an unreasonable charge, is insufficient to inform the accused of the nature of the accusation against him, as required by Const. Amend. 6.

5. Conspiracy ☞25—Food Control Act, punishing conspiracy, invalid.

The provision of Lever Act Aug. 10, 1917, as amended October 22, 1919, denouncing conspiracies to exact excessive prices for necessities, is invalid, since a conspiracy must involve a common purpose to do an unlawful act, or a lawful act by wrongful means, and the sale of private property, not devoted to public use, for whatever price it will bring, is not unlawful.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

Louis Bernstein and another were indicted for violating the Lever Act as amended. Demurrer to indictment sustained.

T. S. Allen, U. S. Atty., of Lincoln, Neb., and Frank Peterson, Asst. U. S. Atty., of Omaha, Neb.

W. F. Gurley, of Omaha, Neb. (David A. Fitch and Arthur Rosenblum, both of Omaha, Neb., on the brief), for defendants.

WOODROUGH, District Judge. In one of the counts defendants are charged with a violation of the provision of the Lever Act, as amended, which declares:

"That it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with necessities. * * * Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding \$5,000 and be imprisoned for not more than two years, or both." 41 Stat. 298, c. 80, § 2.

The count is demurred to on the ground that the provision of the act is in contravention of the Fifth and Sixth Amendments to the federal Constitution, and, the count of the indictment being in due form, the question is squarely submitted whether that part of the law quoted is valid and enforceable.

[1] It is of the utmost difficulty to approach consideration of this question unmoved by rancor and bitter resentment against the hordes of profiteers whose cold-blood rapacity and greed multiply the burdens and sufferings of the Great War. Nor can it be doubted that the letter and spirit of the law in question are directed at the root of a great and menacing evil. Undoubtedly, if in every sale of necessities the price could be forced down to a level that disinterested, impartial men would agree upon as fair and just, the benefits to the country in these critical times of reconstruction would be incalculable. Though actual combat has ceased, no peace has been proclaimed with Germany, and conditions incidental to the war may well have justified as drastic legislation by the Congress as did the continuance of hostilities in the field. There is no doubt in my mind that this law must be regarded and considered as a war measure to the same extent as though no armistice had been signed.

[2] But, although in time of war patriotic citizens voluntarily waive the rights, privileges, and immunities guaranteed them by the Constitution, nevertheless, when such rights guaranteed by the Constitution are invoked before this court, no exigencies of war, or incidents or aftermath of war, can justify their denial. The validity of war measures must equally stand the test of constitutional limitations, and must fall, if rights guaranteed by the fundamental law are infringed or taken away.

[3] The value of an individual citizen's property right in such necessities as he handles, or deals in, derives, almost entirely, from his right to freely sell them according to the course of trade and commerce. An incident of such trade and commerce between individuals is the fixing of a price. In the large, the price is said by economists to be fixed in the course of commerce by the "higgling of the market," which term comprehends within it the incidents of all individual sales, where the infinitely varied elements of personality of competition, of time, circumstance, and condition, enter into the price fixing.

As to all such property, therefore, in the hands of individual citizens, that is strictly private property, and does not come within the category of "property clothed with a public interest," this right inherent in ownership to sell it at a price so fixed is ultimately and actually the property of the citizens, as to which the Fifth Amendment to the Constitution declares:

"Nor shall any person * * * be deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation."

The underlying purpose and the actual effect of this law is to deprive the citizen of his essential right of property in such necessities as are included in its scope, and this without due process of law and without just compensation. The law denounces the making "of an unjust or unreasonable rate or charge," and would leave the question as to the injustice or unreasonableness of any particular price to the jury that may be called to pass on it. Thus the fairness of

the price is not to be determined by the processes of commerce operative at the time, but by the ex post facto inquiry of the jury.

It is urged that, under the war-time conditions to which this law applies, many of the forces that tend to make prices fair in peace times, and which are all included in that "higgling of the market" referred to, are disordered and weakened, and so callous avarice and heartless plundering of the profiteers runs riot. Nor can the measure of truth in this contention be denied. These immoralities are flagrant, and cannot be palliated nor minimized, and no government can merit the confidence of the people which does not exert its just powers to the utmost to effect a remedy.

But this law, which makes it a crime for a man to sell his private property, not clothed with a public interest, for the best price he can get in the ordinary course of trade and commerce, without coercion, without extortion (which includes the element of wresting by force), without wrongful combination or confederation or conspiracy, without undue influence, without misrepresentation, without any fraud recognized by law—this law cannot be sustained, while the Constitution forbids the taking of private property for public use without just compensation, and insures that no person shall be deprived of his property without due process of law.

[4] Again: The Sixth Amendment to the Constitution prescribes that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation against him. In my judgment the form of the law (with which the count of the indictment corresponds) fails to prescribe a rule of conduct with any such certainty as this constitutional requirement contemplates. As laid down by the Supreme Court in *United States v. Brewer*, 139 U. S. 278, 288, 11 Sup. Ct. 538, 541 (35 L. Ed. 190):

"Laws which create crime ought to be expressed, that all men subject to their penalties may know what acts it is their duty to avoid."

This law seeks to abolish the criterion of fairness, upon which prices have heretofore depended in private business, and to establish a new one. But the new criterion is not defined. It is reposed in the varying conscience of jurors who are to conduct the inquiry ex post facto. It must be conceded that many generic, broad descriptions of offenses have become definite, and are upheld and enforced, and it is not in all cases easy to determine when an accused is informed of the nature and cause of the accusation. It would unduly extend this memorandum to review the many intricate and difficult problems presented to the courts under this constitutional provision. I do not find any adjudications, however, in the Supreme Court, which appear to me to conflict with my conclusion that the law in question contravenes the Sixth Amendment and is void for that reason.

The United States District Court in Kentucky, exercising in that state the same jurisdiction as does this court within the state of Nebraska, approved the following enunciation of the law by the Court of Appeals of Kentucky:

"The chief question to be considered is the one affecting the validity of the statute, the provisions of which are found in sections 816 and 819 of the Kentucky Statutes. The first-named section reads as follows: 'If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or the use of any railroad car upon its track, or upon any track it has control of or has the right to use in this state, it shall be guilty of extortion.'

* * * That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' cannot be denied, and that different juries might reach different conclusions, on the same testimony, as to whether or not an offense has been committed, must also be conceded.

"The criminality of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged, and this latter depends on many uncertain and complicated elements. That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct, and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury, and especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime. If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law, and in violation of both state and federal Constitutions, we are not able to comprehend the force of our organic laws.

"In *Louisville & Nashville R. R. Co. v. Railroad Commission of Tennessee*, 16 Am. & Eng. R. R. Cases, 15, a statute very similar to the one under consideration was thus disposed of by the learned judge (Baxter): 'Penalties cannot be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power. The Legislature cannot delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a "fair and just return" on its investments, it must, in order to the validity of the law, define, with reasonable certainty what would constitute such "fair and just return." The act under review does not do this, but leaves it to the jury to supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence cannot know in advance of a verdict whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of 4 per cent., while another might acquit an accused who had demanded and received at the rate of 6 per cent., rendering the statute, in its practical working, as unequal and unjust in its operation as it is indefinite in its terms.'

"The Supreme Court of the United States, in *Railroad Commission Cases*, 116 U. S. 336 [6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636], refers to this Tennessee case and substantially approves it by distinguishing the case then before the court from the Tennessee case. The case is also used to support the text in 8 Am. & Eng. Ency. of L. p. 935, where it said: 'Although a statute has been held to be unconstitutional which left it to the jury to determine whether or not a charge was excessive and unreasonable in order to ascertain whether a penalty is recoverable, yet where the action is merely for recovery of the illegal excess over reasonable rates this is a question which is a proper one for a jury.'

"Mr. Justice Brewer, in the case of *Chicago, etc., R. R. Co. v. Day* [C. C.] 35 Fed. 866 [1 L. R. A. 744], had under consideration the provisions of a statute similar to the one we have before us, and, while the statute was upheld, it was only because there was a schedule of rates provided in the act

which rendered the test of reasonableness definite and certain. The learned judge then said: 'Now the contention of complainant is that the substance of these provisions is that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is or what any jury will find to be a reasonable charge. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it.' In *Dwar. St. 652*, it is laid down 'that it is impossible to dissent from the doctrine of Lord Coke that acts of Parliament ought to be plainly and clearly and not cunningly and darkly penned, especially in legal matters.' See, also, *United States v. Sharp*, *Pet. C. C. 122* [*Fed. Cas. No. 16,264*]; *The Enterprise*, *1 Paine, 34* [*Fed. Cas. No. 4,499*]; *Bish. St. Cr. § 41*; *Lieb. Herm. 156*. And the learned judge concludes that there is very little difference between a provision of the Chinese Penal Code, which prescribed a penalty against any one who should be guilty of 'improper conduct,' and a statute which makes it a 'criminal offense to charge more than a reasonable rate.' The same learned judge, discussing the kindred subject of unreasonable differences in rates, in *Tozer v. United States (C. C.) 52 Fed. 917*, said: 'But in order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty.'

"When we look to the other side of the question we find the contention of the state supported by neither reason nor authority. No case can be found, we believe, where such indefinite legislation has been upheld by any court where a crime is sought to be imputed to the accused. * * * In *Railroad, etc., v. People*, *77 Ill. 443*, in construing a certain section of the statute of that state, its Supreme Court said: 'That section, by itself, makes the offense to consist in taking more than a fair and reasonable rate of toll and compensation, without reference to any standard of what is fair and reasonable. In such case, it may be seen, different persons would have different opinions as to what is a fair and reasonable rate. Courts and juries, too, would differ, and at one time or place a defendant might be convicted and fined in a large amount for the same act which, in another place or at another time, would be held to be no breach of the law, and what might be thought a fair and reasonable rate on one road might be considered otherwise upon another road. There would be no certainty of being able to comply with the law. A railroad corporation, with purpose of conforming to the law, might fix its rates at what it believed to be reasonable, and yet be subjected to the heavy penalties here prescribed.' * * *"

This expression of the law conforms to my own conclusions, and confirms me in the opinion that the law here in question is void. The demurrer to this count of the indictment must therefore be sustained.

[5] There is another count of the indictment laid under the conspiracy section of the Lever Act, denouncing conspiracies to exact excessive prices for necessities. I am of the opinion that this provision of the act is subject to the same vice as that above considered. It assumes to make it a crime for citizens to arrange to sell their goods at the prices the goods will sell for in the course of trade and commerce, without regard to the means to be employed in the sale. Although conspiracy differs in many respects from crimes in general, and a purpose formed in common by more than one person may be fraught with danger and involve punishment from which a single individual is exempt, still the gist of the offense is always the common

purpose to do an unlawful act, or a lawful act by wrongful means. Either the act or the means must be wrongful.

This count of the indictment, conforming to the terms of the act, does not charge as the common purpose an unlawful act, nor wrongful means to accomplish lawful ends, and the demurrer thereto must also be sustained.

In re TRIANGLE S. S. CO.

Ex parte FEDERAL TRADE BANKING CORPORATION.

(District Court, S. D. New York. July 10, 1920.)

1. Bankruptcy ⚡81(1)—Allegation that security held by petitioners is of no value sufficient.

An allegation in a petition by creditors that certain of the petitioners are secured by maritime liens on vessels, but that the liens are of no value, *held* sufficient on demurrer to show such petitioners qualified under Bankruptcy Act, § 59b (Comp. St. § 9643b).

2. Bankruptcy ⚡81(4)—Allegations of acts of bankruptcy not sufficiently specific.

An allegation in a petition by creditors that the alleged bankrupt within four months, with intent to prefer, paid \$500,000 on indebtedness to a creditor named and "several persons, firms, and corporations, creditors of said alleged bankrupt, upon antecedent indebtedness," *held* not sufficiently specific.

In Bankruptcy. In the matter of the Triangle Steamship Company, alleged bankrupt. On demurrer to petition by the Federal Trade Banking Corporation. Demurrer sustained.

Demurrer by a creditor to an involuntary petition which alleged that two of the three petitioning creditors had security in the form of maritime liens upon vessels, which were valueless as security. The acts of bankruptcy were as follows:

"I. * * * That said alleged bankrupt paid certain claims, demands, accounts, and indebtedness to Foreign Trade Banking Corporation, and several persons, firms, and corporations, creditors of said alleged bankrupt, upon antecedent indebtedness, with the intent and for the purpose of preferring such creditors over the other creditors of said alleged bankrupt, and for the purpose of allowing said creditors to obtain a greater percentage of their respective debts than any other of such creditors of the same class, which payments amounted in the aggregate to the sum of \$500,000.

"II. * * * That said alleged bankrupt, with intent to hinder, delay, and defraud its creditors, and with intent and for the purpose of giving a preference contrary to the provisions of the Bankruptcy Law, and upon pretended and alleged antecedent indebtedness claimed and alleged to be due from said bankrupt to Foreign Trade Banking Corporation, and to divers persons, firms, and corporations, assigned, transferred, and set over unto said divers persons, firms, and corporations large and valuable property, consisting of merchandise, accounts, and dues receivable, of the value of about \$500,000, applicable to the payment of debts of said alleged bankrupt."

John S. Sheppard, Jr., John M. Woolsey, and D. M. Tibbetts, all of New York City, for demurrer.

Charles L. Apfel, of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). The demurrer presents two questions: First, of the allegations touching the security held by two of the petitioning creditors; second, of the sufficiency of the acts of bankruptcy. The allegation that the admiralty liens are of no value is enough. The liens may theoretically exist, but section 59b of the Bankruptcy Act (Comp. St. § 9643) means that it is the actual value of the security which counts, and if the vessels have left the jurisdiction and will not return the security may in fact be of no value, because it will be impracticable to realize on the liens.

[2] The second objection is more serious. In *re* Rosenblatt, 193 Fed. 638, 113 C. C. A. 506, turned upon a petition which simply copied the language of the statute without specification of any sort whatever. This petition states that the alleged bankrupt, with intent to prefer, paid \$500,000 upon "indebtedness" to the Foreign Trade Banking Corporation, a creditor, and upon other indebtedness to other creditors. Probably the allegation that part of the sum was paid to "other creditors" is invalid under the cases, and, if so, it must be accepted that the amount of the payment to the Foreign Trade Banking Corporation is left uncertain. The allegation amounts to this: That the alleged bankrupt, at some time after August 10, 1919, with intent to prefer, paid some part of the sum of \$500,000 to the Foreign Trade Banking Corporation upon its existing indebtedness.

As matter of first impression I own that I should have thought this enough. The omissions are only of the exact dates and the exact amounts of the payments made and that I should think could be supplied by a bill of particulars and full justice be done. The allegations as to "other creditors" might be treated as surplusage. However, I cannot distinguish the case at bar from *In re* Mason-Seaman Transportation Co. (D. C.) 235 Fed. 974, decided by Judge Manton while District Judge, where the allegations were certainly as specific as those here, or from *In re* Blumberg (D. C.) 133 Fed. 845, which was an almost exactly similar case. In *re* Hallin (D. C.) 199 Fed. 807, may be distinguished, as well as *In re* Pure Milk Co. (D. C.) 154 Fed. 682, and *In re* Nelson (D. C.) 98 Fed. 76. These are like *In re* Rosenblatt, *supra*, and do not in my judgment control. It seems to me a harsh rule that requires petitioning creditors, who in the nature of things cannot usually be well informed of the alleged bankrupt's dealings, to specify with exactness the amounts and the times of any preferential payments they allege, and it is especially harsh if it results in preventing any amendment, as was held in *Re* Pure Milk Co., *supra*. Through a trifling omission in pleading, which perhaps the pleader had no information to supply, a creditor like the demurrant may be enabled to prevent any inquiry into the good faith of the payment to him.

However, in the face of *In re* Pure Milk Co., *supra*, it is at least an open question whether, if an amendment is necessary which shall specify more particularly the acts of bankruptcy, it would not be regarded as setting up new acts of bankruptcy, and if it were so regarded, then it is settled that the period of four months dates from the

amendment. If this be the rule in cases of inadequate specification, then if I overrule this demurrer, and my decision is wrong, it will be too late for the petitioning creditors to allege preferences occurring between, say, November 20th and December 11th, when the petition was filed. There may be such, and if I sustain the demurrer the petitioning creditors may still avail themselves of those preferences.

Moreover, if I am wrong in sustaining the demurrer, no harm has been done, because, if there are preferences between November 20th and December 11th, they can now be pleaded. If, on the other hand, there are no such preferences, the petitioning creditors may refuse to amend, and may test this order on appeal; or, if they wish, they may amend and show only preferences more than four months before the amendment. Thereupon the question may be raised on demurrer of the validity of the new petition, and on that appeal may be raised the correctness of my order sustaining this demurrer, because the amendment cannot be heard without the original petition.

Under such circumstances I think I ought to follow *In re Mason-Seaman Transportation Co.*, supra, and *In re Blumberg*, supra, especially as it is not our general custom, except in clear cases, to disregard an earlier decision in the Southern district.

Nothing need be said of the second act of bankruptcy.

Demurrer sustained. I will give the petitioning creditors leave to plead over within 10 days, without any separate motion to that end. If their amendment show only acts of bankruptcy before the four-months period, the validity of the petition had better be determined by a new demurrer than by motion for leave to amend.

In re TRIANGLE S. S. CO., Inc.

(District Court, S. D. New York. May 10, 1920.)

Bankruptcy ⇐84—Four-months period computed from filing of amended petition.

Where acts of bankruptcy are sufficiently alleged for the first time in an amended petition, the four-months period within which such acts must have been committed must be computed from the filing of the amended, and not the original, petition.

In Bankruptcy. In the matter of the Triangle Steamship Company, Incorporated, alleged bankrupt. On demurrer to amended petition. Demurrer sustained.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (John M. Woolsey, John S. Sheppard, Jr., and D. M. Tibbetts, all of New York City, of counsel), for demurrer.

Cass & Apfel, of New York City (Alvin C. Cass, of New York City, of counsel), opposed.

MAYER, District Judge. Judge Learned Hand's opinion and order (267 Fed. 300) left the case in the position that the amended petition is to be considered on its merits. The question involved may be briefly stated:

The original petition was held demurrable because the petition failed to set forth acts of bankruptcy. The present petition sets forth allegations as to acts of bankruptcy within the four-months period referred to in section 3b of the Bankruptcy Act (Comp. St. § 9587). It will be assumed, although not decided, that the petition sufficiently alleges the acts complained of. The amended petition recites that "within four months next preceding the date of this petition, and while insolvent," the alleged bankrupt "committed acts of bankruptcy as follows." It thereupon sets out the exact language contained in the original petition as defining the acts of bankruptcy, numbering them I and II. It then recites:

"That the particulars of the transfers set forth in paragraphs I and II are more particularly alleged and specified as follows."

The transactions then set forth are the only ones specifically stated to have occurred more than four months prior to the filing of the amended petition, but apparently within four months prior to the filing of the original petition. The question, then, is whether, for the purpose of calculating the four months, the date is that of the original or of the amended petition.

It is settled by authority. In the case of *In re Condon*, 209 Fed. 801, 126 C. C. A. 524, Judge Lacombe said:

"The original petition, filed April 12, 1911, merely alleged, in the language of the statute, that Condon has made transfers to hinder, delay, or defraud creditors. * * * There was no specification of any of these, nor were any facts in relation thereto set forth. This was insufficient under decisions of this court. *In re Rosenblatt*, 193 Fed. 638, 111 C. C. A. 506 (January 29,

1912); and *In re Brocton Ideal Shoe Co.*, 202 Fed. 199, 120 C. C. A. 447 (January 18, 1913). Thereafter, on May 25, 1911, the petition was amended by setting forth the details of 12 separate transactions of the kind charged in the original petition. Since the petition became a sufficient one only when it was fortified with this amendment, the date of the amendment must be taken as the date from which the four-months period of section 3b is to be calculated. This eliminates all of said alleged transactions except the last 4. Since a single act of bankruptcy, if proved, will sustain an adjudication, it will be sufficient to consider only the twelfth of these alleged transfers."

Judge Hough covered the same point by his observations in *In re Havens*, 255 Fed. at page 481, 166 C. C. A. at page 557:

"It was assumed below that this was an act of bankruptcy not set forth in the original petition and only charged in and by an amendment made more than four months after its commission. Whether such an act, occurring more than four months before amendment, could be introduced into a pending proceeding, was thought an 'interesting question' by Lacombe, J., in the *Riggs Case*, supra. This court answered it in the negative (*In re Haff*, 136 Fed. 80, 68 C. C. A. 646), the matter not having been covered by *In re Sears*, 117 294, 54 C. C. A. 532, which was correctly explained and limited in application by *Gleason v. Smith*, 145 Fed. 897, 76 C. C. A. 427. The general rule as stated in the *Haff Case* has been approved, especially in the Ninth Circuit (*Walker v. Woodside*, 164 Fed. 685, 90 C. C. A. 644), and in the Seventh (*In re Brown Commercial Car Co.*, 227 Fed. 390, 142 C. C. A. 83). Our own decision (*In re Condon*, 209 Fed. 801, 126 C. C. A. 524) is (in this respect) but a reassertion of the *Haff Case*. This rule rests in theory upon the reasoning of Justice Nelson in *Re Craft*, 6 Blatchf. 177, Fed. Cas. No. 3,317, where it was pointed out that 'to allow a substantial amendment—that is, one going to the whole foundation of the proceeding *nunc pro tunc*—would be a direct violation' of a limitation 'obviously for the benefit of the debtor' namely, the requirement that proceedings must be brought within a limited time after the act of bankruptcy is committed; i. e., under the present statute, four months. If, therefore, the creditors' allegations in respect of the proceeds of the \$30,000 mortgage are to be regarded as stating an act of bankruptcy committed, and complete more than four months before amended petition filed, the order complained of was right."

To the same effect is *In re Louisell Lumber Co.*, 209 Fed. 784, 126 C. C. A. 508. These cases, with others therein cited, are decisive of this case.

The demurrer is sustained, and the petition will be dismissed.

GIBSON v. GERNAT.

(Court of Appeals of District of Columbia. Submitted December 1, 1919.
Decided March 1, 1920.)

No. 3278.

1. Master and servant ⇨284 (3)—Scope of employment question for jury.

In an action by a governess against her employer for injuries received when she fell down a dumb-waiter shaft while looking for a butler, *held*, on the evidence, that the question whether she was acting within the scope of her employment at the moment of the accident was for the jury.

2. Master and servant ⇨101, 102 (1)—Reasonably safe working place required.

It is the duty of an employer to provide a reasonably safe place for work.

3. Master and servant ⇨286 (18)—Negligent guarding of dumb-waiter shaft held question for jury.

In an action by a governess against her employer for injuries received when she fell down a dumb-waiter shaft, equipped with doors, similar to the other doors in the house, whether the opening was adequately protected, and whether defendant had provided a reasonably safe place in which plaintiff was to work, *held* properly submitted to the jury under the evidence.

4. Master and servant ⇨289 (19)—Contributory negligence of governess, falling down dumb-waiter shaft, question for jury.

In an action by a governess against her employer for injuries received when she fell down a dumb-waiter shaft, opening to which was an ordinary door, not distinguishable from other doors, in a dark stairway, *held*, that the question whether plaintiff was guilty of contributory negligence was properly submitted to the jury.

5. Appeal and error ⇨882 (8)—Appellant cannot complain of admission of evidence, where he introduced similar evidence.

In an action by a servant for injuries received when she fell down a dumb-waiter shaft from the fourth floor, defendant cannot complain of introduction in evidence of photographs of the opening into the dumb-waiter on the third floor, where both parties introduced evidence concerning the opening to the dumb-waiter on the third floor.

6. Evidence ⇨359 (3)—Photographs of opening to dumb-waiter on third floor admissible, although plaintiff fell from fourth floor.

In an action by a governess to recover damages for personal injuries received when she fell into a dumb-waiter from the fourth floor, photographs of the opening into the dumb-waiter on the third floor were admissible, on the question as to whether plaintiff was exercising due care and caution in entering the doorway constituting the opening to the dumb-waiter on the fourth floor, plaintiff never having been on such part of the fourth floor, where opening was not guarded by a gate as well as a door, as was true of the opening on the third floor.

Van Orsdel, Associate Justice, dissenting.

Appeal from the Supreme Court of the District of Columbia.

Action by Ethel M. Gernat against Grace McMillan Gibson. Judgment for plaintiff, and defendant appeals. Affirmed.

F. D. McKenney, J. S. Flannery, and G. B. Craighill, all of Washington, D. C., for appellant.

S. F. Taliaferro and Thos. P. Littlepage, both of Washington, D. C., for appellee.

ROBB, Associate Justice. This appeal is from a judgment in the Supreme Court of the District for the plaintiff, appellee here, in an action for damages growing out of injuries sustained by the plaintiff in falling down a dumb-waiter shaft in defendant's dwelling house.

At and for about five weeks prior to the time of the accident, plaintiff had been employed by the defendant in defendant's home in this city, exclusively as a nursery governess. The house, in which defendant had resided for several years, was of the English basement type and four stories in height. Plaintiff's duties were chiefly confined to the third floor, where she slept in proximity to the children, and in the front part of this floor was located defendant's sleeping apartment. There were two stairways leading from the third to the fourth floor; one stairway being in about the center of the house and the other in the rear. In the front part of the fourth floor were playrooms for the children, but plaintiff always had used the center stairway in gaining access thereto. The dumb-waiter was in an inclosed shaft extending from the first to the fourth floor, and was equipped on the different floors with ordinary doors, "just the same as any other door leading into a room." Plaintiff knew that between the door on the third floor and the shaft was a gate that extended across the opening, but prior to the accident she had never used the rear stairway on the fourth floor, and there is no evidence tending to show that she knew the location of the dumb-waiter on that floor. Indeed, the evidence fails to show plaintiff even knew that the dumb-waiter extended to the fourth floor. In this connection defendant testified that plaintiff "had nothing to do with the elevator whatsoever." The door to the dumb-waiter shaft on the fourth floor was about three feet distant from and directly opposite the top step or landing of the back stairway, and, unlike the third floor, was equipped with no gate. The door on this fourth floor was supplied with an ordinary knob, and had a lock and key; the key always being left in the lock.

On the night of the accident defendant had been out and returned home some time between 10 and 11 o'clock. Plaintiff was in the sewing room, where she had been all the evening. This room was between the front stairway and defendant's room. According to plaintiff's testimony, which does not differ materially from that of defendant, after some casual remarks, plaintiff inquired of defendant, "Can I do anything for you?" Defendant replied, "Well, I have been ringing and ringing and ringing. Could you 'call or find' Hugh" (the second butler). Plaintiff then asked, "Where do you think he would be?" and defendant answered, "He is not downstairs; he may be in his room." Plaintiff responded that she would see what she could do "and went to call the man"; defendant going to her room. On this point defendant testified that plaintiff, when defendant came in, inquired if there was anything plaintiff could do for her, to which defendant replied that all the lights were on; that she had been ringing the bell, but no one answered. She then inquired of plaintiff if plaintiff knew where Hugh was. Defendant further testified as follows:

"Plaintiff answered that she did not, and defendant said, 'Will you be good enough to call him?' Plaintiff said, 'I will go and get him;' and witness

replied, 'Don't bother to go; just call. As he is not in the pantry, and not downstairs, he may be in his room.'

The man's room was in the servant's quarters, in the rear part of the fourth floor. Plaintiff had not been in the back part of the house on the fourth floor, "and there was a door that shut it off" from the other part of that floor. She "did not know actually where his [Hugh's] room was," but did know that the help slept on the fourth floor, and "had seen them come up and down the back stairway." Plaintiff went to this stairway, opened the swinging door, and called to Hugh several times. Receiving no response, she proceeded up the stairway, which was in darkness, and when she reached the top stair (but a step from the elevator shaft door) endeavored to find an electric bulb, and, while doing so, continued to call without result. Her hand came in contact with a door handle or knob; the door being ajar. She opened the door, and, as she took a step forward, called again, and fell down the dumb-waiter shaft, receiving serious and permanent injuries. As she expressed it:

"I had trodden into the dumb-waiter, which I had not realized was there."

The evidence for the defendant was to the effect that she had cautioned plaintiff to keep the children away from the elevator on the third floor; "that plaintiff had no duties to perform in connection with the fourth floor, except at the front of the house, where the playrooms were, and plaintiff made use of the front staircase to get up and down, to and from the playrooms." The assistant butler, Hugh, in an affidavit received in evidence by agreement of counsel, because he was out of the jurisdiction, stated that it was solely his duty to operate the elevator to or at the fourth floor, and that, in accordance with defendant's instructions, "all doors leading into the elevator shaft were kept locked when not in use"; that the last time he used the elevator at the fourth floor, prior to the accident, he locked the door, and left the key in the lock, as usual.

The theory of the declaration is that it was defendant's duty to provide plaintiff with a reasonably safe place in which to work; that there was a breach of this duty, in that the dumb-waiter shaft on the fourth floor was not properly guarded; and that, while acting within the scope of her employment and in the exercise of reasonable care, she was injured in the manner stated.

[1] The first assignment of error relates to the action of the court in overruling defendant's motion for a directed verdict at the close of all the testimony. The jury was justified in finding that the plaintiff, at the moment of the accident, was attempting to carry out her employer's instructions, and was acting within the scope of those instructions; that is, within the scope of her employment, as alleged in the declaration. Defendant repeatedly had rung for the butler, and, when she made known to the plaintiff that he was not downstairs, but might be in his room, and that plaintiff was to "call or find" him (for such was the testimony of the plaintiff, which the jury, of course, had a right to accept), plaintiff clearly was justified in pursuing the course she adopted. Indeed, if we adopt defendant's recollection of the oc-

currence, there is no change in the result; for the plaintiff still was justified in interpreting the language used to mean that, if unable to locate the butler by calling to him, she was to proceed to his room, for the last words of the defendant, according to defendant's testimony, were, "He may be in his room."

[2] It is conceded that it was the duty of the defendant to provide for the plaintiff reasonably safe surroundings; that is, a reasonably safe place in which to work. *Carter v. McDermott*, 29 App. D. C. 145, 10 L. R. A. (N. S.) 1103, 10 Ann. Cas. 601. But it is insisted that there was no breach of that duty. The views of other courts, in cases involving similar conditions, will be helpful. In *Roth v. Buettell Bros. Co.*, 142 Iowa, 212, 119 N. W. 166, the ground of negligence charged was the omission to keep in repair the latch to the door of an elevator shaft and the bar extending horizontally across the entrance thereto. Plaintiff had been employed in the building for nine years, was a foreman, and familiar with surrounding conditions. The day was stormy, and it was so dark in the elevator shaft that objects could not be observed distinctly. As he approached, he noticed that the door to the elevator was open, and that the bar was not in place, "and supposing he saw the framework of the elevator, stepped in, and fell down the shaft." The court ruled that it was a question for the jury "whether defendant had exercised reasonable care for the protection of its employes against injury which might result from the absence of barriers to the shaft."

In *Foren v. Rodick*, 90 Me. 276, 38 Atl. 175, plaintiff sustained injuries by falling into the cellar of a block, the first floor of which was occupied by stores, and the second floor by offices. Near the double door entrance to the staircase leading to the offices was a single door opening from the sidewalk to the cellar. Plaintiff, although she previously had visited the office to which she was going, by mistake opened the cellar door, stepped forward, and fell into the cellar; there being only a ladder leading down. The court said:

"The conclusion is irresistible in the case at bar that the maintenance of the unfastened door and unguarded entrance to the cellar, in close proximity to the main entrance to the second floor of the building, without any sign or warning to distinguish the one from the other, and the attachment of the professional sign of a tenant to the building in such a position between the two doors as to leave it uncertain to which entrance it was designed to give direction, rendered the conditions connected with the approach to the main entrance of the building misleading and dangerous. In this respect the building was improperly constructed and negligently maintained."

Hayward v. Merrill, 94 Ill. 349, 34 Am. Rep. 229, is closely in point. Plaintiff was a guest in the hotel kept by defendant, and was assigned to a room, adjacent to the door of which was a similar door communicating with an elevator well. The hall was dimly lighted, and plaintiff, by mistake, opened the door to the elevator well and stepped through, to his injury. The court said:

"The opening ought to have been better protected than it was, and the omission to do so, under the circumstances proven, may well be attributed to the defendant as gross negligence."

In *Camp. v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282, the defendant was proprietor of an inn, on the third floor of which was a dance hall, which he had let for the evening for a public dance. The hall was reached by two flights of stairs from the street, one directly over the other; the lower extending to the second floor and the upper to the third floor. The door and stairway in the second story occupied the same relative position to each other as the door and stairway below. Plaintiff, who had been drinking, passed down the flight of stairs leading from the third to the second floor, and, seeing an open door, which he supposed opened to the street, stepped out upon a dark and unguarded piazza or balcony and fell to the ground. The court said:

"The facts proved justified the jury in finding that it was dangerous to leave the door open, and that persons not familiar with the premises might, in the nighttime, without being chargeable with negligence, mistake this door for the street door, and go onto the awning, under the impression that they were going onto the sidewalk."

Clopp v. Mear, 134 Pa. 203, 19 Atl. 504, was an action based upon negligence, wherein it appeared that the store of defendant had two entrances of like appearance; one intended for customers and the other leading to a hatchway. The door to the latter entrance being unfastened, plaintiff opened it by mistake, "and, taking the entering step to the store, plunged headlong into the cellar." The court said that the jury had been properly instructed on the question of negligence and contributory negligence, and hence that it was unnecessary to notice specially any of the assignments of error; that "neither of them can be sustained without ignoring principles that have been so long and thoroughly well settled as to admit of no reasonable doubt." See, also, *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. 978, 9 L. R. A. 640, 22 Am. St. Rep. 846; *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450; *Wendler v. People's House Fur. Co.*, 165 Mo. 527, 65 S. W. 737.

[3] We are of opinion that, upon both principle and authority, no error was committed by the court in the present case in submitting to the jury the question whether the opening in the dumb-waiter shaft on the fourth floor was adequately protected; in other words, whether defendant had provided plaintiff a reasonably safe place in which to perform the duties assigned her. It must be remembered that this opening was directly opposite and within a step of the back stair landing. There was nothing to distinguish the door to this opening from any other door, and, while it was provided with a lock and key, the key was permitted to remain in the lock—a fact known to the defendant. It is true that the butler, who alone operated the dumb-waiter, had been instructed to keep this door locked; but the plaintiff testified, and the jury evidently believed, that it was not locked upon the occasion in question. The possibility that the butler might forget to lock the door might have been anticipated by the defendant, for human memory is proverbially frail in matters of this sort. Unless the butler tried the door after using the elevator, he might not know whether it was locked or unlocked, for, if closed, it would present the same appearance, whether locked or unlocked. This danger evidently was

appreciated by the defendant, for on the third floor she had provided more adequate protection by the installation of a gate inside the door. On the fourth floor there was no gate, and not even a spring lock on the door. An ordinary door, that through oversight might be left unlocked, as in this case, was the only barrier between this four-story well and the hallway, with the stairway landing only three feet away. This was not adequate protection.

[4] But it is insisted plaintiff was guilty of contributory negligence. In each of the decisions to which reference has been made it was held that this question was for the jury. In *Foren v. Rodick*, 90 Me. 276, 283, 38 Atl. 175, 178, the court said:

"She [plaintiff] turned the knob, and the door readily yielded 'about the same as any door.' She says it was dark when she opened the door. There was nothing to suggest a 'yawning abyss.' The existing condition was not instantly manifest; but, suspecting no danger, she naturally stepped over the threshold simultaneously with the inward swing of the door. She was seeking to enter the building by the implied invitation of the defendants. She had a right to expect reasonable safety and convenience in the approaches. She was not required to use extraordinary precaution, but only such ordinary care and caution as persons of reasonable prudence, care, and discretion usually and ordinarily exercise under such circumstances."

In that case, it will be remembered, the plaintiff, instead of using the double door entrance, opened a single door and fell into the cellar. In the present case we are concerned with an elevator in a dwelling house, occupied by the defendant and her children. On the third floor the elevator was equipped with a gate inside the door, and, whatever may have been the reason for its installation, the material fact is that the gate was there, and that plaintiff knew it was there. Defendant stated on the stand that she had warned plaintiff "to keep the children away from the elevator on the third floor"; but it is not even suggested that any warning had been given as to the fourth floor, in the front part of which the children had playrooms. It would not have been a violent assumption, therefore, had plaintiff concluded that the elevator shaft had no opening on the fourth floor, if it projected beyond the third floor, or that any opening on the fourth floor was so situated and protected as to give defendant no concern even for her children.

It is suggested, on behalf of defendant, that plaintiff should have used the front stairway upon the occasion in question. The answer to this obviously is that the plaintiff, when informed by defendant that the butler, Hugh, might be in his room, which was in the back part of the fourth floor, naturally made use of the staircase leading directly to that part of the floor, and which she had seen used by the servants in going to and from their quarters. It is apparent from her testimony that her mind was occupied with the execution of the mission intrusted to her by her employer, and we think she had a right to suppose—especially in view of known conditions on the third floor and the failure of her employer to acquaint her with any unusual conditions on the fourth floor—that she would not be subjected to the dangers which awaited her and of which she had no warning. She was not rambling around, as has been suggested, but engaged in the performance of a duty intrusted to her by her employer, and when she found

the door to the shaft ajar, under the circumstances disclosed, we think she had no reason to assume that a step forward would result as it did.

Among the authorities relied upon by counsel for appellant is *Steger v. Immen*, 157 Mich. 494, 122 N. W. 104, 24 L. R. A. (N. S.) 246, where the plaintiff, during a visit to defendant's five-story apartment house building, borrowed a key from a tenant, and, finding an unlocked door in a relatively similar situation to that of a toilet on the floor below, without any investigation entered and fell down an open shaft. It was ruled that he was guilty of contributory negligence as matter of law. The plaintiff in that case was on a mission of his own, and the circumstances were somewhat different from those in the present case. There the plaintiff was looking for a place which he did not even know existed, and which as a matter of fact had no existence. Here the plaintiff, in a private dwelling, was proceeding to carry out the instructions of her employer, which took her to the very point where the accident occurred. In *Hilsenbeck v. Guhring*, 131 N. Y. 674, 30 N. E. 580, the plaintiff, the guest of a tenant, walked through a cellar door, across a platform, and fell downstairs. It was pointed out by the court that the head of the cellar stairs was "two or three steps" from the door, "so that it could not be claimed that the top of the stairs was so close up to the door that one in the exercise of ordinary care would be apt to fall down the stairs upon the door being opened, and before he would have a fair or reasonable opportunity to notice what was in front of him." Comment on this case is unnecessary, for the difference between it and the case at bar is apparent. Without reference to other cases cited in behalf of defendant, it may be observed that we have found nothing therein to dissuade us from adopting the principles laid down in the authorities already reviewed. If dangerous conditions are needlessly and carelessly maintained, and, as here, are the proximate cause of the injury complained of, those responsible therefor ought in common justice to respond in damages.

[5, 6] One point remains. It is based upon the contention that the court erred in permitting testimony and photographs to be introduced in evidence as to conditions surrounding the elevator opening on the third floor. Since both parties introduced evidence on this point, we think defendant is in no position to raise that question. But, however that may be, the evidence clearly was admissible on the question as to whether plaintiff was exercising due care and caution. Her knowledge of conditions existing on the third floor was material in this connection.

Finding no error in the record, we affirm the judgment, with costs. Affirmed.

VAN ORSDEL, Associate Justice (dissenting). This case has been disposed of by my Associates upon the theory of the relation between the parties of master and servant. We therefore start with plaintiff as a servant in the house of defendant. The mere fact that she had not before been called upon to ascend the rear stairs to the fourth floor does not affect the question as to the nature or scope of her duties. That she was performing her duties as a servant in the house

is the theory upon which the declaration is cast, and upon which my Associates have based their opinion. Accepting, therefore, the position assumed, plaintiff and Hugh were fellow servants.

The negligence of defendant is predicated upon the hypothesis that the dumb-waiter shaft was defectively constructed. There is a marked distinction between a factory or public building and a private dwelling house. In factories the duties of the employes are ordinarily confined to a particular part of the premises, and the building must be constructed for the protection of employes instructed to go into portions thereof with which they are not familiar. The same rule applies to public buildings, to which the public has more or less unrestrained access. They must be constructed and maintained with a view to the accommodation and safety of the members of the public, who usually have no knowledge of the existing conditions. On the other hand, a private dwelling house is constructed to suit the convenience of the owner or lessee. Elevators in charge of skilled operators and open and commodious stairways are an impossibility in ordinary construction. Stairways descending from open hallways and blind stairways accessible from doors leading from rooms or hallways are common—indeed, ordinary—features of construction. A private dwelling is not constructed with any view whatever to public convenience, and the public, as such, has no rights in the premises. Invited guests have access only to such parts of the house as are set apart for their use, and usually act under the escort or direction of some member of the household. Servants are members of the household, and it is their first duty to acquaint themselves with the house and any peculiarities pertaining to its construction.

As the degree of care required of the owner of a private dwelling is less than that required of the owner of a factory or public building, so the care required of a domestic servant is greater than that required of an employe in a factory or public building. Ordinarily the duties of the domestic servant are coextensive with the house itself. They extend, or may extend, to any or all parts of the house, both by day and by night. Hence the servant will be presumed to observe and understand all the peculiarities of construction in the house to the same degree as a prudent person of equal age and experience, with equal capacity for estimating their significance, under the same circumstances, would observe and understand them.

Before contributory negligence, as matter of law, can exist, it must consist of such an act as not only contributes to, but is the proximate cause of, the accident. It is not difficult to locate the proximate cause of the accident in this case. It consisted in the carelessness of plaintiff in opening the door and stepping into the shaft under conditions uncalled for from the nature of her mission. It is stated in the opinion that there is no evidence tending to show that plaintiff knew the location of the dumb-waiter in the fourth floor. She was familiar with its location and operation on the third floor, and must have known that it ascended and descended past that floor; that the shaft did not extend horizontally or at an angle, but vertically; and that it must, of necessity, occupy the same relation to the stairway on the fourth floor

as it did to the stairway on the third floor. It is also stated in the opinion that the record fails to disclose that plaintiff knew the dumb-waiter shaft extended to the fourth floor; but, on the other hand, it also fails to show that she had any reason to believe that it did not so extend, and she had no right to assume that it terminated at the third floor. Her knowledge of its existence at least should have suggested to her the probability of its continuation to the fourth floor, a fact which she was required to take into consideration and guard herself against when groping in the dark.

Nor can it be held that she was justified in assuming that, if the shaft did extend to the fourth floor, it was protected by a gate. True, a gate blocked the entrance to the shaft on the third floor; but she knew that this was for the protection of the children, and that none existed on the first and second floors. The existence, however, of a gate on the third floor and plaintiff's knowledge of it, has no bearing upon the question of her negligence. If she had gone to the fourth floor to use the dumb-waiter, and, relying upon a gate, had opened the door and fallen in, the existence of the gate on the third floor might have been important. But her mission to the fourth floor had nothing to do with the dumb-waiter. Whatever case plaintiff has must rest upon the hypothesis that when she opened the door she did not know she was entering the shaft; hence she was not relying upon the presence of a gate from her knowledge that there was one on the floor below.

Not only did the darkness call for the utmost care on her part, but there is no contention on the part of plaintiff, nor is there any evidence to support the assumption, that her orders from defendant, given the broadest possible interpretation, required her to open and pass through a door. It is upon this erroneous assumption that plaintiff's action in opening the door into the shaft is excused by my Associates. The opinion assumes that she thought she was opening the door into Hugh's room. Either this theory must be correct, or else she did something not contemplated in her mission—opening and passing through a door. But this presumption, upon which the opinion rests, that she mistook the shaft door for the door to Hugh's room, has absolutely no basis in fact. Nowhere in her testimony does she make any statement from which even a remote inference may be drawn, that she had any intention of opening Hugh's door, or any other door, or that her mission required it. She testified that she was calling Hugh, and the evidence clearly discloses that this was what she was requested by defendant to do. If she felt it her duty to go to Hugh's room in order to arouse him, propriety would seem to suggest, considering the hour of the night, that she do so by rapping on the door, instead of unceremoniously entering the room as she entered the shaft.

Twice in the opinion it is stated erroneously that the door was ajar. While plaintiff used the expression in her testimony, she evidently meant that it was not latched. Plaintiff testified:

"As I was feeling for the light, * * * my hand came on a door handle. I believe it was a knob, but am not sure. I did not have to turn the latch. It was ajar. I pulled it like that (illustrating), and it came quite easily, and I stepped forward."

The trial justice, who witnessed the illustration of plaintiff on the witness stand, stated to the jury in his charge:

"If the door was locked, the plaintiff cannot recover; if it was not, in fact, locked, but stood ajar, or stood as the plaintiff testified, so that upon a mere taking hold of the knob the door came open, then in so far as that point is concerned it is the case she has stated in the declaration."

In the declaration plaintiff alleges:

"Her hand came into contact with a doorknob upon a door standing slightly ajar, or only lightly fastened; she opened the door, taking one step forward," etc.

Plaintiff alleges she opened the door before stepping in. She so stated on the witness stand; the court so stated to the jury; the case was tried on that hypothesis in the court below, and in the briefs and arguments of counsel in this court. Therefore the most that can be fairly adduced from the record is that the door was closed, but not latched.

Thus we have the case stated in the most favorable light for plaintiff; that she was sent into the back part of the hall to call Hugh, not to blunder around in the dark, or to open doors and enter unknown chambers, closets, or dumb-waiter shafts. No clearer case of deliberate, reckless, heedless, contributory negligence was ever presented to a court.

But was the shaft, in fact, defective construction in a private dwelling? Certainly not, if the door is kept closed and locked. Let us assume, to meet the theory of negligence advanced by the court in this case, that a gate had been provided inside the door. Then, whether the door is locked, merely closed, unlatched, or open, the gate furnished absolute protection—approved construction. But suppose a servant, in disobedience of the master's express instruction, removes the gate, and neglects to restore it, and another servant comes along in the dark, unfamiliar with conditions, opens the door, steps in, and is injured. What becomes of the theory of defective construction? In that case the gate, when in place, furnished a perfect barrier. In the present case the door, when kept locked, as required by the master, formed a complete barrier. In both cases the dangerous condition was due, not to this or that style of construction, but to the negligence of the fellow servant.

This is not the case of a dangerous contrivance left unguarded. Plaintiff did not stumble or fall into an open shaft. The door was closed. To make the situation dangerous, she was required to do an affirmative act—open the door; an act not contemplated in the order of defendant, or even remotely related to the mission upon which she had been sent. The request of defendant certainly did not contemplate the entry of plaintiff into Hugh's sleeping apartment at the midnight hour.

It therefore logically follows that, so long as the door to the shaft was closed, a perfectly safe place was afforded plaintiff in which to perform her mission. Until she opened the door, the hall was safe. The duty of the master to furnish a safe place only requires that it be

safe for the performance by the servant of the particular duty assigned. Each case must rest upon its own facts. We are without authority, as a court, to judicially legislate upon the general subject of dwelling house architecture in the District of Columbia, with the view of preventing every possible accident which might occur as the result of this or that particular style of construction.

Counsel for plaintiff in their brief suggest that no case has been found analogous to this. The reason is apparent. They might have gone further, and truthfully stated that no case has been found where a servant in a private house has attempted to recover damages for injuries sustained from alleged defects in construction. Servants in private houses from time immemorial have been falling down stairs, through hatchways, and over obstacles left by the negligence of fellow servants; but no one prior to this, owing to the peculiar relation, seems to have conceived the notion that such an action for damages would lie.

The door is the usual instrument for inclosing passageways in private dwellings, and, whether locked, latched, or unlatched, it is notice to all to use their senses in opening it and passing through. And this is the rule of the cases. In *Steger v. Immen*, 157 Mich 494, 122 N. W. 104, 24 L. R. A. (N. S.) 246, the accident occurred in an apartment building, a collection of private dwellings, where a guest in one of the apartments was furnished a key to the toilet. He mistook the location of the toilet, opened a door, as in this case, stepped into a dumb-waiter shaft, and was injured. No question of defective construction seems to have been involved in the case. At least, it was regarded as unworthy of consideration by the court. The plaintiff was held to be guilty of contributory negligence as matter of law. In that case plaintiff was given a key and sent on a mission which required the opening of a door, while plaintiff's mission did not. If, in these cases, the negligence of the defendants is traceable to defective construction, the plaintiff in the Michigan case had a much stronger case than the plaintiff in the present case, since his mission required him to open and pass through a door in a semi-public building.

In *Gaffney v. Brown*, 150 Mass. 479, 23 N. E. 233, the plaintiff was accustomed to get her dinners at a house, on the ground floor of which the dining room was conducted. She came there as a boarder. When she started to leave the dining room, she went to a door which she assumed was the exit door. She opened the door, stepped in, and was precipitated down a stairway to the cellar. It was held to be contributory negligence as matter of law.

In *Clark v. Fehlhaber*, 106 Va. 803, 56 S. E. 817, 13 L. R. A. (N. S.) 442, the plaintiff, a dressmaker, was summoned to the house of defendant. She entered the rear vestibule, and, not knowing which one of several doors to enter, knocked on one of them, and defendant called to come in. Plaintiff opened the door, entered, and fell down a flight of stairs into the cellar. The court held that the accident was merely the result of misapprehension on the part of both parties. Plaintiff thought she was knocking on the entrance door, and defendant thought she was knocking on the right door. Both innocently con-

tributed to the accident, and there could be no recovery. There was no intimation of defective construction.

In *Hilsenbeck v. Guhring*, 131 N. Y. 674, 30 N. E. 580, plaintiff went to a house in which his son-in-law lived as a tenant. Late in the afternoon he went to a water-closet, which opened on the hall on the first floor, not knowing its exact location. By the reflection of a dim light he saw a door slightly open, and, supposing it to be the right door, stepped in upon a platform, from which he fell into a cellar, breaking his leg. Disposing of the case, the court, in part, said:

"We cannot see there was any obligation on the part of the defendant to keep the hallway lighted, or to keep the cellar door locked, at the peril of becoming responsible for an accident such as has happened in this case. We are of the opinion that the evidence fails to disclose the lack of reasonable care on the defendant's part in the attention given to these doors or to the lighting of the hallway. * * * Again, on the plaintiff's part, he was clearly guilty of negligence contributing to the injury. He says it was dark, and after he got hold of the door in question it was so dark he could not see into the space in front of him. He had never been there before, and he had no information which might mislead him, or cause him to think there was but one, and that the door into the closet. He knew nothing about it, and in that state of ignorance he opens a door which he thought was the one leading to the closet; but, it being dark, he could not be certain, and, notwithstanding the darkness, he walks ahead, and, while supposing himself in the closet, steps to the head of the stairway, and falls down the cellar stairs. In such case, and in the darkness, he should not have proceeded in a perfectly strange place without a light, or in some way taking precautions which would have enabled him to proceed in safety, * * * and hence, if one do come to a door in a hallway under such circumstances as this case shows, he cannot walk through it in darkness and claim damages for the resulting injury."

Other cases may be cited where persons, through mistake, have fallen into private stairways, hatches, or shafts. *Campbell v. Abbott*, 176 Mass. 246, 57 N. E. 462; *Massey v. Seller*, 45 Or. 267, 77 Pac. 397; *Kaiser v. Hirth*, 46 How. Prac. (N. Y.) 161. In no case has defective construction been intimated as ground of negligence. These cases sufficiently emphasize the distinction between private and public places, and answer the cases cited by the court where the accident occurred through mistaking the wrong doorways leading into and about public buildings. The cases relied upon in the opinion of the court all relate to accidents in public buildings. In all but one case the injured party was a stranger to the premises, and in each instance the mission of the injured party directly contemplated passage through a door.

In the present case plaintiff, though a servant in the house, was not a slave. She was not compelled to obey the indefinite request of defendant. She could have refused to ascend the stairs until they were lighted. She must have known of the custom that the light was kept burning until the last servant retired. She saw the servants ascending and descending the stairs. She was constantly around and about the foot of the stairs, and was familiar with conditions. Defendant also had a right to assume that the light was on, since the house throughout was lighted, indicating that the servants had not all retired.

Some responsibility must be attached to plaintiff's plunging into the dark without knowing the conditions ahead. But, as I have suggested,

the way was safe for her mission. It required an affirmative act on her part, not related to her mission, to create the danger.

The motion for a directed verdict should have been sustained.

MOENS v. UNITED STATES.

(Court of Appeals of District of Columbia. Submitted January 5, 1920. Decided March 1, 1920.)

No. 3306.

1. Indictment and information ☞121(1)—Bill of particulars discretionary with trial court.

The question of granting defendant's motion for a bill of particulars is generally considered to be a matter within the sound discretion of the trial court.

2. Criminal law ☞1167(1)—Denial of bill of particulars not prejudicial.

Denial of a motion for a bill of particulars in a prosecution for having in possession obscene pictures, "after receiving the assurance of the district attorney that the pictures prints, etc., mentioned in the indictment would be shown to the defendant and his counsel," could not have prejudiced the defendant, if the condition was complied with.

3. Criminal law ☞1144(3)—Presumed on appeal that condition to refusal of bill of particulars was complied with.

In a prosecution for having obscene pictures in possession, where a transcript of the evidence and proceedings at the trial has not been preserved by bill of exceptions, and is not before the court, it must be assumed that defendant had access to pictures, prints, etc., which the district attorney promised to show him as a condition to a refusal to grant a motion for a bill of particulars.

4. Criminal law ☞1151—Continuance largely within discretion of trial court.

The granting of a motion for a continuance in a criminal case is a matter largely within the discretion of the trial court, and its action will not be disturbed, unless it clearly appears that the accused has been prejudiced.

5. Criminal law ☞1144(7)—Presumed on appeal that accused was not prejudiced by refusal of continuance.

In the absence of a complete bill of exceptions, where it is impossible to determine to what extent, if any, accused was prejudiced by a ruling denying a motion for a continuance, it must be assumed that the action of the court was without error.

6. Indictment and information ☞34(3)—Indorsement indicating section of law no part of indictment.

An indorsement indicating the section of the law under which an indictment was found is no part of the indictment itself, and, if it charges a crime under some other statute, it is perfectly competent to prosecute under such other statute.

7. Obscenity ☞5—Exhibition of pictures indictable at common law.

The exhibition of obscene pictures is an indictable offense at common law.

8. Indictment and information ☞89—Guilty knowledge need not be alleged, unless part of statutory description.

Where guilty knowledge is a part of a statutory description of a crime, it must be alleged; but it by no means follows that, where the statute is silent as to knowledge, the scienter need not be averred.

9. Indictment and information ⚡110(19)—Obscenity ⚡5—Guilty knowledge necessary, and it must be alleged in indictment for possessing obscene pictures.

Having in possession obscene pictures and prints in violation of Code of Law 1901, § 872, is an offense involving moral turpitude and criminal intent, unlawful in itself, in which notice is necessary to raise the duty which a defendant is alleged to have broken, and in such a case guilty knowledge must be averred in the indictment, and it was insufficient to simply allege that defendant "feloniously and unlawfully did have in his possession for the purpose of exhibiting the same" obscene pictures, prints, etc., although the statute is silent as to guilty knowledge.

10. Indictment and information ⚡71—Crime must be charged with precision and certainty.

A crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged.

11. Obscenity ⚡15—Criminal intent implied from guilty knowledge of obscene nature of pictures in possession.

If an indictment under Code of Law 1901, § 872, charges knowledge on the part of the accused of the obscene character of the pictures in his possession, criminal intent in exhibiting them would be implied from the guilty knowledge of their nature.

12. Indictment and information ⚡60—Allegations must be inconsistent with innocence.

If an indictment may be true, and still the accused not be guilty of the offense attempted to be charged, it is insufficient.

Appeal from the Supreme Court of the District of Columbia.

Herman M. Bernelot Moens was convicted of having in his possession obscene pictures and prints for the purpose of exhibiting the same, and appeals. Reversed and remanded.

Crandall Mackey and R. P. Evans, both of Washington, D. C., for appellant.

J. E. Laskey, U. S. Atty., and Chas. W. Arth, Asst. U. S. Atty., both of Washington, D. C.

VAN ORSDEL, Associate Justice. Appellant, defendant below, appeals from a conviction of having in his possession obscene pictures and prints for the purpose of exhibiting the same in violation of section 872 of the District of Columbia Code.

[1-3] The first assignment of error relates to the alleged refusal of the court to grant defendant's motion for a bill of particulars. Generally this is considered to be a matter within the sound discretion of the trial court. *Du Bois v. People*, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183; *Tilton v. Beecher*, 59 N. Y. 176, 17 Am. Rep. 337; *State v. Bacon*, 41 Vt. 526, 98 Am. Dec. 616. The court denied the motion "after receiving the assurance of the district attorney that the pictures, prints, etc., mentioned in the indictment would be shown to the defendant and his counsel." If this condition was complied with defendant was not prejudiced; since, in the present case, it was equivalent to a formal bill of particulars. A transcript of the evidence and proceedings at the trial has not been preserved by bill of exceptions, and is consequently not before us. Hence we must assume that in due

course defendant had access to the "pictures, prints," etc., as stipulated in the order of the court.

[4, 5] The second assignment is based upon the refusal of the court to sustain defendant's motion for a continuance. This, also, is a matter largely within the discretion of the trial court, and the court's action will not be disturbed, unless it clearly appears that the accused has been prejudiced by the ruling. According to the affidavit in support of the motion, defendant expected to prove by the absent witnesses that the pictures were taken for scientific purposes and to use in the advancement of science. In the absence of a complete bill of exceptions, it is impossible to determine to what extent, if any, defendant was prejudiced by the ruling. We must assume that the action of the court was without error.

[6] The two remaining assignments relied upon by counsel for defendant will be considered together, and relate to the action of the court in overruling a motion to quash the indictment and a motion in arrest of judgment. It appears that defendant was indicted under section 312 of the federal Penal Code (Comp. St. § 10485), as appears from the indorsement on the indictment. Between the date of the finding of the indictment and the trial, this court, in the case of *Kleindienst v. United States*, 48 App. D. C. 190, held that offenses embraced in chapter 13 of the federal Penal Code (Comp. St. §§ 10484-10496), which were covered by the provisions of the Code of Laws for the District of Columbia should be prosecuted under the latter. The district attorney, therefore, under the original indictment, prosecuted defendant for the violation of section 872 of the District Code. If the indictment charges a crime under section 872, it was perfectly competent to prosecute defendant for violating the provisions of that statute. The indorsement indicating the section of the law under which the indictment was found is no part of the indictment itself.

"It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made are embraced by some statute in force. The indorsement on the margin of the indictment constitutes no part of the indictment and does not add to or weaken the legal force of its averments. We must look to the indictment itself, and if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute." *Williams v. United States*, 168 U. S. 382, 389, 18 Sup. Ct. 92, 94 (42 L. Ed. 509).

This brings us to the question whether the count of the indictment under which defendant was tried charges a crime under section 872 of the District Code. The statute, among other things, provides that—

"Whoever sells, or offers to sell, or give away, in the District, or has in his possession with intent to sell or give away or to exhibit to another, any obscene, lewd, or indecent book, pamphlet, drawing, engraving, picture, photograph, instrument, or article of indecent or immoral use, * * * shall be fined," etc.

The count of the indictment on which defendant was tried charged that he—

"feloniously and unlawfully did have in his possession for the purpose of exhibiting the same, forty certain obscene prints and pictures, representing cer-

tain persons, to wit, women, in obscene, impudent and indecent postures, * * * against the form of the statute," etc.

[7-9] It is urged that, as defendant is not charged with willfully and knowingly having in his possession the obscene prints and pictures, the indictment is fatally defective. The exhibition of obscene pictures is an indictable offense at common law. *Commonwealth v. Sharpless et al.*, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632. It is well settled that, where guilty knowledge is part of a statutory description, it must be alleged. *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135. But it by no means follows that, as in this case, where the statute is silent as to knowledge, the scienter need not be averred in the indictment.

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *United States v. Carll*, *supra*.

On the other hand, it is held that, where knowledge is not an express element of the statute, it need not be averred—

"under the laws against the sale of intoxicating liquor or adulterated milk, and many other police, health, and revenue regulations." In such cases "the defendant is bound to know the facts and obey the law, at his peril. Such is the general rule where acts which are not mala in se are made mala prohibita from motives of public policy, and not because of their moral turpitude or the criminal intent with which they are committed." *Commonwealth v. Raymond*, 97 Mass. 567, 569.

The crime in this case does not consist in the mere possession of the obscene matter but in its possession coupled with the purpose or intent of exhibiting it to others. The statute is aimed at the protection of public morals and expressly forbids the possession of obscene matter "with intent to sell or give away or to exhibit to another." The act here denounced is one involving moral turpitude and criminal intent, unlawful in itself, in which notice is necessary to raise the duty which defendant is alleged to have broken. In such a case guilty knowledge should be averred and proved.

The decision of Mr. Justice Gary in *United States v. Carll*, *supra*, is directly in point. The indictment, as here, was under a statute for a common-law offense, silent as to knowledge. The statute (section 5431, Rev. Stat. U. S.) provided that—

"Every person who, with intent to defraud, passes, utters, publishes, or sells any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be punished," etc.

The indictment charged that defendant—

"feloniously, and with intent to defraud the bank, * * * did pass, utter, and publish upon and to the said bank * * * a falsely made, forged, counterfeited, and altered obligation and security of the United States."

The court, holding the indictment defective, in that the scienter was not averred, said:

"The language of the statute on which this indictment is founded includes the case of every person who, with intent to defraud, utters any forged obligation of the United States. But the offense at which it is aimed is similar

to the common-law offense of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object. This indictment, by omitting the allegation contained in the indictment in *United States v. Howell* (11 Wall. 432), and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged, and counterfeit, fails to charge him with any crime. The omission is a matter of substance, and not a 'defect or imperfection in matter of form only,' within the meaning of section 1025 of the Revised Statutes."

[10] The *Carll Case* is in no way modified in *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606. In that case the statute (section 3893, Rev. Stat. U. S. [Comp. St. § 10381]) made it a crime for any person to knowingly deposit or cause to be deposited, for mailing or delivery, any obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character. The indictment charged that the accused—

"did unlawfully, willfully, and knowingly deposit and cause to be deposited in the post office in the city of New York, for mailing and delivery by the post office establishment of the United States, a certain obscene, lewd, and lascivious paper."

It was contended that while the indictment charged the accused with knowingly mailing the alleged document, it was defective in that it failed to charge him with knowledge of the obscene nature of the paper. The court, after suggesting that "the indictment would have been in better form if it had more distinctly charged that the accused was aware of its character," said:

"In their ordinary acceptation, the words 'unlawfully, willfully, and knowingly,' when applied to an act or thing done, import knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing, and when used in an indictment in connection with the charge of having deposited in the mails an obscene, lewd, and lascivious paper, contrary to the statute in such case made and provided, could not have been construed as applying to the mere depositing in the mail of a paper the contents of which at the time were wholly unknown to the person depositing it. The case is therefore not one of the total omission from the indictment of an essential averment, but, at most, one of the inaccurate or imperfect statement of a fact; and such statement, after verdict, may be taken in the broadest sense authorized by the words used, even if it be adverse to the accused."

In no instance does the court intimate that the scienter need not be alleged. On the contrary, what the court does hold is that, in such a case, guilty knowledge must be imputed to the accused by express averment in the indictment. These cases merely adhere to a well-established rule of criminal pleading, that—

"The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged." *Evans v. United States*, 153 U. S. 584, 587, 14 Sup. Ct. 934, 936 (38 L. Ed. 830).

[11, 12] So here, if the indictment had charged knowledge of the character of the pictures in the possession of the accused, the criminal intent in exhibiting them would be implied from the guilty knowledge

of their nature. *United States v. Clark* (C. C.) 37 Fed. 106. But, under the indictment as it stands, as suggested in brief of counsel for defendant, a blind man, having the pictures in his possession, without knowledge of their nature for the purpose of exhibiting them to others, could be convicted. A clear rule as to the sufficiency of an indictment for a statutory offense is stated in *Commonwealth v. Young*, 15 Grat. (Va.) 664, as follows:

"If the indictment may be true, and still the accused may not be guilty of that offense, the indictment is insufficient."

Applying the rule to this case, the insufficiency of the indictment is manifest. The motion in arrest of judgment should have been sustained.

The judgment is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

In re STADEKER.

(Court of Appeals of District of Columbia. Submitted March 12, 1920. Decided May 3, 1920.)

No. 1306.

Patents 17—Wind-shield cleaner held not to involve invention.

A wind-shield cleaner, formed by bending a metallic rod upon itself to form a cleaning portion and a handle which can be firmly grasped, though it apparently possesses utility, *held not to involve invention.*

Appeal from the Commissioner of Patents.

Application by Gilbert I. Stadeker for patent. From a decision denying five claims, the applicant appeals. Affirmed.

J. H. Milans and C. T. Milans, both of Washington, D. C. (A. Miller Belfield, of Chicago, Ill., on the brief), for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

ROBB, Associate Justice. Appeal from a decision of the Commissioner of Patents denying five claims for a patent on an automobile wind-shield cleaner. Claim 5 reads as follows:

"5. A device of the class specified, consisting of a metallic rod bent upon itself to form a cleaning portion and a handle portion, the latter portion being provided with a series of lateral bends extending from side to side in zigzag manner to form a wide, flat, vertical handle to permit the device to be firmly grasped and to rest flatwise against the palm of the operator's hand."

While appellant's device apparently possesses utility, we are constrained to agree with the Patent Office that its evolution did not involve invention. The patents to Wolfe (No. 1,171,377, February 8, 1916), De Vore (No. 525,189, August 28, 1894), and Goodrich (No. 1,211,698, January 9, 1917), as found by the Commissioner, disclose every element of the device of the issue. The decision must be affirmed.

Affirmed.

HOENIG v. PARKER.

(Court of Appeals of District of Columbia. Submitted May 10, 1920. Decided June 2, 1920.)

No. 1307.

1. Patents ☞91(3)—Finding as to priority not sustained by the evidence.

In an inference proceeding in the Patent Office, a finding that one of the parties first conceived and disclosed the invention *held* contrary to the evidence.

2. Patents ☞87—Burden of showing abandonment on one asserting it.

In an inference proceeding in the Patent Office, the burden of affirmatively proving abandonment of an invention is on him who asserts it.

3. Patents ☞83—Delay in filing application explained by financial condition.

In an inference proceeding in the Patent Office, failure of a party for about 10 months after reducing his invention to practice to file his application *held* sufficiently explained by his financial condition, so that there was no abandonment.

Appeal from Commissioner of Patents.

Triparty interference between William M. Parker, Harry Edward Hoenig, and Julian H. Kendig. From a decision granting William M. Parker priority, Harry Edward Hoenig appeals. Reversed.

E. Hume Talbert, of Washington, D. C., for appellant.

Geo. E. Tew, of Washington, D. C., and Geo. A. Rockwell, of Boston, Mass., for appellee.

SMYTH, Chief Justice. This was a triparty interference, involving the application of Parker, filed January 8, 1915; Kendig, filed in February, 1915; and Hoenig, filed in October, 1915. It embraces but a single count, which reads:

"A device of the character described comprising a member with a passage; a member for attachment to a support and having a fixed head, the body of said attachment member extending through said passage, said fixed head positively preventing accidental withdrawal of the first-mentioned member from one end of said attachment member; and means to positively limit, at a predetermined point, movement of the first-mentioned member toward the tip of said attachment member."

The invention relates to two-part insulators and means for holding the parts in assembled relationship. The means consist of a nail passing through perforations in the cap and base portions, and a struck-up portion on the shank of the nail for positively limiting the movement of the nail and base in one direction. The issue is directed broadly to the means for positively limiting the movement.

The idea was to provide an insulator which could be assembled at the factory, shipped to the point of use, and then readily installed. The Examiner of Interferences was of opinion that to prove reduction to practice it was necessary to show commercial use of the device, involving assembling, shipment, handling, and installation. He held that Parker and Kendig were entitled to their respective filing dates for reduction to practice, and that Hoenig should be given the last of December, 1914, for his time of conception, but that, not having put

the device into commercial use and because of the shortness of the nail used, he had not actually reduced to practice, and, since he was not diligent between the time of conception and the date of filing, he must be confined to the latter date. Parker was therefore awarded priority. Kendig did not appeal. Hoenig did.

The Board of Examiners held that Hoenig was entitled to the date given him by the Examiner of Interferences for conception; also that the device was of such a simple nature that it needed no test to show that it would do what was claimed for it, and that Hoenig should be allowed December 31, 1914, for actual reduction to practice. Differing, however, from the Examiner of Interferences with respect to Parker, they ruled that he, having prepared his application December 24, 1914, and filed it with due diligence January 8, 1915, was entitled to December 24 as the date of his invention, and hence to priority over Hoenig. The First Assistant Commissioner, ignoring Parker's application date, ruled that he was limited to his filing date, January 8, 1915, for constructive reduction to practice, rejected the testimony on behalf of Hoenig with respect to a conception and reduction to practice in December, 1914, and held that he had failed to establish that he had disclosed the invention prior to Parker's filing date, January 8, 1915. In consequence he awarded priority to Parker.

Parker asserts that he conceived and reduced to practice in 1913. We agree with the First Assistant Commissioner that the record does not sustain him in this. He is not entitled to any date before December 24, 1914, the date accorded him by the board of examiners.

Hoenig claims that about the middle of November he went to Pittsburgh to pay interest on a note given to the Baird Machinery Company in part payment for a large machine that he had previously purchased. While there he had a conversation with the purchasing agent of the Iron City Electrical Company, who spoke of the salability of a two-piece porcelain knob, if it was economically put together for shipping and resale. Hoenig, who had extensive experience in porcelain die making, says that shortly after his return from Pittsburgh he conceived the device of the issue, and about November 18 or 20 commenced to make a die to be used in producing it. He completed the die near January 1, 1915. On cross-examination he exhibited a canceled check dated November 18, 1914, and payable to the Baird Machinery Company, for the purpose of supporting his statement that he had paid the company money at that time. After completing the die, he assembled, he says, two knobs—the insulators are sometimes spoken of as knobs—in the manner called for by the claim of the issue. This was done, he declared, in the presence of C. C. Smith, Worthen, and Lyde. The next day he showed the assembled knobs to Hellyer, J. T. Smith, and Hetzel.

C. C. Smith fully corroborated him in important particulars. He testified that he was a porcelain die maker of several years' experience; that he was employed by Hoenig, and commenced work on the dies about the 1st of December, 1914. Hoenig supplied him sketches from which he worked. Along near the middle of December he learned that the dies on which he was employed were for the purpose of producing the device of the issue. One of the means by which he

recalled the dates was the fact that, at the time he worked on the dies, he also did some work for the Louthan Supply Company. This he remembers because from the work done for that company Hoenig, who was financially embarrassed, procured the money to pay him wages which were past due and for which he had been compelled to institute suit against Hoenig before one Bennett [presumably a justice of the peace, though he calls him a notary public], sometime before Christmas, 1914. He says that he saw Hoenig put a die on the press and crimp two nails on it some two weeks after work on the dies had been started by him. Having described the die which was used, he then described the fins produced by it on the nail. He said in that connection that two halves of a knob were put together with a nail through it, and after the nail had been punched it left two little fins, the struck-up parts—one on each side of the nail. He thus indicated the invention of the issue. His testimony shows conception and disclosure by Hoenig before the middle of December, 1914, and reduction to practice as early as January 1, 1915.

J. T. Smith, after describing the invention by saying that it was a nail put through two parts of a knob, with two little "wickers" pressed on the nail, declared that he first saw it in Hoenig's machine shop the first week in January, 1915, and he fixes the time by the circumstance that Hoenig was then back in his payments for some real estate which he had purchased from Smith in 1913. Hoenig, in attempting to excuse his failure to make the payments when they became due, showed Smith the knob as a thing out of which he might get the money necessary to discharge his debt.

Worthen testified that he was also an employé of Hoenig; that he had talked with him about a patent knob in which he was interested, and then he described the knob by saying that it had a nail run through it "and flattened out on the end or near the end, after it was assembled." He fixes the time of the conversation by a job done by him for one Hammerton, but the year in which he did it is not satisfactorily established.

[1] The other persons referred to above as being cognizant of what Hoenig had done were not called, but there is nothing to show that they were not available to Parker, if he desired them. If C. C. Smith's story that he sued Hoenig for his wages near Christmas, 1914, was not true, it was very easy for Parker to contradict it. He tied his testimony to Christmas. It is most improbable that the things related took place at Christmas, 1915, for that was after all the parties to the interference had filed. On the other hand, if they transpired at Christmas, 1913, it would place Hoenig ahead of his rivals beyond a doubt. Hoenig and his witnesses were not mistaken. They either told the truth or deliberately falsified, and there is nothing in the record which would warrant so harsh a conclusion as the latter. We agree with the Board of Examiners that the invention is a simple one, and that any person by trying a specimen could determine at once whether or not it would stand the strains to which it would be subjected in actual use. The record establishes that Hoenig conceived and disclosed the invention before the middle of December, 1914, that he

reduced it to practice as early as January 1, 1915, and was diligent in the meantime.

[2, 3] It is asserted by Parker that Hoenig, even if he was the first to conceive and reduce to practice, abandoned his invention. We do not think so. The burden of affirmatively proving abandonment is on him who asserts it. *Hathaway v. Field*, 48 App. D. C. 370, 371, and cases there cited. The only evidence upon which Parker relies in this regard is the failure of Hoenig for about ten months after reducing to practice to file his application. This failure, we think, is sufficiently explained by his financial condition, already referred to.

The decision of the Patent Office is reversed, and priority awarded to Harry Edward Hoenig.

Reversed.

VAN ORSDEL, Associate Justice, took no part in the consideration or decision of this case.

HOENIG v. KENDIG.

(Court of Appeals of District of Columbia. Submitted May 10, 1920. Decided June 2, 1920.)

No. 1308.

Appeal from a Decision of the Patent Office.

Interference proceeding between Harry Edward Hoenig and Julian H. Kendig. From a decision awarding priority to the latter, the former appeals. Reversed.

E. Hume Talbert, of Washington, D. C., for appellant.

J. C. Bradley, of Pittsburgh, Pa., for appellee.

SMYTH, Chief Justice. Hoenig appeals from a decision of the Patent Office awarding priority to Kendig. The invention relates to two-part insulators and means for holding the parts in assembled relationship. It is expressed in one count:

"In combination in an insulator, base and cap portions having perforations extending therethrough, and a metal fastening member comprising a shank extending through the perforations and provided at the end carrying the cap with an integral head which will not pass through the perforation in the cap and provided at the other end with a point, the said shank being provided with a struck-up portion positioned so as to engage the base and prevent the withdrawal of the fastening member therefrom."

The means consist of a nail passing through perforations in the cap and base portions, and a struck-up portion on the shank of the nail for engaging the base to prevent the withdrawal of the nail therefrom. This interference is a companion of the interference between Hoenig and Parker, 50 App. D. C. —, 267 Fed. 323, this day decided, and was submitted on the same testimony. The Examiner of Interferences decided in favor of Kendig. The Board of Examiners reversed him and awarded priority to Hoenig. The First Assistant Commissioner overruled the board and affirmed the action of the Examiner of Interferences.

Hoenig claims conception about the middle of November, 1914, and reduction to practice not later than January 1, 1915. Hoenig's earliest date is February 20, 1915. In the companion case we held that Hoenig was entitled

to conception and disclosure before the middle of December, 1914, and reduction to practice as early as January 1, 1915, and that he was diligent in the meantime. Our view of the testimony and the law in that case is controlling here. Consequently, the decision of the Patent Office is reversed, and priority awarded to Harry Edward Hoenig.

Reversed.

VAN ORSDEL, Associate Justice, took no part in the consideration or decision of this case.

In re ZENK.

(Court of Appeals of District of Columbia. Submitted May 11, 1920. Decided June 2, 1920.)

No. 1309.

1. Patents ~~672~~—Mold for commutators anticipated.

A mold for commutators *held* to disclose nothing not covered by the prior art.

2. Patents ~~6120~~—Patent for article not bar to patent for process.

A patent for an article was not a bar to a patent for the process used in making it, where the application for a patent for the process was a division of and was copending with the application which resulted in the patent for the article, even though the method or process was disclosed; it not being claimed.

3. Patents ~~672~~—Process for molding commutators not anticipated.

A process for molding commutators *held* not anticipated by anything in the prior art.

4. Patents ~~636~~—Doubt resolved in favor of inventor.

Where the question of patentability is doubtful, the doubt will be resolved in favor of the inventor on application for patent.

Appeal from Commissioner of Patents.

In the matter of the application of Charles C. Zenk for a patent for a mold and method or process of making commutators. From a decision rejecting the application, he appeals. Affirmed as to one count, and reversed as to others.

E. B. H. Tower, Jr., of Milwaukee, Wis., and R. O. Hinkle, of Chicago, Ill., for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

VAN ORSDEL, Associate Justice. This appeal is from the decision of the Commissioner of Patents rejecting the application of appellant Zenk for a patent for a mold and method or process of making commutators for electric generators and motors. Of the seven claims, the following three are illustrative:

"1. The method of making a commutator which consists in arranging commutator segment bars circumferentially in spaced relation, surrounding certain sides of said bars with insulating material having the property of hardening under the action of heat and pressure, and applying heat and pressure to harden said material and unite it into a solid body for insulating the bars and holding them together."

"6. The method of making a commutator which consists in arranging commutator segment bars circumferentially in spaced relation with a strip of

~~672~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

insulating material between each of the bars, surrounding the inner edges and ends of the bars with an insulating material having the property of hardening under the action of heat and pressure, and applying heat and pressure to harden said material into a body which insulates said bars and firmly holds them in position.

"7. A commutator mold, comprising an annular outer shell having spaced notches in its inner periphery for receiving strips of insulation, an inner shell having notches therein for receiving the inner edges of commutator segment bars, the outer edges of said bars being received between the strips of insulating material positioned on the inner periphery of the outer shell, and means for supporting said shells and holding them in position so that the spaces between the commutator bars may be filled with insulating material and heat and pressure applied thereto."

In the prior art, commutators were constructed of circumferentially arranged bars or segments, supported by strips of insulation and held together by clamping rings or bolts or screws. Appellant was the first to successfully produce a purely molded commutator, wherein the molded insulating material served both to insulate and hold the bars in place, dispensing entirely with mechanical support.

A patent was granted for the article produced, and the present application is confined to the process and mold. The scope of the claims of the patent, as affecting the present application, is stated by the Assistant Commissioner in his opinion, as follows:

"Applicant has been allowed a patent, No. 1,255,681, on the article. Claim 1 of the patent, which was granted on the application of which the present application is a division, reads as follows:

"1. A commutator comprising metal commutator bars and a body of heat-hardened resinous condensation product holding said bars in place."

"Claim 4 includes the limitation that the body of resinous condensation product is molded about the bars.

"These claims were allowed in view of evidence presented that no one prior to this applicant had been able to make a successful molded commutator, and that there was therefore invention in using a resinous condensation product, specifically, 'Bakelite,' as the insulating material."

[1] We think the allowance of these claims in the Patent Office does not foreclose appellant from making the present method or process claims, unless barred by the prior art. We are of opinion that appellant's mold contains nothing patentable over the prior art. As held by the Assistant Commissioner:

"Claim 7 is for the commutator mold, and the only feature of this claim not found in the mold of Lundell (September 8, 1891) is the slots in the inner and outer shell by which the commutator segments are held in position. As pointed out by the Examiners in Chief the slots shown in the patent to Lorrimer (March 5, 1912) perform the same function as is performed by applicant's slots."

[2] Therefore claim 7 should be disallowed; but as to the process claims we feel constrained to differ from the holding of the Patent Office. The present application was a division of, and was copending with, the application which resulted in the patent for the article. The patent, is therefore not a bar, even if the method or process was disclosed, inasmuch as it was not claimed. *Suffolk Co. v. Hayden*, 3 Wall. 315, 18 L. Ed. 76; *Ide v. Trorlicht Carpet Co.*, 115 Fed. 137, 145, 53 C. C. A. 341.

The mere fact that the process and product claims might have been consolidated in a single patent furnishes no ground for the rejection of the process claims. Separate patents may be issued for the product and the process.

"A single exercise of the inventive faculties may produce both a process and its product, a machine and the manufacture it creates, a composition of matter and the art by which it is applied to its intended use. In all such cases, if the inventions are truly separable, the inventor is entitled to a monopoly for each, although neither could have been discovered and been made available without the other. A patent for but one, though it may necessarily describe the other, is thus no hindrance to an application for a patent for the unsecured invention; but the new application must be judged according to its own intrinsic merits, as if no previous patent had been granted." Robinson on Patents, § 466.

[3] Leaving out of consideration the product patent, and considering the process claims independently, we are of opinion that this feature of the invention is not anticipated in the prior art. Appellant's process produced the first successful molded commutator. The success over the prior art consisted in producing a commutator which would withstand the rigorous use required of it without the support of rings, bolts or screws. This was accomplished by the novel method of manufacture devised by appellant. After the assembled bars and rings in which the bars are circumferentially spaced are placed in the mold, "powdered 'Bakelite'" is forced "into the crevices and recesses of the mold." When this is completed, the mold is subjected simultaneously to pressure and a high degree of heat, resulting in the softening of the moldable material, the accurate positioning of the bars and the forcing of the moldable material into a compact solid "body which insulates said bars and firmly holds them in position." The basis of the Commissioner's disallowance of the process claims is stated in his opinion as follows:

"Claims 1 to 6 cover a process of making a commutator. Claim 7 is for the mold used in making this commutator. Claims 1 to 5 differentiate from the patent to Lundell only by the statement that the insulating material which is placed between the segment bars has the property of hardening under heat and pressure and that the heat and pressure are applied to harden this material."

It is this step in the process which, we think, constitutes invention.

Coming to the references, the Lieb patent of September 2, 1890, discloses a process in which the insulating material is first prepared "as a fluid, a plastic or a semi-plastic mass," and when the bars are spaced "the insulating material is allowed to flow in, or is pressed in, to the interior of the ring of bars." It will be observed that the conception of softening the moldable material, positioning the bars radially and longitudinally, and forming a complete insulating body simultaneously under heat and pressure, was totally foreign to Lieb.

The disclosure of Lundell is still more remote. When he has the sections or segments arranged in the form of a ring, the ring is forced into a receptacle, when, as he states, "having thus arranged the several parts, I pour into the annular space a suitable insulating material, which, on cooling or drying, becomes hard." He had no conception of accomplishing the result by simultaneous heat and pressure.

[4] While the question of patentability is not entirely free from doubt, we are disposed, in accordance with our rule in such cases, to resolve the doubt in favor of the inventor.

The decision of the Commissioner of Patents is affirmed as to count 7, and reversed as to counts 1 to 6, inclusive, and the clerk is directed to certify these proceedings as by law required.

Affirmed as to count 7, and reversed as to counts 1 to 6, inclusive.

GRANT v. GIUFFRIDA et al.

(Court of Appeals of District of Columbia. Submitted May 4, 1920. Decided June 2, 1920.)

No. 3392.

1. Equity ⚡46—Where there is adequate remedy of law, equity will not afford relief.

Wherever a court of law may take cognizance of a right, and has power to proceed to a judgment affording a plain adequate remedy, the constitutional right of a trial by jury may not be abridged by resort to a court of equity, and a bill seeking only a decree for the payment of money will not lie.

2. Injunction ⚡43—Will not lie to enjoin payment of moneys to defendant pending an accounting.

Where a bookkeeper misappropriated funds, employer was not entitled to enjoin third persons from paying defendant bookkeeper money, or turning over property alleged to belong to him, pending an accounting; there being a complete and adequate remedy at law, and the fact that the bookkeeper sustained a fiduciary relationship to plaintiff not being alone sufficient to confer equity jurisdiction.

Appeal from the Supreme Court of District of Columbia.

Bill by Joseph Giuffrida and John Giuffrida, copartners trading as J. Giuffrida & Bro., against Charles M. Grant and others. From an order enjoining certain defendants from paying over to defendant Grant moneys, credits, or securities pending the final determination of the suit against him, defendant Grant appeals. Reversed and remanded.

Dan Thew Wright and Philip Ershler, both of Washington, D. C., for appellant.

H. S. Barger and P. H. Marshall, both of Washington, D. C., for appellees.

ROBB, Associate Justice. Special appeal from an order in the Supreme Court of the District, enjoining certain defendants from paying over or delivering to appellant Grant, a defendant below, moneys, credits, or securities, pending the final determination of the suit against Grant for an accounting.

The facts, as stated in the bill, are substantially as follows:

On November 1, 1919, Giuffrida & Bro., plaintiffs below and appellees here, wholesale and retail dealers in leather and shoe findings in this city, employed Grant as bookkeeper and cashier. The latter

part of February, 1920, having reason to suspect the integrity of Grant, the plaintiffs "employed an expert accountant to examine and audit their books and accounts, for the purpose of ascertaining the extent of any misappropriation by defendant Grant of the funds of the plaintiffs, and said audit is still in progress, and, owing to the magnitude of the work necessary to be done to complete the same it cannot be completed for at least ten days or two weeks."

At the time of the filing of the bill on March 5, 1920, the examination and audit had disclosed that Grant "wrongfully obtained and misappropriated to his own use approximately \$3,038.70." The investigation also "disclosed facts which indicate that the extent of the misappropriation by the defendant Grant of moneys belonging to the plaintiffs' firm may exceed \$14,000." Plaintiffs were informed and believed that Grant "is a depositor with the defendant Commercial National Bank, which is indebted to him on book account as such depositor, and that said Grant has securities and valuables in a safety deposit box of said defendant bank, and also that the defendant Grant has a balance due him from, and valuable securities in the possession of, the defendants Wm. B. Hibbs and W. W. Spaid, copartners, and defendants J. Upshur Moorhead, A. Robert Elmore, and Harry R. Duryee, copartners, as aforesaid." Plaintiffs were unable to avail themselves of the remedy of attachment at law as against the defendant Grant "for the reason that plaintiffs do not know the amount due from him to them." Believing that Grant would "obtain possession of all his assets and property, and put the same beyond the reach of the plaintiffs, and make it impossible for them to recover the full amount due them from him by reason of his misappropriation of moneys of the plaintiffs," it was averred that plaintiffs were without remedy at law.

In the prayers of the bill there was sought a disclosure from all the various financial institutions named as defendants, an order restraining them from turning over to Grant any moneys or securities in their possession, "an accounting * * * to determine the indebtedness of the defendant Charles M. Grant to the plaintiffs," the appointment of a receiver or receivers to take charge of any and all moneys, credits, and property "of the defendant Charles M. Grant," and hold the same pending final disposition of the case, a decree "subjecting the moneys, credits, and property of the defendant Charles M. Grant in the custody or possession of any or all of the other defendants herein to the satisfaction or on account of such indebtedness of the said defendant Grant to the plaintiffs," and general relief.

[1] Wherever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment affording a plain, adequate, and complete remedy, the constitutional right of a trial by jury may not be abridged by resort to a court of equity. Thus in *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451, it was ruled that a court of equity of the United States will not sustain a bill, in a case involving fraud, to obtain only a decree for the payment of money by way of damages, when a like amount might be recovered in an action at law. And in *Curriden v. Middleton*, 232 U. S. 633, 34 Sup. Ct. 458, 58

L. Ed. 765, which was a bill in equity for damages caused by fraud and deception, and containing a prayer for discovery, the court said:

"As there is a prayer for final relief, the prayer for discovery must stand or fall with that, at least in a case like the present; there is no need to consider whether or how far bills for discovery alone have been displaced by the powers now given in actions at law. The relief sought is simply a decree for damages—for a large part of the moneys paid and obligations incurred were paid and incurred to others than Middleton, so that, although the word 'restitution' is used, there is no attempt to rescind, to follow a specific fund or to establish a trust. Being a suit for damages, the proper remedy is an action at law, as was held below."

The court further observed that "mere complication of facts alone and difficulty of proof are not a basis of equity jurisdiction."

[2] In the present case it will be noted that the moneys, credits, and securities alleged to be in the possession of the various financial institutions named as defendants are specifically averred to be the property of the defendant Grant. There is no intimation in the bill that these moneys, credits, and securities were wholly or partially derived from the plaintiffs, or were in fact the property of the plaintiffs. This is not an attempt, therefore, "to follow a specific fund, or to establish a trust." Nor may the bill be sustained on the prayer for an accounting. Grant was employed by plaintiffs for a period not exceeding 4 months. The books and accounts are in plaintiffs' possession, and, according to the bill, the plaintiffs were proceeding to have an expert accountant determine the amount due from Grant to them. No interrogatories were propounded to Grant, and we are at a loss to perceive wherein a suit at law would not afford as complete an opportunity to plaintiffs to establish the extent of Grant's indebtedness as would a suit in equity. While courts of equity have exercised a general jurisdiction in cases of mutual and complicated accounts, the case here is not of such a nature. This simply is an attempt, in a court of equity, to obtain a decree for the payment of money, when a similar recovery could be had in an action sounding in tort. The fact that Grant sustained a fiduciary relationship to the plaintiffs is not alone sufficient to confer jurisdiction upon a court of equity; the real test being whether a plain, adequate, and complete remedy may be had at law.

We do not deem it necessary to examine, in detail, the cases cited in support of the decree below. It is sufficient to say that they differ materially in their facts from this case. In *Warren v. Holbrook*, 95 Mich. 185, 54 N. W. 712, 35 Am. St. Rep. 554, much relied upon, the defendant not only was charged with a breach of trust, but plaintiff sought to pursue the fund wrongfully appropriated by the defendant. Had the plaintiff in the present case attempted to pursue funds wrongfully appropriated by Grant and in the hands of the defendants named in the bill, a different case would have been presented.

In the interests of justice, however, we are of the view that the plaintiffs should be permitted, if so advised, to amend their bill upon reasonable terms, or in the alternative to transfer the case to the law side of the court.

The decree must be reversed, with costs, and the case remanded for further proceedings not inconsistent with this opinion.
Reversed and remanded.

LEVY v. SPLAIN, United States Marshal.

(Court of Appeals of District of Columbia. Submitted April 5, 1920.
Decided June 2, 1920.)

No. 3332.

- 1. Habeas corpus ⇨92(2)—Extradition papers being regular, investigation limited to whether accused was at place of crime.**

On petition for habeas corpus, where there was no claim that extradition papers were not regular on their face, there was but one question open for investigation, namely, whether or not accused was in the state where the crime was alleged to have been committed at the time the alleged crime was committed.

- 2. Habeas corpus ⇨85(2)—Extradition papers prima facie proof of presence at place of crime.**

Extradition papers prove prima facie that accused was in the state where the crime was committed at the time that it was charged to have been committed, and the burden is on him to establish the contrary.

- 3. Habeas corpus ⇨85(2)—On attempt to extradite, accused entitled to release on showing absence from state on date crime charged.**

In a habeas corpus proceeding by one being extradited, it was sufficient for accused to show that he was not in the state where the crime was alleged to have been committed at the time named in the indictment, and when that fact was proved, so that there was no dispute in regard to it, and there was no claim of any error in the dates named in the indictment, the fact so proved was sufficient to show that accused was not in the state when the crime was, if ever, committed, notwithstanding the date charged in an indictment was not binding on the prosecution in such foreign state.

- 4. Habeas corpus ⇨111(1)—One out of state on date of alleged conspiracy entitled to release.**

Where indictment charged conspiracy on a certain date, without a continuando, accused in an extradition proceeding was entitled to be discharged on habeas corpus, where he proved that he was not in the state where the offense was charged to have been committed on the date alleged.

Appeal from the Supreme Court of the District of Columbia.

Habeas corpus proceeding by Barnett Levy against Maurice Splain, United States Marshal in and for the District of Columbia. From a judgment remanding him to the custody of the marshal, petitioner appeals. Reversed.

J. B. Stein, of Washington, D. C., for appellant.

J. E. Laskey, U. S. Atty., and Morgan H. Beach, Asst. U. S. Atty., both of Washington, D. C., for appellee.

SMYTH, Chief Justice. Barnett Levy, the appellant, was indicted by the grand jury of the commonwealth of Massachusetts for having conspired on the 1st day of January, 1918, with several persons named, to steal the property of divers persons unknown to the grand jurors.

Pursuant to the requisition of the Governor of Massachusetts, Levy was arrested in this District by United States Marshal Splain, as a fugitive from the justice of that state, upon a warrant issued by Mr. Justice Bailey, Acting Chief Justice of the Supreme Court of the District of Columbia. While in the custody of the marshal, for the purpose of being turned over to the agent of the commonwealth of Massachusetts, a writ of habeas corpus was sued out of the Supreme Court of the District to test the validity of his detention. After a hearing, it was adjudged that he was legally held, and he was remanded to the custody of the marshal.

[1, 2] In the petition for the writ several grounds were alleged for the discharge of the prisoner; but, as there is no claim that the extradition papers were not regular on their face, there is but one question open for investigation, namely, whether or not Levy was in Massachusetts at the time the crime charged was committed. The extradition papers prove *prima facie* that he was, and the burden is on him to establish the contrary. These rules of decision in extradition cases are firmly bedded in our law, and need no further discussion. *Ellison v. Splain*, 49 App. D. C. 99, 261 Fed. 247; *Biddinger v. Commissioner of Police*, 245 U. S. 128, 135, 38 Sup. Ct. 41, 62 L. Ed. 193.

[3] The evidence shows without doubt that Levy was not in Massachusetts on the 1st day of January, 1918, and the court below so found. He was there in September, 1917, and again about the middle of January, 1918. On the 8th day of June, 1918, the indictment was returned. The trial court, in disposing of the case, said:

"Under the law here, as in Massachusetts by statute, * * * the fact that this conspiracy was laid on the 1st day of January, 1918, is not binding upon the prosecution there, and it would not be here. You can show that the crime was committed any time within three years from the finding of the indictment. Nothing more is required in extradition than is required on the trial of an indictment."

A similar view was urged by counsel for the state in *Hyatt v. People ex rel. Corkran*, 188 U. S. 691, 711, 23 Sup. Ct. 456, 459 (47 L. Ed. 657); but the court refused to adopt it, saying:

"In the case before us it is conceded that the relator was not in the state at the various times when it is alleged in the indictments the crimes were committed, nor until eight days after the time when the last one is alleged to have been committed. That the prosecution on the trial of such an indictment need not prove with exactness the commission of the crime at the very time alleged in the indictment is immaterial. The indictments in this case named certain dates as the times when the crimes were committed, and where in a proceeding like this there is no proof or offer of proof to show that the crimes were in truth committed on some other day than those named in the indictments, and that the dates therein named were erroneously stated, it is sufficient for the party charged to show that he was not in the state at the times named in the indictments, and when those facts are proved, so that there is no dispute in regard to them, and there is no claim of any error in the dates named in the indictments, the facts so proved are sufficient to show that the person was not in the state when the crimes were, if ever, committed."

In the case at bar, as in that case, there is no proof or offer of proof that the crime was in truth committed on some other day than that named in the indictment, and that the day therein named was errone-

ously stated. Consequently, to paraphrase the language of the Supreme Court of the United States, it was sufficient for Levy to show that he was not in the state at the time named in the indictment, and when that fact was proved, so that there was no dispute in regard to it, and there being no claim of any error in the dates named in the indictment, the fact so proved is sufficient to show that Levy was not in the state when the crime was, if ever, committed.

This court ruled, in *Hayes v. Palmer*, 21 App. D. C. 450, 461, that if the person sought offered proof showing with precision that he had left the demanding state before the date of the alleged crime, it would then devolve upon the person detaining him "to show that he was a fugitive from justice by producing evidence that he was in the state at the time charged in the indictment, or to prove that said date had been erroneously charged and could be carried back to the necessary time." This is in line with the doctrine of the *Hyatt Case*. In view of these holdings, which, so far as we can ascertain, have not been modified in any wise by subsequent decisions, we are constrained to say that Levy cannot be held.

[4] It is true that in *Ex parte Montgomery* (D. C.) 244 Fed. 967, 970, an extradition case, the court decided it was not necessary to prove that the person charged with the crime was in the demanding state on the date on which the crime was laid in the indictment. But that was a conspiracy case with a *continuando*. "While the indictment here mentions specially but a single day," said the court, "it also alleges a conspiracy claimed to have been hatched during two years preceding the indictment. Conspiracy is a *continuando* crime, and the rule is now well settled that the demanding state is not bound, either upon the trial or in the extradition proceedings, by the specific date laid." In *United States v. Kissel*, 218 U. S. 601, 605, 31 Sup. Ct. 124, 54 L. Ed. 1168, it was also said that a conspiracy was a continuing crime. But this language must be read in the light of the facts. In that case the indictment charged the defendants with having committed the crime upon a certain date "and from that day until the day of presenting the indictment."

If the indictment in the case before us had charged Levy with having conspired on the 1st of January, and from that date until the date of presenting the indictment, June 8, 1918, or until the last of January, 1918, the testimony that he was in Massachusetts about the middle of January of that year would have been sufficient to warrant his surrender to Massachusetts; but the indictment does not read that way. There is nothing, therefore, in either of those cases, which authorizes us to disregard the rule announced in unmistakable terms in the *Hyatt* and *Hayes Cases*.

For this reason, the judgment of the lower court must be reversed, with directions to discharge the appellant.

Reversed.

HAMMER et ux. v. GORDON.

(Court of Appeals of District of Columbia. Submitted May 5, 1920. Decided June 2, 1920.)

No. 3337.

1. Attorney and client ⚡123(2)—Evidence sufficient to sustain finding of relation.

In a suit against an attorney to set aside a conveyance of real estate, evidence *held* sufficient to sustain a finding that plaintiff looked to defendant for advice with respect to such property and the care of it, and that she relied on his judgment, and that the relation of attorney and client existed.

2. Attorney and client ⚡123(2)—Attorney, purchasing property from client, must deal fairly.

While the law does not prohibit an attorney from purchasing land from a client, it imposes upon him the duty of dealing fairly with the client in every respect, and the burden is on one who has purchased property from a client to prove that he discharged this duty.

3. Attorney and client ⚡123(2)—Client held entitled to reconveyance of land sold to attorney.

A sale of land by a woman to one representing her as an attorney held unfair, so that it should be set aside, where her interest in the property was worth several thousand dollars, and she received only \$900 in value.

4. Cancellation of instruments ⚡47—Finding of rental value of property held sustained by evidence.

In action against attorney to set aside a conveyance of a house and lot worth \$7,000, finding by the court that the use of the premises by the defendant was of the value of \$24 a month *held* sustained by the evidence.

Appeal from the Supreme Court of the District of Columbia.

Suit by Isabel J. Gordon against William A. Hammer and wife. Decree for plaintiff, and defendants appeal. Modified and affirmed.

T. L. Heffords and E. C. Dutton, both of Washington, D. C., for appellants.

A. Coulter Wells, W. Parker Jones, and W. H. Holloway, all of Washington, D. C., for appellee.

SMYTH, Chief Justice. Pursuant to a contract Isabel J. Gordon conveyed to William A. Hammer a piece of real estate situated in Washington. Some two months thereafter she instituted this suit against him and his wife, Eleanor Tingley Hammer, in which she prayed that the deed be canceled and the defendants required to reconvey the property to her. From a decree granting the relief sought, the Hammers appeal.

The property in question was valued at about \$7,000. At the time of the transfer in June, 1917, it was incumbered with a first trust for \$4,500, and a second in the sum of \$274.30; also with past-due interest on the trusts and with taxes. It badly needed repairs, and as a result produced net about \$10 per month.

Some 9 months before the transfer Mrs. Gordon's husband deserted her and their two minor children, a boy aged 16 and a girl aged 13, leaving them without any means of support, save the \$10 a month

rent and what the children could earn. She had no money to pay the interest on the trusts or the taxes. At one time she borrowed \$43 from Hammer to pay taxes, giving her piano to him in security. Because of her situation she says she was "under continuous nervous and mental strain and almost distracted."

[1, 2] Hammer was a member of the bar, and occupied desk room in the office of her husband, who was also an attorney at law at the time he deserted her. Hammer knew Gordon's address, which was unknown to Mrs. Gordon; but he failed to disclose it to her. Whenever she or the children desired to communicate with Gordon, they handed their letters to Hammer, who forwarded them. He, according to Mrs. Gordon, directed what she should say in her letters, and censored the children's letter, so as "to see that they did not write anything that would make the father angry." The father answered the children's letters, but always through Hammer. One witness testified that he undertook to secure a second trust loan for Mrs. Gordon for the purpose of taking care of the charges against the property in question, and that he reported to Hammer "as Mrs. Gordon's attorney." She testified that "she consulted Hammer as her attorney, and advised with him and relied on his being faithful to her and her interests at all times in regard to the matters of this suit." He denies that he represented her in any respect. There are circumstances in the evidence tending to support the position of each. The question is a close one, but we think that there is sufficient to sustain a finding that she looked to Hammer for advice with respect to this property and the care of it, and that she relied on his judgment. He is, then, chargeable with all the obligations of such a relation. While the law did not prohibit him from purchasing from her, it imposed upon him the duty of dealing fairly with her in every respect, and the burden is on him to prove that he discharged this duty. *Marmion v. McClellan*, 11 App. D. C. 467; 6 *Corpus Juris*, 682; *Moran v. Sullivan*, 12 App. D. C. 137, and cases there cited.

[3] Hammer knew Mrs. Gordon's unfortunate plight. It is not unreasonable to say that, even if she had business experience, which she did not have, she was not able to exercise prudent judgment under the circumstances. This being so, it was incumbent on Hammer to see to it that every element of the transaction which he had with her was such as an experienced business person would approve. She says that she was to receive \$7,000 for the property. Hammer denies it, and produces her written contract in support of his denial; it shows that he was to assume the payment of the trusts and taxes, and pay her \$1,500 in monthly payments of \$10 each, without interest. He gave her 150 notes in evidence of the debt. Each bore on its face the statement that it was without interest. It would take 12½ years to pay this debt. On a basis of 6 per cent. the then present cash value of the \$1,500 would be about \$900. The debt was unsecured, either by a trust on the property or otherwise. If Hammer saw fit to sell the property at any time after he had procured title, he could have done so without paying what he owed Mrs. Gordon. True, after Mrs. Gordon demanded a reconveyance, he offered to give her a deed

of trust on the property to secure her; but the deed was not signed by his wife. Such a deed did not satisfy his obligation to her. We think the deal was an unwise one from Mrs. Gordon's standpoint, and that it cannot be considered as fair to her. The court, in setting aside the deed and directing a retransfer of the property to Mrs. Gordon, did not err.

[4] The record shows that Hammer paid \$504.44 on account of the second trust, taxes, interest, etc. Against this the court set off the value of the use of the property by him during his occupancy of it for 21 months. It is complained that the use was not worth more than \$217, or \$10.33 a month. There is evidence that the property at one time rented for \$53 a month, but that the cost of repairs brought the net return down to \$10.33 a month. What it cost for repairs during Hammer's occupancy does not appear. The property, as we have seen, was valued at about \$7,000. The court proceeded upon the theory that the use was worth \$24 a month, or \$504 for the period. We are not disposed to disturb this finding.

Of the notes given by Hammer, there are 148 still in the possession of Mrs. Gordon. She also has two of his checks, of \$10 each. The contract for the sale of the land has not been canceled. The court below assessed costs against Mrs. Hammer, who made no claim to any interest in the property. We believe the decree should be modified, so as to require Mrs. Gordon to deliver the aforementioned notes and checks to Hammer, and the contract to the clerk of the lower court to be canceled, and that Mrs. Gordon should not be charged with costs. As thus modified, the decree is affirmed, at the cost of the appellant William A. Hammer.

Modified and affirmed.

BRUCKMAN v. MILLER.

(Court of Appeals of District of Columbia. Submitted May 13, 1920. Decided June 2, 1920.)

No. 1316.

1. Patents ☞97—Proceedings before Commissioner of equitable nature.

Proceedings in the Patent Office are of an equitable nature, and, so long as a case is pending, it is within the supervision of the Commissioner, who is charged with the duty of seeing that full justice is done, proceeding with due regard for the requirements of the statutes and the rules of practice affecting procedure in the Patent Office.

2. Patents ☞104—Commissioner may order case reopened to take testimony.

Commissioner of Patents, in the exercise of his supervisory power, may order a case reopened for the taking of additional testimony.

3. Patents ☞91(4)—Patentable idea held derived from junior party under evidence.

In a proceeding in the Patent Office on application for a patent for a machine for making cones used as receptacles for ice cream, evidence held to show that applicant for patent derived from junior party the information which enabled him to file his application, resulting in the junior party being entitled to priority.

Appeal from Commissioner of Patents.

Proceeding between Frederick A. Bruckman and Frederick A. Miller in the Patent Office. From a decision in favor of the latter, the former appeals. Reversed.

A. E. Dieterich, of Washington, D. C., for appellant.

T. J. Geisler, of Portland, Or., for appellee.

VAN ORSDEL, Associate Justice. The issue of this interference relates to the invention of a machine for making cones used as receptacles for ice cream. It is unnecessary to set out the claims or to consider the invention in detail, since the appeal turns wholly upon the question of originality.

It is urged by appellant, the junior party, that appellee, Miller, derived from him the information which enabled him to file his application for patent. Certain conceded facts are important. Both parties were employed by the Crystal Ice & Storage Company, of Portland, Or. Miller had access to the room where Bruckman was engaged in building a rotary cone-making machine, which he had invented, and of which the present invention is a modification. Miller admits that he frequently visited the room where Bruckman was at work, and admits that Bruckman disclosed to him the broad idea of the present invention, but denies that he derived from him any information as to the details by which the problem could be solved.

The Examiner of Interferences found in favor of Bruckman, but was reversed by the Board of Examiners in Chief and the Assistant Commissioner, upon the ground, as stated by the Commissioner:

"If the claims cover broadly the mere reversal of the moving parts (the molds and the batter carriage) in the machine of this patent, then it is clear that either there was no invention or that Miller got the broad idea from Bruckman. If, on the other hand, the invention is more narrowly the specific means of operating—that is to say, the solution of the problem of reversing the relative motions of the heavy and light parts—then Bruckman entirely fails to show any disclosure to Miller."

We are convinced from a careful review of the testimony that Bruckman not only disclosed to Miller the broad idea of the invention, but the means of operation, to enable Miller, with the additional knowledge he had of the Bruckman rotary machine then in course of construction, and with the assistance of counsel, to prepare his application for patent. In these matters Miller stands alone, while Bruckman is amply corroborated.

This deduction from the testimony is verified, however, by the sworn admissions of Miller. When the case was pending on appeal before the Assistant Commissioner, Miller voluntarily made two affidavits in which he admitted that he derived the whole invention from Bruckman. He states in the first affidavit as follows:

"I make this affidavit for the reason that I have been instrumental in causing Mr. Bruckman a good deal of trouble and expense, and that Mr. Bruckman originated the idea of the machine I have been heretofore claiming as my own."

In the second affidavit, after stating in detail the circumstances under which he derived the information from Bruckman, he says:

"As heretofore stated, I made this affidavit and the affidavit dated December 25, 1918, of my own free will; that I have not received any money or property of any kind or promise of reward for making the same; that I voluntarily approached Mr. Bruckman and told him what I would do; that we have discussed what occurred, when he was working on his machine, and from talking the matter over, my mind has been refreshed, and matters that did not transpire have been called to mind that I had entirely forgotten. I very much regret to make this affidavit. I feel it my duty now to make the affidavit; that I am convinced that I would not have been able to build this machine, if I had not obtained the original idea from Mr. Bruckman."

The Commissioner, in denying Bruckman's motion to reopen the proofs and introduce the testimony of Miller, gave as a reason that in the affidavits "Miller fails to say that Bruckman disclosed to him the real invention in issue," and also that the affidavits did not disclose newly discovered evidence, "for not only was it open to Bruckman to take Miller's testimony at the time of taking his proofs, but Miller was bound to know, when he testified, all that he now alleges he knows and proposes to testify."

[1, 2] These proceedings are of an equitable nature, and, so long as the case is pending in the Patent Office, it is within the supervision of the Commissioner, who is charged with the duty of seeing that full justice is done, proceeding with due regard for the requirements of the statutes and the rules of practice affecting procedure in the Patent Office. There was nothing, however, to prevent the Commissioner, in the exercise of his supervisory power, to order the case reopened for the taking of additional testimony.

[3] While the denial of the motion to reopen the case constitutes reversible error, which would, standing alone, necessitate sending the case back for the taking of further testimony, we deem this course unnecessary, since on the evidence, regardless of the affidavits, Bruckman is entitled to priority.

The decision of the Commissioner of Patents is reversed, and the clerk is directed to certify these proceedings as by law required.

Reversed.

BLAINE v. WHITE.

(Court of Appeals of District of Columbia. Submitted May 12, 1920. Decided June 2, 1920.)

No. 1312.

1. Patents \S 113(7)—Decision of three tribunals of Patent Office not disturbed, unless clearly erroneous.

Where the three tribunals of the Patent Office concur in the disposition of a case, the decision of the Commissioner will not be disturbed on appeal, except where error very clearly appears.

2. Patents \S 101—Necessity for construction of claims does not arise until uncertainty is encountered.

The necessity for judicial construction of claims never arises until uncertainty is encountered.

3. Patents §91(1)—Junior party in interference proceeding has burden of proof.

Burden of proof as to priority is on the junior party in an interference proceeding in the Patent Office.

Appeal from Commissioner of Patents.

Interference proceeding between Joseph R. Blaine and Joseph White. From an award of priority against him, the former appeals. Affirmed.

L. T. Greist and W. N. Cromwell, both of Chicago, Ill., for appellant.

J. Edgar Bull and Geo. F. Scull, both of New York City, for appellee.

SMYTH, Chief Justice. Blaine appeals from an award of priority against him in an interference proceeding. The invention involved relates to a sheet-guide adjustment on a printing press. We do not think it necessary to set out any of the counts of the issue, in view of the manner in which we think the matter should be disposed of. Blaine moved to dissolve the interference on the ground that count 1 was unpatentable, in view of the prior art, and that the party, White, had no right to make count 2 of the issue. This motion was overruled by the law examiner. White's motion to amend by adding seven counts was sustained. Blaine failed to file a preliminary statement as to these counts. He took no testimony touching the original counts, but stood on the record as to them. He was the junior party. Judgment of priority went against him as to all the counts. Afterward he filed several motions in the Office, all of which were denied. On appeal from the decision of the Examiner of Interferences, he was defeated before the Board of Examiners, and their action was affirmed by the First Assistant Commissioner.

[1] The subject involved is intricate, and its just consideration calls for expert knowledge. The line which separates the respective contentions of the parties is quite attenuated and not easily perceived. It is the settled rule of this court that, where the three tribunals of the Patent Office concur in the disposition of such a case, the decision of the Commissioner will not be disturbed by this court, except where error very clearly appears. *Creveling v. Jepson*, 47 App. D. C. 597; *Lindmark v. Hodgkinson*, 31 App. D. C. 612; *Murphy v. Meissner*, 24 App. D. C. 260; *Stone v. Pupin*, 19 App. D. C. 396; *Podlesak v. McInnerney*, 26 App. D. C. 399.

[2, 3] Blaine admits the rule, but denies its applicability. He says that the three tribunals, while reaching the same conclusion, did so by different routes, some of which are inconsistent, or at least are not identical with the others. We think not. The Law Examiner held that the counts were patentable and readable upon the disclosures of both parties. In this he was affirmed by the Examiner of Interferences. On appeal the Board of Examiners rejected Blaine's contention that the counts were inconsistent, and refused to consider the prior art, because the meaning of the counts was not obscure, and

therefore needed no construction. "The necessity for judicial construction never arises until uncertainty is encountered." *Mayo v. Whedon*, 47 App. D. C. 138, 140. The board sustained the lower tribunals in their holding that the counts were patentable, and readable on the claims of both parties. In this they were affirmed by the Assistant Commissioner, who held that Blaine had in no way established that the claims were not readable on the application of White. Having failed to do this, White was necessarily entitled to priority, being the senior party, and Blaine taking no testimony to overcome his date. We think the rule pertinent, and that there is a total absence of such error as would warrant us in overruling the commissioner.

There is nothing in *Podlesak v. McInnerney*, 26 App. D. C. 399, requiring a different conclusion. It was there ruled that, if a certain course was followed in construing the claims, it might be found that there was no interference in fact, and the court sent the matter back to the Patent Office "for further consideration as to the identity of invention." Between this and what was held in the instant case we perceive no conflict.

For the reasons stated, the decision of the Patent Office is affirmed, and priority is awarded to Joseph White, the senior party.

Affirmed.

LAMBERT v. HOPE et al.

(Court of Appeals of District of Columbia. Submitted May 13, 1920. Decided June 2, 1920.)

No. 1315.

1. Patents ⚡118—Nothing gained by patent issued to individual while joint application was copending.

Where a joint application for a patent was filed November 29, 1915, and thereafter one of the applicants filed an individual application on May 8, 1916, which inadvertently went to patent June 5, 1917, while the joint application was copending, the individual applicant gained nothing by the issue of the patent to him.

2. Patents ⚡91(4)—Award of priority as to an invention relating to drying kiln proper under evidence.

In a proceeding in the Patent Office involving invention relating to an apparatus for drying wood veneer, evidence held insufficient to warrant a decision in favor of the junior party, and an award of priority to the original applicants was proper.

Appeal from Commissioner of Patents.

Proceeding between Eric Lambert and John F. Hope and another in the Patent Office, to obtain a patent for a drying kiln for drying wood veneer. From an award of priority to the latter, the former appeals. Affirmed.

Chas. C. Stauffer, of Washington, D. C., for appellant.

Hervey S. Knight, of Washington, D. C., and Arthur C. Brown, of Kansas City, Mo., for appellees.

VAN ORSDEL, Associate Justice. This appeal is from an award of priority to appellees Hope and Lambert for an invention relating to an apparatus for drying wood veneer, consisting of a rectangular housing, in which the material to be dried is placed, and heated air, acting directly upon the material, is drawn through the housing by means of a radiator in one end of the housing and a fan in the other. The single count of the issue reads as follows:

"A dry kiln comprising a rectangular shaped housing, a radiator located in one end of said housing forming an end way thereof and provided with openings through which air may be drawn, the opposite end of said housing closed by an end wall, and an exhaust fan connecting with the interior of said housing through said wall."

[1] It appears that Hope and Lambert filed a joint application November 29, 1915, and thereafter Lambert filed an individual application on May 8, 1916, which inadvertently went to patent June 5, 1917, while the joint application was copending. Lambert gains nothing by the issue of the patent to him, and, being the junior party, and in the position of assailing a prior application in which he joined as joint inventor, the burden is heavily upon him.

In view of the prior art, the Commissioner expresses doubt as to the disclosure of a patentable invention, but by reason of the issuance of the patent to Lambert sustains the interference on the authority of *In re Orcutt*, 32 App. D. C. 345. On this point the Commissioner said:

"The small advance over the prior art in accordance with this decision shall be assumed for the purposes of this controversy to be patentable; but the very small advance should be kept in mind in reading the testimony. For example, Lambert criticizes Hope because he (Hope) does not state specifically the feature or features he contributed or suggested to the joint invention of Hope and Lambert. In view of these references (patent to Zappert of May 19, 1896, and patent to Soverhill of October 10, 1893), it is questioned if Lambert can specifically state what novel features he has added to the prior art, and, as he is entitled to claim only what is novel as his invention, his testimony as to what he invented must be weighed in the light of the prior art."

[2] The testimony has taken a wide range, but, considering only that material to the very narrow advancement over the prior art, we find no basis upon which the contention of Lambert can be sustained. He totally fails in his attempt to carry reduction to practice back to an earlier structure of 1894. In his effort to eliminate Hope from inventive co-operation in the present 1915 structure, he stands alone; while Hope is corroborated directly by his father, and indirectly by Brown, the attorney, who prepared the joint application.

Without stopping to review the somewhat voluminous testimony, we fully agree with the conclusion of the Commissioner that—

"Lambert joined Hope in executing the joint oath that they were joint inventors. As against Lambert's statement that this oath was fraudulently obtained, the two Hopes and Brown, the latter Lambert's own witness, deny this. The joint oath was not repudiated until Hope and Lambert quarreled, when Lambert filed his sole application. There is not a word of testimony to show that Lambert, instead of Hope and Lambert, invented anything novel over the prior art."

The decision of the Commissioner of Patents is affirmed, and the clerk is directed to certify these proceedings as by law required.
Affirmed.

PROCTOR & GAMBLE CO. v. ENEY SHORTENING CO.

(Court of Appeals of District of Columbia. Submitted May 14, 1920. Decided June 2, 1920.)

No. 1319.

1. **Trade-marks and trade-names** Ⓒ21—Use of sign "Esco" likely to produce confusion with goods sold under the sign "Crisco."

The use of the sign "Esco," as a trade-mark for a lard substitute, would be likely to produce confusion with lard substitute sold under the sign "Crisco," and registration was properly refused.

2. **Trade-marks and trade-names** Ⓒ43—Origin of mark immaterial.

The trade-mark statute takes no account of the origin of a mark; the only question being, Would its use be likely to result in confusion? in which case it is unregistrable.

Appeal from Decision of Patent Office.

Opposition of the Proctor & Gamble Company to the application of the Eney Shortening Company for the registration of a trade-mark. From a decision in favor of the latter, the former appeals. Reversed.

Paul Finckel, of Washington, D. C., and A. M. Allen, of Cincinnati, Ohio, for appellant.

E. T. Fenwick and Chas. R. Allen, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. From a decision of the Patent Office, overruling the opposition of the Proctor & Gamble Company to the application of Eney Shortening Company for the registration of the sign "Esco" as a trade-mark for a lard substitute, the former appeals.

The opposer shows that it is the owner of the sign "Crisco" as a trade-mark for a lard substitute, and alleges that, as its goods are of the same descriptive qualities as the goods of the applicant, the marks being similar, confusion would be likely to result in the minds of the public with respect to the origin of the goods upon which the marks appeared, and that, in consequence, the opposer would be damaged thereby. 33 Stat. 725, c. 592, §§ 5 and 6 (Comp. St. §§ 9490, 9491). The Examiner of Interferences sustained the opposer, but he was reversed by the First Assistant Commissioner, who held that no likelihood of confusion had been shown.

[1] It is conceded that the goods are substantially identical. The only question, then, is as to whether or not the two marks are so similar as to be likely to produce confusion in the minds of purchasers with respect to the origin of the goods upon which they are used. As no testimony was taken, we must determine it by an inspection of the marks themselves. What constitutes objectionable similarity in marks has been so often considered by this court (Wayne County Preserving

Co. v. Burt Olney Canning Co., 32 App. D. C. 279; Phoenix Paint & Varnish Co. v. John T. Lewis & Bros. Co., 32 App. D. C. 285; Kaut-Reith Shoe Co. v. International Shoe Co., 45 App. D. C. 545; Thomas Manufacturing Co. v. Aeolian Co., 47 App. D. C. 376; William Waltke & Co. v. George H. Schafer & Co. [D. C.] 263 Fed. 650) that we do not deem it necessary to enter upon a discussion of it here. For the reasons given in those decisions we hold that the use of the marks before us upon the goods to which they are applied in this case would be likely to produce confusion. Even if we doubted it, we would still rule in favor of the opposition on the authority of William Waltke & Co. v. George H. Schafer & Co., supra, and Lambert Pharmacal Co. v. Mentho-Listine Chem. Co., 47 App. D. C. 197.

[2] The applicant says that its mark is made up "of the initials of the corporation with the termination 'Co.'; Eney Shortening Co., 'Esco'"—and seems to think that there is something in that which should entitle it to have the mark registered, but we perceive no force in the suggestion. The trade-mark statute takes no account of the origin of a mark. The question is: Would its use be likely to result in confusion? If so, it is unregistrable. As was said by the Examiner of Interferences, the "consuming public know little and care less about the origin of any mark, and very seldom, if ever, take it into consideration." The statute does not contemplate that the public should do so. It follows that the decision of the Patent Office must be reversed, and the opposition sustained.

Reversed.

ERBEN v. YARDLEY.

(Court of Appeals of District of Columbia. Submitted May 12, 1920. Decided June 2, 1920.)

No. 1313.

1. Patents §90(5)—First to conceive and reduce to practice entitled to priority.

The mere fact that one was the first to conceive and first to reduce to practice is sufficient ground on which to base award of priority.

2. Patents §106(2)—That third person is prior inventor immaterial in interference proceeding.

In an interference proceeding in the Patent Office, the losing party has no standing to contend that a third person really is the prior inventor.

Appeal from the Commissioner of Patents.

Interference proceeding between Hermann F. T. Erben and John L. Mok Yardley. From a decision awarding priority to the latter, the former appeals. Affirmed.

A. G. Davis, of Schenectady, N. Y., and Melville Church, of Washington, D. C., for appellant.

W. G. Carr, of East Pittsburgh, Pa., for appellee.

ROBB, Associate Justice. Appeal from a Patent Office decision in an interference proceeding awarding priority to the senior party, Yard-

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ley. The invention relates to synchronous booster rotary converters, and is expressed in two counts, which need not be reproduced here.

[1] The Board of Examiners in Chief and the Assistant Commissioner, after a careful analysis of the testimony, reached the conclusion that Yardley was the first to conceive and first to reduce to practice, and we are in accord with those findings. Counsel for appellant contend here, as below, that the mere fact that Yardley was the first to conceive and first to reduce to practice is not sufficient ground upon which to base an award of priority to him. The Assistant Commissioner directed attention in his opinion to the fact that such has been the rule in the Patent Office since 1872, and that the rule has received the approval of this court in *Hubbard v. Berg*, 40 App. D. C. 577, and *Thompson v. Storrie*, 46 App. D. C. 324. We can find no sufficient reason for the overturn of this long-established rule and the decisions of this court approving it.

In the Patent Office each party, as frequently happens, urged the nonpatentability of the issue to the other party; Erben contending that the French patent to Siemens-Schuckert, dated January 20, 1913, anticipates Yardley, and hence that the interference should be dissolved. The Law Examiner ruled against Erben's contention and declined to dissolve the interference. Yardley had satisfied the Primary Examiner on this point by filing affidavits under rule 75 of the Patent Office, for the purpose of overcoming this reference. Erben contended below, as here, that he should have been permitted to inspect those affidavits.

In *Gueniffet v. Wictorsohn*, 30 App. D. C. 432, we ruled that it was unnecessary to determine what right either party to an interference ultimately might have to a patent; the only question involved being that of priority between the parties to the interference. In *Lecroix v. Tyberg*, 33 App. D. C. 586, and in *Gammeter v. Thropp*, 42 App. D. C. 564, we held, following our decision in *Burson v. Vogel*, 29 App. D. C. 388, that the possible existence of a statutory bar of public use to the issuance of a patent to one of the parties to an interference is not an issue in that interference. We have repeatedly held that the question of patentability is not before us in an interference proceeding. *Sobey v. Holsclaw*, 28 App. D. C. 65; *Mell v. Midgley*, 31 App. D. C. 534; *Norling v. Hayes*, 37 App. D. C. 169.

[2] The issue here is between the parties to the interference, and the losing party has no standing to contend that a third party really is the prior inventor. That such was the contention in the Patent Office is apparent from the Assistant Commissioner's decision, wherein it is stated:

"Erben contends that the issue is not patentable to Yardley, since the showing made by him to establish that he made the invention prior to the date of a certain French patent was not sufficient; and Yardley contends that what Erben did was, in view of the state of the art, not patentable over the disclosure made in what is known as the 'Power' article. * * * Neither of these questions is properly to be considered on an appeal on priority."

The Assistant Commissioner clearly was right, for Yardley, even assuming that he was anticipated by the French patent, still would be

prior to Erben. Since the issue raised by the affidavits filed by Yardley was one in which Erben had no interest in the interference proceeding, the Patent Office did not err in denying Erben's motion to inspect them.

The decision is affirmed.

Affirmed.

GAMMETER v. BACKDAHL.

(Court of Appeals of District of Columbia. Submitted May 14, 1920. Decided June 2, 1920.)

No. 1318.

Patents §90(5)—First inventor not affected by attempts to perfect before applying for patent.

Where it clearly appears that the first party to conceive an invention was in good faith engaged in perfecting it at the time his adversary entered the field, he should not be deprived of the fruits of his discovery because his efforts were not as successful as he hoped they would be, unless further tests were so unnecessary as to constitute evidence of negligence or bad faith; and that the further experiments led to nothing so far as benefiting the public was concerned, is immaterial.

Appeal from Assistant Commissioner of Patents.

Interference proceeding between John R. Gammeter and Carl Gustaf Alfred Backdahl. From a decision awarding priority to the latter, the former appeals. Reversed.

H. A. Dodge, of Washington, D. C., and Robert M. Pierson, of Akron, Ohio, for appellant.

W. Lee Helms and Chas. S. Jones, both of New York City, for appellee.

ROBB, Associate Justice. Appeal from a decision of an Assistant Commissioner of Patents in an interference proceeding awarding priority to the senior party, Backdahl. The invention relates to mandrels or cores for the formation and curing of pneumatic tires. Counts 1, 3, and 6 are sufficiently illustrative of the six counts of the issue, and are here reproduced:

"1. A fluid-tight, hollow, stretchable, metallic mandrel."

"3. A tire-making mandrel, comprising a fluid-tight, hollow, lead annulus, provided with an inlet for introducing an expanding fluid."

"6. A tire-making mandrel, comprising an inner rigid metallic ring adapted to fit between the halves of a tire mold, and an outer, annular, hollow, lead mandrel body thereon, provided with a fluid inlet pipe extending through said ring."

Backdahl is restricted to his filing date of December 14, 1915, for conception, disclosure, and constructive reduction to practice. Each of the Patent Office tribunals has found, and the evidence fully supports the finding, that Gammeter conceived and disclosed the invention September 7, 1915. The evidence clearly shows that from that time until the early part of June, 1916, he was endeavoring to evolve a fluid-tight and expansible lead core, adapted to produce a cord tire as

well as a fabric tire. A core that would produce either would be within the issue. The application drawings were commenced the latter part of May and completed late in June, when they were turned over to a patent attorney, who was very busy at the time, and later took a vacation extending over a month. There was further activity on the part of Gammeter, in August of 1916, and the application was filed on November 8th following.

The Examiner of Interferences and the Board of Examiners in Chief held that Gammeter was diligent at the time Backdahl entered the field, and reasonably diligent from that time until the filing of his application. The Assistant Commissioner disagreed with this finding, and therefore reversed the decisions of the lower tribunals.

Where, as here, it clearly appears that the party first to conceive the invention was in good faith engaged in perfecting it at the time his adversary entered the field, that party should not be deprived of the fruits of his discovery because his efforts were not as successful as he hoped they would be. The Assistant Commissioner reached the conclusion that Gammeter's further "experiments led to nothing so far as benefiting the public goes"; but that is not the test. The question is whether further tests were so unnecessary as to constitute evidence of negligence or bad faith. Many times we have stated that an inventor is to be commended rather than condemned for taking reasonable time to perfect his invention, "to prevent the Patent Office from being overloaded with applications for patents for crude and incomplete devices." *Griffin v. Swenson*, 15 App. D. C. 135, 142.

For the reasons stated by the Examiner of Interferences and the Board of Examiners in Chief, we are clearly of the view that Gammeter was not lacking in diligence. We are satisfied from the evidence that from the date of disclosure to the time his application was filed he was proceeding with reasonable diligence to perfect and patent his invention. As stated in *Woods v. Poor*, 29 App. D. C. 397, there is no arbitrary rule or standard by which diligence may be measured, and each case must be considered and decided in the light of surrounding circumstances. Being fully convinced of Gammeter's good faith, we reverse the decision of the Assistant Commissioner, and award priority to him.

Reversed.

In re SCHOLL MFG. CO., Inc.

(Court of Appeals of District of Columbia. Submitted May 13, 1920. Decided June 2, 1920.)

No. 1314.

Trade-marks and trade-names ¶3(4)—Mark to designate instep supports, consisting of hand holding up arch support and foot, is descriptive.

A mark to designate instep supports, consisting of a hand holding up an arch support and foot, held merely descriptive, and not entitled to registration as a trade-mark, under Act Feb. 20, 1905, c. 592, § 5 (Comp. St. § 9490), although it had been extensively used by the applicant.

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Appeal from Commissioner of Patents.

In the matter of the application of the Scholl Manufacturing Company, Incorporated, to have registered a trade-mark for instep supports. From a decision rejecting the application, applicant appeals. Affirmed.

J. H. Milans and C. T. Milans, both of Washington, D. C., for appellant.

T. A. Hostetler, of Washington, D. C., for appellee.

SMYTH, Chief Justice. Scholl applied to have registered as a trade-mark for instep supports a drawing of which this is a copy:



He alleged use of the mark from 1912. In the statement accompanying the application, he said that he made no claim to the representation of the arch support. The application was rejected on the ground that the mark was a descriptive device. The trade-mark statute (33 Stat. 724, c. 592, § 5 [Comp. St. § 9490]) declares that "no mark which consists merely * * * in words or devices which are descriptive of the goods with which they are used" shall be registered. The mark of the applicant is a device, and is merely descriptive. We agree with the examiner of trade-marks and designs that it is—

"an apt and convenient way of describing the characteristics of the arch support and of the benefits to be derived from using the same, and it would be most natural for other manufacturers to use or want to use the same sort of picture to describe or advertise a similar mark."

The disclaimer does not help the applicant, for two reasons: (1) What would remain after the representation of the arch support had been removed would not be the mark which he had used on his goods, but only a part of it. It would be a different mark, one that he had not used, and hence he would not be entitled to register it. *Id.* § 1. (2) Even if that were not so, the remaining part would "still inform the beholder," as the Assistant Commissioner ruled, "that the goods so marked were supports for the instep," and hence would be descriptive.

It is immaterial that the device has been extensively used by the applicant, or that several traders have not heard of its being used by others; for these things do not tend to prove, even in the least, that it is not descriptive. Being descriptive, the statute forbids its registration.

The decision of the Commissioner of Patents is affirmed.
Affirmed.

GRUS v. EYNON.

(Court of Appeals of District of Columbia. Submitted May 11, 1920. Decided June 2, 1920.)

No. 1311.

Patents ¶91(1)—**Junior party in interference proceeding has burden of proof.**

In an interference proceeding in the Patent Office the junior party has the burden of proof as to priority.

Appeal from Commissioner of Patents.

Interference proceeding between William Grus, Jr., and George A. Eynon. From an award of priority to the latter, the former appeals. Affirmed.

Frank T. Brown and Charles M. Nissen, both of Chicago, Ill., for appellant.

J. B. Hull, of Cleveland, Ohio, for appellee.

ROBB, Associate Justice. Appeal from concurrent decisions of the Patent Office tribunals in an interference proceeding, awarding priority to the senior party. The invention relates to automobile leaf spring lubricators. The issue is stated in five counts, of which the second will serve as an example:

"2. In a leaf spring lubricator, a pad of absorbent material, a casing fitting over the absorbent material, having a recess in its bottom and a perimetric wall, and means for pressing the casing against the edges of the leaves of a spring, to compress the pad on its edges more than in the center."

The Patent Office tribunals have very carefully reviewed the evidence, and found that appellant has not sustained the burden of proof. As we fully agree with the conclusion reached, we deem it unnecessary further to discuss the evidence, and accordingly affirm the decision. Affirmed.

PREST-O-LITE CO., Inc., v. PLAY-O-LITE CO., Inc.

(Court of Appeals of District of Columbia. Submitted May 10, 1920. Decided June 2, 1920.)

No. 1300.

Trade-marks and trade-names ¶21—**Adopted mark "Prest-O-Lite," held not to prevent registration of mark "Play-O-Lite."**

Where mark "Prest-O-Lite" was adopted in 1904 for use on gas tanks, and in 1915 applied to the manufacture of storage batteries, the user was not in a position to prevent the registration in 1917 of "Play-O-Lite" for use on electric lamps, where "Linolite," "Tubolite," "Portalite," and "Pract-El-Lite" were registered by others between 1904 and 1915, and applied to electric lights.

Appeal from a Decision of the Patent Office.

Trade-mark opposition proceeding between the Prest-O-Lite Company, Incorporated, and the Play-O-Lite Company, Incorporated. From concurrent decisions, the former appeals. Affirmed.

E. W. Bradford, of Washington, D. C., for appellant.

Wm. F. Hall, of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from concurrent decisions of the Patent Office in a trade-mark opposition proceeding.

In 1904 appellant adopted the mark "Prest-O-Lite" for use on gas tanks, and in 1915 it applied the same mark to the manufacture of storage batteries. In 1917 appellee adopted the mark "Play-O-Lite" for use on electric lamps for illuminating the front of pianos. The record shows that "Linolite" was registered for use on incandescent electric lamps in 1907; the application showing use of the mark since 1902. "Tubolite" was registered in 1909 for the same goods; the date of use being 1906. "Portalite" for use on electric lamps was registered in 1912, while "Pract-El-Lite" for incandescent electric lights was registered in 1915, with July of 1914 as the date of use. So far as appears, all these marks are in use, and were in use when appellant extended its business to cover or include storage batteries.

We have just ruled, in *French Battery & Carbon Co. v. Prest-O-Lite Co.*, 49 App. D. C. 373, 265 Fed. 1013, present term, where the facts were the same, that the Prest-O-Lite Company was not in a position to prevent the registration of "Ray-O-Lite" for use on electric lamps. The same reasoning applies here. When "Linolite," "Tubolite," "Portalite," and "Pract-El-Lite" were registered for use on electric lamps and lights, the field was open, for at that time appellant was using its mark on gas tanks. Appellant's subsequent use of its mark in 1915 on storage batteries did not entitle it, of course, to strike down the prior registrations made in good faith, or destroy the business of the various firms securing those registrations. See *United Drug Co. v. Rectanus*, 248 U. S. 90, 101, 39 Sup. Ct. 48, 63 L. Ed. 141. As the field already was occupied, it follows that appellant is not in a position to object to the registration by appellee of its mark for use on electric lights.

The decision is affirmed.

Affirmed.

DU RELL v. HALEY.

(Court of Appeals of District of Columbia. Submitted May 11, 1920. Decided June 2, 1920.)

No. 1310.

Patents ¶90(5)—Failure to reduce to practice within two years shows lack of necessary diligence.

Where early efforts of one inventing a process and apparatus for concentration of ore did not amount to reduction to practice, and he did

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- nothing thereafter for almost two years, and another entered the field meanwhile, he was lacking in diligence, and the second entering the field was entitled to an award of priority.

Appeal from Commissioner of Patents.

Interference proceeding between Charles Terry Du Rell and Dennis Frederick Haley. From concurrent decisions of the Patent Office, the former appeals. Affirmed.

Theo. K. Bryant, of Washington, D. C., for appellant.

Dean S. Edmonds and Pennie, Davis, Marvin & Edmonds, all of New York City, for appellee.

ROBB, Associate Justice. Appeal from concurrent decisions of the Patent Office tribunals in an interference proceeding, in which priority was awarded the junior party.

The invention involves a process and apparatus for concentration of ores. The claims are 12 in number, but it is unnecessary to repeat them here. Each of the Patent Office tribunals has held that appellant's early efforts did not amount to reduction to practice, and that, as he did nothing thereafter for almost two years, and appellee entered the field meanwhile, he was lacking in diligence. Each of those tribunals has carefully and satisfactorily discussed the evidence in behalf of appellant, and for the reasons stated by them we affirm the decision from which this appeal was taken.

Affirmed.

ESSANAY FILM MFG. CO. v. LERCHE.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1920. Rehearing Denied October 18, 1920.)

No. 3445.

- 1. Evidence** ⚡378(5)—**Telegram by manager stating offer by president, admissible, without proof of manager's authority.**

A telegram by the manager of a film corporation, stating that the president of the corporation had agreed to offer employment to plaintiff as an actress on terms therein stated, is admissible to establish the terms of the contract, without proof that the manager was authorized to employ actresses, where there was evidence to show that the president had authorized the offer as stated in the telegram.

- 2. Corporations** ⚡432(12)—**Evidence held to sustain finding that president authorized telegram by manager.**

In an action for breach of contract of employment of a motion picture actress, evidence of negotiations between the actress and the manager, resulting in a telegram from the manager, stating the president had agreed to certain terms, with testimony by the manager as to his conversations with the president, *held* to sustain a verdict finding that the president authorized the telegram, notwithstanding his denial.

- 3. Corporations** ⚡521—**Instruction submitting issues of manager's authority must be construed with evidence.**

In an action for breach of a contract employing a motion picture actress an instruction submitting to the jury the question whether the defendant's manager had authority to employ plaintiff must be treated as referring to his authority to send a telegram on behalf of the president, which was introduced in evidence, not as submitting the issue whether he had independent authority.

- 4. Frauds, statute of** ⚡154—**Jury finding held to preclude amendment of answer to plead statute.**

Where the jury found that the president of the defendant corporation authorized the sending of a telegram offering employment to plaintiff, which was sufficient to comply with the statute, it was not error for the court to refuse to defendant leave to amend its answer, so as to set up the statute.

- 5. Master and servant** ⚡40(3)—**Evidence held to show actress' objection to part assigned was justified.**

In a suit for breach of contract of employment of a motion picture actress, evidence *held* sufficient to support a verdict finding that plaintiff's objection to appearing in a part assigned was that it was unfitted to her experience, not, as defendant contended, because it was only a two-reel film.

- 6. Master and servant** ⚡30(5)—**Dramatic actress can refuse assignment to comedy.**

Where a film company employed an actress, who was skilled in the representation of dramatic emotional parts, with knowledge of the character of her work, the employment is presumed to have been for similar parts, so that she could properly object, and even refuse to appear in a comedy part, for which she was not fitted.

In Error to the District Court of the United States for the Southern Division of the Northern District of California; Oscar A. Trippet, Judge.

Action by Charlotte Burton Lerche against the Essanay Film Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Alfred Wright and Alexander Macdonald, both of Los Angeles, Cal., for plaintiff in error.

W. J. Ford, Henry G. Bodkin, and Leon R. Yankwich, all of Los Angeles, Cal., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is an action for damages for breach of contract of employment, brought by Charlotte Burton, a dramatic motion picture actress, against the Essanay Film Manufacturing Company, in which a jury rendered a verdict in favor of the defendant in error against the plaintiff in error in the sum of \$8,200, upon which a judgment was duly entered. At the inception of the trial, it appeared that the plaintiff had married since the institution of the action, and upon motion her name was changed, so as to appear as Charlotte Burton Lerche. Throughout the entire proceedings, the plaintiff, who is the defendant in error here, was referred to as "Miss Burton," and she will be so referred to in this opinion. The plaintiff in error will be referred to as the "company."

The complaint contained two causes of action. In the first cause of action it is alleged that the company contracted to employ Miss Burton as a motion picture actress for the period of one year, beginning the 27th day of November, 1916, at a salary of \$200 weekly during all of said year; that on the 30th of November, 1916, Miss Burton entered upon her employment under said contract, and thereupon fulfilled and performed her part of said contract according to its terms until about the 12th day of February, 1917, when the company willfully and without any lawful cause whatsoever refused to permit her to continue further in her employment under said contract and discharged her therefrom. It is alleged that Miss Burton was, and at all times has been, and is, ready, able, and willing to perform all the terms, requirements, and conditions of said contract on her part to be performed. It is alleged that by reason of the discharge of Miss Burton she has been damaged in the sum of \$8,200.

In a second cause of action Miss Burton alleged that she was employed for the period of one year as a dramatic motion picture actress; that the company further contracted to give and furnish her a large amount of favorable publicity as such dramatic motion picture actress in the newspapers throughout the United States, and to present her in leading emotional dramatic rôles in all motion pictures produced by the company during the term of her employment requiring the services of an emotional dramatic motion picture actress.

The company in its answer denied the allegations of the complaint, and particularly denied that the company entered into a contract with Miss Burton for her services as a motion picture actress, or for any other services, for a period of one year, and averred in its first separate answer that the company agreed to employ Miss Burton for no definite period of time in the nature of what is generally known in the theatrical profession as a "try-out"; that is to say, an employment from week to week on trial, for the purpose of ascertaining whether or not Miss

Burton would be suitable to the company for parts that would be assigned to her by the company as a motion picture actress in the scenarios and plays selected by the company, and for such services the company would pay her the sum of \$200 per week.

In an amended answer the company alleged that it had paid Miss Burton a salary of \$200 per week for the first 10 weeks; that it had assigned her to a principal part in a photoplay, and requested her to accept and play the part, which she refused to do, and because of such refusal the company terminated the contract. The company also alleged that by agreement with Miss Burton the contract had been terminated and abandoned on January 29, 1917.

At the trial, upon the conclusion of the evidence on behalf of Miss Burton, the court dismissed the second cause of action, and the case proceeded to a conclusion upon the first cause of action, and a verdict was rendered thereon in favor of Miss Burton in the sum of \$8,200. From the judgment entered upon this verdict the company brings the case here upon writ of error.

It appears from the record that the Essanay Film Manufacturing Company is a corporation organized and doing business under the laws of the state of Illinois, with a plant in the city of Chicago; George K. Spoor, at the time mentioned in the complaint, was president of the corporation, residing in Chicago; the employment of Miss Burton by the company at a salary of \$200 per week was admitted by the company's separate and amended answer, and by the testimony of Mr. Spoor, the president of the company. Whether that employment was to continue for the period of one year, as claimed by Miss Burton, or from week to week only, as claimed by the company, was the first question raised by the complaint and separate answer.

The evidence supporting the verdict in favor of Miss Burton was a telegram, dated at Chicago November 15, 1916, addressed to Charlotte Burton, Santa Barbara, Cal., in which it is stated:

"Mr. Spoor has agreed on two hundred for first year and with option on second year at three hundred. Suggest you arrange to come at once. I will make contract agreeable to you on arrival. [Signed] V. R. Day."

[1] Counsel for the company objected to this telegram, on the ground that no authority had been shown for sending the telegram seeking to bind the defendant company without obtaining from Mr. Day any statement or any description of the duties of his employment, other than the bald statement that he was the business manager of the corporation, whether these duties involved at that time the employing of actors or actresses, either for one year or for two. The court overruled the objection, referring to some statement not in the record, made by the attorney for the plaintiff on opening the case to the jury, and for the further reason that "Miss Burton had gone on there in pursuance of this telegram, and gone to work and received the compensation for it." There was the further obvious answer to the objection that Mr. Day did not assume to employ "actors or actresses for one year or for two." What he stated in the telegram was that "Mr. Spoor has agreed on two hundred for first year and with option on

second year at three hundred." Was this statement true or false? This was the only question that could be raised on this telegram.

[2] Day testified that he was employed by the company in the capacity of business manager, and had held that position since 1910, and had been in the company's employ until June 1, 1919; that he first met Miss Burton in the latter part of 1916 in California, and discussed her employment with the company, but nothing final was said about her employment. The witness then went back to Chicago, and then had some correspondence with her in the form of letters and telegrams. The telegram mentioned above was part of this correspondence. Pursuant to this telegram, Miss Burton went to Chicago, and was paid her expenses to Chicago and \$200 per week for a period of 9 weeks, when she was dismissed.

The deposition of George K. Spoor, the president of the company, was read in evidence. He testified that Day was general all-round man in the city office; that he was in California in October and November, 1916, as an employé of the company. The witness first met Miss Burton the latter part of November, 1916, at the plant in Chicago, when Day introduced the witness to her. He talked with her for a few minutes; nothing was discussed about her becoming an employé of the company. The witness never at any time or place talked to her, or she to him, about becoming an employé of the company. Mr. Spoor admitted that he talked with Mr. Day some time in the early part of November or latter part of October, 1916, about employing Miss Burton, which he says was for a temporary period at a salary of \$200 per week; that he said to Day:

"We will pay her salary during the time she is here, and until we find out what she can do, and, if she wants to come for a trial, all well and good. You can let her come, and we will see how good she is, and let you know whether we want her or not."

This deposition was read to Mr. Day upon the trial, who testified that—

"Nothing was ever said in the conversation about a try-out. After explaining to him her present employment, and her present salary and her ability, as I had seen it in pictures and as explained to me, the salary was agreed upon at \$200 a week, and nothing was said about try-outs or by the week. The year was always mentioned."

If this testimony of Day was true, the employment of Miss Burton was by Mr. Spoor, the president of the company, and not by Day; the latter acting in the transaction merely as a clerk or an amanuensis of Spoor in reducing the agreement to writing in the form of the telegram to Miss Burton. Spoor does not deny that Day had authority to send the telegram and engage Miss Burton.

Here was a direct contradiction between the testimony of these two witnesses with respect to the term of the employment, a controlling fact in the case. The attending circumstances were in favor of Day's testimony. He did not assume to employ her while he was in California. He submitted the question of her employment and the terms to Mr. Spoor. The telegram was sent immediately after the conversation respecting the employment and terms. Spoor said to Day, "You

can let her come," and the employment was waiting upon that telegram. Miss Burton accepted the terms and proceeded to Chicago, where she was paid her expenses and a salary of \$200 a week for 9 weeks. The further fact that when Miss Burton called upon Mr. Spoor in Chicago, upon her reporting there for employment, "nothing was said about her becoming an employ   of the company," tends to show that Mr. Spoor treated that feature of Miss Burton's relation to the company as a closed incident. The question was one of fact as to whether the telegram correctly stated Mr. Spoor's action in the matter, and was submitted to the jury for its finding. The finding was in favor of the plaintiff.

It is true that the testimony was permitted to take a wider range concerning the negotiations leading up to the final engagement of Miss Burton; but all of these matters were subordinate to the controlling question: Did Mr. Spoor authorize the employment, as set forth in the telegram to Miss Burton dated November 15, 1916? If he did, the contract was entered into as alleged in the complaint. The jury so found, and that disposes of that question, and also the objection that the court erred in admitting the telegram in evidence.

[3] It is true the court submitted to the jury the question whether Day had authority to employ Miss Burton; but this instruction must be treated in the light of the evidence as referring to the employment in accordance with the terms of the telegram, and not that Day assumed any independent authority in the transaction.

[4] The court did not err in refusing the application of counsel for the company to file an amendment to its answer setting up the statute of frauds. The ground upon which this application was made was that the contract proven was an oral contract entered into with Day. That question is disposed of by the evidence and the verdict of the jury that the contract entered into was evidenced by the telegram to Miss Burton, signed by Day, and authorized by Spoor, dated November 15, 1916. It is not questioned that the telegram, if authorized, was a sufficient writing under the statute of frauds. There was no material variance between the proof and the allegations of the complaint concerning the terms of the employment of Miss Burton. The ruling of the court on that question was also correct.

[5] Concerning Miss Burton's discharge from the employment of the company, it appears from the evidence that Miss Burton had reported for employment at the office of the company in the latter part of November, 1916; that she continued subject to call for about 9 or 10 weeks, when she was given a comedy play entitled "Black Cat Comedy" by the director. She protested that there must be some mistake, as she did not do comedy. She appealed to a Mr. Eubank, who it appears had cast her in this play. Obtaining no satisfaction from him, she appealed to Mr. Spoor, to whom she reported in substance that she had been cast in a "Black Cat Comedy"; that she did not do comedy, and could not hope to make good; that she was absolutely inexperienced in comedy, and that she was a dramatic actress. Mr. Spoor made inquiry concerning the assignment, and she said to him:

"Perhaps Mr. Eubank does not know my work. However, I said, I have told Mr. Day, and Mr. Van Dyke, and Mr. Young, who are directing here, that there are three pictures of mine down town showing in the theaters which will give them a very good idea of the nature of the acting I have been doing, and I told him I would be awfully glad if he would run off some of my stuff to see my work, and he said that he had enjoyed my still pictures; that is, still pictures are pictures taken of situations. I said, 'Oh, you saw my still pictures?' He opened a drawer in his desk, and took out about 200 pictures of situations I was in. He said, 'I have enjoyed them very much.' I said, 'You can readily see, Mr. Spoor, I am a dramatic actress, because of the situations of mine, the stills,' and he looked them over, and he was very lovely, and he said, 'Well, you had better calm yourself down now; go to your dressing room, to your hotel, and I will take this up.'"

The testimony of Mr. Spoor relating to this interview is as follows:

"The second and last time I saw Miss Burton, she came to me alone to my office at the Essanay plant, and told me that Mr. Eubank had cast her in a two-reel production, and that she would not appear in a two-reel production, because she had been engaged to appear as leading woman for Mr. Walthal in five-reel productions, or at least other five-reel productions. I told her that that could not be so, as I had no knowledge of that fact, and that I had other people on the pay roll drawing as much or more money than she was, people who were better known, and they were expected to appear in any productions, whether one, two, or five reels, that we would cast them in, and stated that I would expect her to appear in the two-reel production that Mr. Eubank had cast her for. I also told her that we did not know what her work was, and had no way of telling, unless she appeared in this production, and that we would have no way of telling, and I expected her to take the part. She said, 'I would rather not. I would rather wait for a five-reel production' I said, 'I expect you to take this part and show us what you can do.' She made no reply to this, but left the office."

A number of days after that interview Miss Burton received the following notice of dismissal:

"Chicago, January 29, 1917, Miss Charlotte Burton, Essanay Studio, Chicago, Illinois—Dear Miss Burton: We hereby give you notice that your services will not be required after two weeks from this date. Very truly yours, Essanay Film Manufacturing Company, George K. Spoor, President."

After receiving this notice, she tried to see Mr. Spoor about the dismissal and its cause, but was unable to secure an interview with him. Spoor testified that she left the employ of the company because she refused to accept the part Mr. Eubank had cast her for, and Eubank so notified him, and he gave her notice of dismissal. Mr. Eubank testified that she had refused to play the part he had assigned her in the "Black Cat Comedy." Miss Burton testified that she had not refused to play it, but had protested against playing it, because she did not do comedy. She had previously testified that she was absolutely inexperienced in comedy, and could not hope to make good.

[6] The court submitted to the jury the question whether Miss Burton had refused to perform her duties, referring to the testimony, and to the fact that notice of discharge did not specify why she was discharged and the further fact that she could not find out why she was discharged. The court also instructed the jury that —

"Where an actress is engaged to perform services, and where the contract is silent as to the nature and character of rôles to be played by such actress, you have a right to infer that she was to play in photoplays of the same

nature and character that she was capable of doing, and which the defendant knew she was capable of doing."

Miss Burton was a dramatic actress, and the evidence tends to show that her character representations in photoplays were known to Spoor. She was cast for a part in a comedy play; she had had no experience in comedy, and she believed she could not hope to make good. This was a reasonable objection on her part, whether considered as a protest or a refusal to play, and did not constitute a breach of contract on her part.

In Labatt on Master and Servant, vol. 1, p. 879, the author, in discussing what constitutes a breach of duty on the part of the servant, says:

"Nor has the master any right to require that the servant shall either temporarily or continuously engage in work which is distinctly and manifestly quite outside the circle of the duties incident to his position. The question whether in any given instance the work is of this description is one of fact. The material elements to be considered in determining this question are the general nature of the employment to which the contract relates, or capabilities which the servant was known to possess when he was engaged."

We are of the opinion that there was no error in submitting this question whether Miss Burton had been guilty of a breach of contract to the jury as a question of fact, to be determined in the light of all the surrounding circumstances. We find no prejudicial errors in the admission of evidence over the objection of counsel for the company or the instructions to the jury.

The judgment of the District Court is accordingly affirmed.

AKIRA ONO v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1920.)

No. 3451.

1. Aliens ⇨54—Specification of immaterial statute in Secretary of Labor's deportation order immaterial.

Where the order of the Acting Secretary of Labor, directing the arrest of a Japanese person and that he be granted a hearing, to show cause why he should not be deported, recited that he had entered the United States in violation of Act Feb. 5, 1917, such recital was immaterial, though the entry occurred before the passage of the act; the question for determination in the deportation proceedings being whether the alien was lawfully in the United States and whether there existed any authority for his deportation.

2. Aliens ⇨39—Congress may restrict immigration.

Congress by statute may forbid aliens from coming into the United States, and may provide for their expulsion, devolving upon the executive department or its subordinate officers the duty of carrying out the law.

3. Aliens ⇨54—Action of executive department under deportation statute final when proceeding is fairly conducted.

The action of the executive department or its subordinate officers under deportation statutes is final, when hearings are fairly conducted.

4. Evidence ⚡11—Judicial notice taken of historical events.

Courts will take judicial notice of history, such as the protest of the Japanese government against the proclamation of President Roosevelt specifically reciting that passports issued to Japanese laborers were being used for the purpose of enabling the holders to enter the continental territory of the United States, as well as the subsequent so-called "gentlemen's agreement."

5. Aliens ⚡46—Japanese laborer not entitled to admission.

Under Act Feb. 20, 1907, providing that, when the president shall be satisfied that passports issued by any foreign government to its citizens to go to other countries are being used for the purpose of enabling the holders to come into the continental territory of the United States, the President may refuse to permit such citizens to enter the continental territory of the United States, as well as the proclamation of President Roosevelt superseded by the so-called "gentlemen's agreement" between the United States and Japan and the proclamation of President Taft, a Japanese laborer is not entitled to enter the continental United States, even though he left Japan without passport.

6. Aliens ⚡53—Japanese laborer, who entered United States without passport, may be deported within five years.

Under Act Feb. 5, 1917, a Japanese laborer, who entered the United States surreptitiously without passport, deserting a vessel on which he was a coal passer, may, his entry being unlawful under Act Feb. 5, 1917, and the presidential proclamations, be deported five years thereafter.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Petition by Akira Ono for a writ of habeas corpus to obtain release from custody in deportation proceedings by the United States. From a judgment denying relief, petitioner appeals. Affirmed.

J. Marion Wright, of Los Angeles, Cal., for appellant.

Robert O'Connor, U. S. Atty., and W. F. Palmer, Asst. U. S. Atty., both of Los Angeles, Cal.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The appellant petitioned the court below for a writ of habeas corpus to inquire into his alleged illegal imprisonment, after hearing which matter the court dismissed the writ and remanded the petitioner to the custody of the Immigration Department of the government, for deportation. The record of the proceedings of the government against him were made a part of the petition, and it shows, among other things, the appellant to be a native and subject of the empire of Japan and an unskilled laborer, and that he left that country December 30, 1914, via England, arriving at Galveston, Tex., by ship on which he was a coal passer, about March 1, 1915, and there deserted the ship and unlawfully entered the United States, where he has remained ever since. In his testimony he admitted that he had no passport of any kind at the time of leaving Japan. At the time of his arrest five years had not elapsed, but more than three years had since his entry into this country.

[1] The record shows that the order of the Acting Secretary of Labor, directing the arrest of the appellant, and that he be granted a

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

hearing to enable him to show cause why he should not be deported in conformity with law, recited that evidence had been submitted to that official from which it appeared that the said alien had been found in the United States—

"in violation of the Immigration Act of February 5, 1917, for the following, among other, reasons: That he entered and is within the United States in violation of the sixth proviso of section 3 of the above-mentioned act (rule 11)."

That proviso reads as follows:

"That whenever the President shall be satisfied that passports issued by any foreign government to its citizens or subjects to go to any country other than the United States, or to any insular possession of the United States or to the Canal Zone, are being used for the purpose of enabling the holder to come to the continental territory of the United States to the detriment of labor conditions therein, the President shall refuse to permit such citizens or subjects of the country issuing such passports to enter the continental territory of the United States from such other country or from such insular possession or from the Canal Zone." Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼b.

The mention of that clause of the statute of February 5, 1917, by the Assistant Secretary, we regard as unimportant, not only because it was so mentioned as one only of the reasons for his action, but mainly for the reason that the real question is whether the case shows that the appellant was found illegally here, and, if so, whether there exists any legal authority for his deportation. It is not pretended that he was not afforded a full and fair hearing upon those questions by the immigration officers. See *Guiney v. Bonham* (C. C. A.) 261 Fed. 582, 584, and cases there cited.

[2, 3] It is well-settled law that Congress by statute may forbid aliens from coming into the United States, and may provide for their expulsion, devolving upon the executive department, or its subordinate officers, the right and duty of carrying out the law, and that the action of that department, within the authority of the statute, is final, provided its proceedings are fairly conducted. *Low Wah Suey v. Backus*, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165, and cases there cited.

[4, 5] It only remains to consider, therefore, whether the entry of the appellant into the United States was unlawful, and, if so, whether there was any statutory authority for his expulsion. That he deserted his ship, had no passport from his own country, and smuggled himself into this, was practically admitted by himself. The last proviso of section 1 of Act Feb. 20, 1907, entitled "An act to regulate the immigration of aliens into the United States" (34 Stats. 898, c. 1134), reads:

"Provided further, that whenever the President shall be satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the Canal Zone are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, the President may refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such other country or from such insular possessions or from the Canal Zone."

Under and in pursuance of the last-mentioned act of Congress the President, on the 14th day of March, 1907, issued this proclamation:

"Whereas, by the act entitled 'An act to regulate the immigration of aliens into the United States,' approved February 20, 1907, whenever the President is satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the Canal Zone, are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, it is made the duty of the President to refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such country or from such insular possession or from the Canal Zone;

"And whereas, upon sufficient evidence produced before me by the Department of Commerce and Labor, I am satisfied that passports issued by the government of Japan to citizens of that country or Korea and who are laborers, skilled or unskilled, to go to Mexico, to Canada, and to Hawaii, are being used for the purpose of enabling the holders thereof to come to the continental territory of the United States to the detriment of labor conditions therein:

"I hereby order that such citizens of Japan or Korea, to wit, Japanese or Korean laborers, skilled and unskilled, who have received passports to go to Mexico, Canada, or Hawaii, and come therefrom, be refused permission to enter the continental territory of the United States.

"It is further ordered that the Secretary of Commerce and Labor be, and he hereby is, directed to take, through the Bureau of Immigration and Naturalization, such measures and to make and enforce such rules and regulations as may be necessary to carry this order into effect."

Courts take judicial notice of the history of the country, and consequently this court knows what is known to every well-informed person, that the Japanese government made objection to the language employed in the foregoing proclamation of President Roosevelt of March 14, 1907, resulting in what is commonly known as the "gentlemen's agreement" between the two countries, by which the government of Japan agreed to issue no more passports to its laborers under which they might enter the continental portion of the United States, and in this modified proclamation by President Taft, issued February 24, 1913:

"Whereas, by the act entitled 'An act to regulate the immigration of aliens into the United States,' approved February 20, 1907, whenever the President is satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the Canal Zone, are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, it is made the duty of the President to refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such country or from such insular possession or from the Canal Zone;

"And whereas, upon sufficient evidence produced before me by the Department of Commerce and Labor, I am satisfied that passports issued by certain foreign governments to their citizens or subjects who are laborers, skilled or unskilled, to proceed to countries or places other than the continental territory of the United States are being used for the purpose of enabling the holders thereof to come to the continental territory of the United States to the detriment of labor conditions therein;

"I hereby order that such alien laborers, skilled or unskilled, be refused permission to enter the continental territory of the United States.

"It is further ordered that the Secretary of Commerce and Labor be, and

he hereby is, directed to take, through the Bureau of Immigration and Naturalization, such measures and to make and enforce such rules and regulations as may be necessary to carry this order into effect."

It is obvious, therefore, that even if the appellant had arrived at Galveston with a passport from his government and had sought by reason thereof entry into this country, the immigration officials at Galveston would have, as in duty bound, denied him admission; a fortiori, his surreptitious entry into the United States was clearly unlawful.

[6] Belonging, as the appellant clearly did, to a class, to wit, that of unskilled laborers, denied the right of entry into the United States by virtue of the Act of February 20, 1907, and the presidential proclamations promulgated under and pursuant thereto that have been set out, he was by the express provision of section 19 of the Act of February 5, 1917 (39 Stat. 874, 889 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¹/₄jj]), subject to deportation at any time within five years from the time of his entry. Section 23 of the same act required the Commissioner General of Immigration under the direction of the Secretary of Labor, to prescribe suitable rules and regulations for carrying out the provisions of the act, by virtue of which authority certain rules and regulations were made and adopted by the executive department for, among other things, the deportation within five years of any alien who entered the continental territory of the United States prior to May 1, 1917, and who was at the time of such entry a member of any one of the classes denied admission thereto by virtue of any provision of the above-mentioned Act of February 20, 1907 (rules 11 and 13).

It may be added that the sixth proviso of section 3 of the Act of February 5, 1917, referred to in the order of arrest issued by the Acting Secretary of Labor is, as will be readily seen, substantially and almost literally the same as the last proviso of the Act of February 20, 1907.

The judgment is affirmed.

RICHMOND CEDAR WORKS v. FOREMAN BLADES LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. July 10, 1920.)

No. 1775.

1. Evidence [⌘]121(6)—Declarations by possessor, claiming title, are competent as *res gestæ*.

Declarations made by one in possession of land that he held it as his own are admissible to show adverse possession, as explanatory of the possession and part of the *res gestæ*.

2. Evidence [⌘]273(4)—Declarations of possessor, claiming to hold under another, are competent.

Declarations by a person in possession of land that he held it for another, who claimed ownership, are competent to establish adverse possession, whether the possessor was a tenant of the claimant, or was a slave belonging to the claimant, who could not claim possession in his own right.

3. Evidence ⚡266—Witnesses ⚡38—Testimony and declarations made by slaves admissible.

Since the removal of the disability of slavery, the testimony of former slaves as to transactions occurring during their slavery, and testimony as to acts and declarations by slaves, are as competent as though the state of slavery had never existed.

4. Adverse possession ⚡27—Evidence held to show possession by slaves.

In an action of trespass, where defendant claimed by adverse possession under color of title, evidence held sufficient to sustain the jury's finding that slaves were in possession under defendant's predecessor in title, and that the cabin in which they lived was located on the disputed tract.

5. Appeal and error ⚡1053(1)—Admission of irrelevant documents subsequently excluded is harmless.

Error in the admission in evidence of documents, which it subsequently appeared were entirely irrelevant, and which were then excluded from the consideration of the jury, was harmless.

In Error to the District Court of the United States for the Eastern District of North Carolina, at Elizabeth City; Henry G. Connor, Judge.

Action by the Richmond Cedar Works against the Foreman Blades Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. S. Manning, of Raleigh, N. C., and J. Kenyon Wilson, of Elizabeth City, N. C., for plaintiff in error.

A. D. MacLean, of Washington, N. C. (J. B. Leigh and Aydlott & Sawyer, all of Elizabeth City, N. C., and Small, MacLean, Bragaw & Rodman, of Washington, N. C., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. In its complaint Richmond Cedar Works alleges ownership of ²²/₂₄ interest in a tract of land in the county of Pasquotank, N. C., containing 2,081.9 acres and trespass by defendant Foreman Blades Lumber Company by cutting timber thereon of the value of \$120,000. The defendant disclaimed title to all of the land described in the complaint, not included in a conveyance to it from C. L. Hinton and others dated April 1, 1912. It admitted cutting timber from the land embraced in that deed, but denied plaintiff's title thereto. The jury's affirmative answer to the following issue decided all the issues in favor of the defendant:

"Has the defendant, Foreman Blades Lumber Company, or those under whom said company claims, been in the possession of the land described in the complaint, known as the 'Proctor Tract,' under known and visible lines and boundaries, under color of title, for seven years prior to the 9th day of July, 1915."

The plaintiff made out a complete chain of title beginning with a grant from the state of North Carolina to John Hamilton, dated December 27, 1792; but there was no proof that it or any of its predecessors in title had been in possession of the land, and there was affirmative proof that none of them had for many years paid any taxes there-

on. The last distinct reference until 1911 to the tract of land in dispute occurring in the plaintiff's chain of title was in a deed from Francis Johnson to Alexander W. Johnson, dated February 25, 1806. After that time the chain of title depended on inheritances and wills, in which no specific reference was made to this land. In all the intervening period of more than 100 years the record discloses no assertion of title under the John Hamilton grant.

The defendant relies entirely on adverse possession under color of title. This color of title commences with a tax deed dated September 8, 1812, held by the court to be invalid as a conveyance, but available as color of title. Among the successive deeds constituting color of title, one was made in 1831 by Elizabeth Proctor to her son, Fred S. Proctor, and one in 1856 by Fred S. Proctor to James W. Hinton and W. W. Griffin. In 1857 Griffin executed a deed to W. R. Abbott for his half interest, and in 1860 R. F. Overman, assignee in bankruptcy of Abbott, conveyed to James W. Hinton Abbott's interest in the property.

[1] The first question is whether there was competent evidence of adverse possession in defendant's predecessors in title between 1831 and 1860, and the effect of that evidence. There is no dispute that during this period the land was known as "the Proctor land." No other Proctors appear in the record, except those from whom the defendant derived color of title. These were Elizabeth B. Proctor, Samuel Proctor, her husband, and Fred S. Proctor, her son. Very old negroes in the neighborhood testified that they had always known the land as the Proctor land; that a negro, Bill Mathias, who belonged to some of the Proctors, lived on the land for a much longer period than 7 years, and died there in 1857; that his wife, who was a free woman, continued to live there until she died in 1866. David Hinton, one of these witnesses, testified that Bill Mathias told him that he belonged to Mr. Fred Proctor, and that he had put him on the land. John Gallop testified that Bill Mathias told him that he was in possession under Fred S. Proctor, who put him on the land. These last statements, attributed to Bill Mathias, are the only portions of the evidence recited which are attacked as incompetent. These declarations of Mathias were in effect a claim to hold under Fred S. Proctor adversely to the plaintiff's predecessors in title. Surely if Proctor had been on the land himself, and had asserted that he held it as his own, there would have been no question as to the admissibility of the testimony. Such statements are acts explanatory of the possession and are part of the *res gestæ*. *Yates v. Yates*, 76 N. C. 142, 147, 148; *Bunch v. Bridgers*, 101 N. C. 58, 7 S. E. 584; 16 Cyc. 1170; 2 C. J. 273.

[2, 3] The authorities make the rule equally clear that one who is holding under another may assert the source of his possession as a claim against the true title in favor of the person under whom he holds. It is true that Mathias was a slave, and could not assert title in himself, nor could his possession inure to his own benefit. So, also, a tenant cannot assert title in himself, nor can his possession inure to his own benefit; but the slave holds for his master, the tenant for his landlord, and there is no reason for receiving the declaration of a tenant, asserting his possession to be under his landlord, which does not apply

with equal force to a slave asserting his possession for his master. Since the removal of the disability of slavery, the competency of testimony of former slaves as to transactions taking place while they were in a state of slavery has never been questioned. Testimony as to acts done and statements made by former slaves while in a state of slavery, if otherwise competent, stands on the same footing. Mathias' assertion of his holding under his master was an act, and not testimony taken at the time.

[4] But, even if these statements of Bill Mathias be excluded, the jury could not have escaped the inference that he held the land for Fred S. Proctor; for the evidence was that the Proctors, who claimed the land, were Elizabeth and her son, Fred S. Elizabeth conveyed to Fred S. in 1831, and after that date could not have been claiming the land. This leaves no Proctor for whom Mathias could have been holding as a slave, except Fred S. Thus it appears that the uncontradicted evidence shows that no other reasonable conclusion could have been reached, except that Mathias held for Fred S. Proctor. There was no testimony whatever tending to rebut that of these old negroes, except as to location, and we can find no reason in the record for discarding it. It seems to us, therefore, the jury were bound to find that Bill Mathias was the slave of Fred S. Proctor, that the possession of Bill Mathias of the land he was on was adverse to the true title, that it continued for more than 7 years, and that it inured to the benefit of Fred S. Proctor, under whom the defendant claims.

The testimony as to the location of the house of Mathias on the Proctor land seems to us conclusive. It was furnished by the old negroes and J. H. Hinton, who were familiar with its location, and confirmed by the surveyor, Dudley, who saw the evidence of clearing and cultivation on the land in dispute. Against this there is no testimony whatever, except that of D. O. Newberry, an agent of the plaintiff, who looked after its litigation, to the effect that he went on the Proctor land with Elijah Edge, one of the old negro witnesses, that he saw the lines of the Proctor tract, and that the place where old Mathias and his wife lived, as indicated to him by Edge, was off the Proctor land. Thus it is apparent that the location of the Mathias house on the land in dispute was proved by such an overwhelming preponderance of the evidence that it would have been the duty of the trial judge to set aside a verdict based on an opposite conclusion.

As the evidence recited required a verdict for the defendant on the issue presented to the jury, we do not think discussion of the numerous and somewhat refined assignments of error would be of value. There was evidence, also, of adverse possession under color of title by continuous cutting of timber for 7 or 8 years under color of title by those under whom defendant claims. This evidence was properly submitted to the jury.

[5] The District Judge, in the course of the trial, admitted some documents over the objections of the plaintiff's counsel. Since these documents turned out to be entirely irrelevant, and were excluded from the consideration of the jury, the error of the admission was harmless. Careful examination of the record is convincing that the

case was tried with the utmost fairness and submitted to the jury by a charge which was exceedingly liberal to the plaintiff.

Affirmed.

**FIDELITY & DEPOSIT CO. OF MARYLAND v. BANK OF CHARLESTON,
NAT. BANKING ASS'N.**

(Circuit Court of Appeals, Fourth Circuit. July 6, 1920.)

No. 1791.

1. Banks and banking ⇨140(2)—Payment of check on unauthorized indorsement is conversion of payee's property.

A bank, which cashed a check on indorsement by its agent, with knowledge that the indorsement was unauthorized, and charged the check against the drawer's account, is liable to the payee of the check for conversion of his property, though it would not be liable to him in an action for breach of contract.

2. Pleading ⇨214(3)—Demurrer held to admit knowledge of agent's authority.

A bank cannot rely upon the trust and confidence reposed for years by the payee of a check in its agent as a defense to payment of the check on the agent's indorsement, where it admitted by demurrer that it had knowledge that the agent was not authorized to indorse the check.

3. Pleading ⇨192(2)—Insufficiency as to details does not render complaint demurrable.

An objection that the allegations of the complaint are not sufficient to inform defendant fully as to the transactions referred to therein does not support an order sustaining a demurrer to the complaint, though defendant would be entitled to have the complaint amended in those respects.

Rose, District Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Action by the Fidelity & Deposit Company of Maryland against the Bank of Charleston, National Banking Association. Judgment for defendant on sustaining demurrer to the complaint, and plaintiff brings error. Reversed.

This is a civil action, instituted in the District Court of the United States for the Eastern District of South Carolina, by the Fidelity & Deposit Company of Maryland against the Bank of Charleston, S. C., for damages, amounting to \$5,000, with interest, for the conversion of a check. The facts as set forth in the complaint show:

That F. W. Wagener & Co. delivered to T. Moultrie Mordecai, as agent of the Deposit Company, a check on the bank for \$5,000, payable to the order of the deposit company; the check being given as collateral security and in consideration of the deposit company becoming surety on a recognizance bond of one Keenan. That the said Mordecai, without the knowledge, permission, or consent of the deposit company, indorsed said check by indorsing thereon "Fidelity & Deposit Company of Maryland, by T. Moultrie Mordecai, Attorney in Fact," and presented the check to the bank for payment. That the check was paid, and the bank charged such payment to the account of, and returned it to, the drawer. That Mordecai was not authorized by the deposit company to indorse the check or collect the same, and payment to him by the bank was unwarranted, unauthorized, and without the knowledge or consent

of the plaintiff, and that the bank knew or should have known that it had no right to make such payment. That Mordecai did not pay over to the deposit company the money so collected, nor has it received the same from any other source.

These facts being set forth, the complaint then alleged that by reason of the above the bank had converted to its own use property of the plaintiff to the value of \$5,000, which it refuses to deliver to plaintiff, to his damage, and prays judgment accordingly.

The defendant answered, and before trial served notice of oral demurrer to complaint, on the grounds that the complaint does not state facts sufficient to constitute a cause of action in that:

(a) There is and was no privity of contract between the plaintiff and defendant in regard to the alleged check referred to in the complaint.

(b) That the payee of a check has no right of action against the drawee, unless and until it accepts or certifies the same, which does not appear upon the face of the complaint to have been done in this case.

(c) That the duty and liability of the defendant bank, if any, by reason of the facts and circumstances alleged in the complaint, would be to F. W. Wagener & Co. only, and not to the plaintiff herein.

The demurrer was sustained, and the complaint dismissed, and the case comes here on writ of error.

J. N. Nathans, of Charleston, S. C., and Washington Bowie, Jr., of Baltimore, Md. (Nathans & Sinkler, of Charleston, S. C., on the brief), for plaintiff in error.

Frederick H. Horlbeck and Julian Mitchell, both of Charleston, S. C. (Mitchell & Smith, of Charleston, S. C., on the brief), for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). The plaintiff in error will be referred to as plaintiff, and the defendant in error as defendant; such being the relative positions the parties occupied in the court below.

The defendant, having filed a demurrer, thereby admitted all the allegations contained in the complaint, to wit, that Mordecai had no authority to indorse the check or collect the same; that the bank knew, or should have known, that it had no right to pay the check; that the bank came into possession of the check with that knowledge; that it charged Wagener's account with the same, and thereupon came into possession of the proceeds thereof, which were the property of the plaintiff, and it has not paid them over to the plaintiff, or any one authorized to receive the same, and refuses to do so; and that the bank turned over the check to the drawer.

[1] The vital question here is as to whether the conduct of the bank as respects the cashing of the check was such as to render it liable for conversion. Is it reasonable to contend that, where a bank cashes the check of another on the indorsement of a third party, who it knew was not authorized to make such indorsement, the bank should be exonerated on the ground that there was no privity between the payee of the check and the bank? Are the facts in this case, as alleged and admitted, in harmony with those of the decisions relied upon by counsel for defendant? In the case of *First National Bank v. Whit-*

man, 94 U. S. 343, 24 L. Ed. 229, it was held that the payee of a check, before it was accepted by the drawee, could not maintain an action against the bank on which it was drawn. The court, in that case, refers to the opinion of Mr. Justice Davis in the case of *Bank of the Republic v. Millard*, 10 Wall. 152, 19 L. Ed. 897, as leaving little to add upon this subject by way of illustration or authority. It also deals with the question of the acceptance of a check by a bank wherein it would be liable to the holder. There it appeared that the bank had made a weekly statement to the drawer of the check of deposits received and payments made, and had returned the check as having been paid. It also appears that the amount of the check was entered to the credit of the bank, and it was contended that this constituted in effect an application of the money of the drawer to the use of the holder of the check, thereby creating privity between the payee and the bank. In discussing this point, the court said:

"There is no suggestion in the evidence that either the bank or Mr. Spinner knew that the indorsement of the payee was unauthorized. The bank, we assume, would not knowingly subject itself to the dangers and liabilities resulting from making payment to one not authorized to receive it."

Thus it will be seen that that case is easily distinguishable from the case at bar. In this instance, as we have said, it is admitted by the demurrer that the bank knew the indorsement was unauthorized. Therefore, with full knowledge that Mordecai had no right to indorse the check, it subjected itself to all dangers and liabilities that might occur by making payment to one not authorized to receive it.

The case of *Laclede Bank v. Schuler*, 120 U. S. 511, 7 Sup. Ct. 644, 30 L. Ed. 704, affirms the doctrine announced in the *Millard and Whitman Cases*, supra. Mr. Chief Justice Fuller, in delivering the opinion of the court in the case of *St. Louis & San Francisco Railway Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 68, which bears on this point, said:

"It is settled law in this court that the holder of a bank check cannot sue the bank for refusing payment, in the absence of proof that it was accepted by the bank or charged against the drawer (*Bank of The Republic v. Millard*, 10 Wall. 152; *First National Bank v. Whitman*, 94 U. S. 343, 344; *Laclede Bank v. Schuler*, 120 U. S. 511, 514). * * *

In the case of *Thompson v. Sioux Falls National Bank*, 150 U. S. 231, 14 Sup. Ct. 94, 37 L. Ed. 1063, it was alleged that the check had been issued by the bank (cashier's check) for value received, and duly indorsed, and that plaintiff had lawfully come into possession of it in due course of business. The defense in that instance was that the check had not come lawfully into possession of the plaintiff in the usual course of business, and that its acquisition was ultra vires. Mr. Justice Brown, who delivered the opinion of the court, said:

"We have not deemed it necessary to consider whether this check falls within the class upon which we have held that no action will lie in favor of the holder against the drawee before acceptance. *Bank of Republic v. Millard*, 10 Wall. 152; *First Nat. Bank of Washington v. Whitman*, 94 U. S. 343; *Bull v. Bank v. Kasson*, 123 N. Y. 105. In any view we have been able to take of this case, we think the question of plaintiff's title to the check

and its right to recover upon the same should have been left to the jury under proper instructions."

In the case of *Fourth Street National Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855, the court upheld an equitable assignment of the amount of the check in question in favor of the drawee. There the question as to the right of the holder of a check against the bank was urged, and the previous decisions of the court were presented and argued. Mr. Justice White, in delivering the opinion of the court, commences with the citation of the previous decisions, beginning with the *Millard Case*.

When we come to consider the above authorities, we find that the Supreme Court of the United States has decided only that an action *ex contractu* on the check by payee against the bank before acceptance will not lie, but it did not decide that an action for conversion could not be maintained. On the contrary, as in the *Millard* and *Johnston Cases*, it is fair to infer that, if it had been shown the bank had charged this check on its books against the drawer, using that as a basis, plaintiff would be entitled to recover on a count for money had and received, and it should be remembered that in the *Whitman Case* it is equally reasonable to infer that an action would lie against the bank, if it appeared that the bank knew the indorsement was unauthorized. Therefore the real question presented in this case has not been directly passed upon in any decision of the Supreme Court.

In the case of *Siegel v. Kovinsky*, 93 Misc. Rep. 541, 157 N. Y. Supp. 340, the court recognizes the principle contended for by plaintiff in this instance. Among other things, the court in that case said (Syl. 3 and 4):

"In the absence of an indorsement of a check by one authorized thereto by him, the payee, on a wrongdoer's appropriation of the check, may recover from the maker as his debtor. In such case the payee may also recover from the bank upon which the check is drawn as for a conversion of the check, or of its proceeds, by the bank's payment to one other than the payee."

Also the case of *Louisville & N. R. Co. v. Citizens' & People's Nat. Bank of Pensacola*, 74 Fla. 385, 77 South. 104, L. R. A. 1918C, 610, sustains the contention of the plaintiff in this instance. In discussing this phase of the question the court said:

"The first count of the declaration may be considered as one in *trover* for the conversion of a check. The check was the property of the plaintiff; it was in the plaintiff's possession, for Weekly's possession was the plaintiff's possession; it was taken by the defendant, upon whom it was drawn, and the proceeds paid to a person who had no authority from the plaintiff to receive it; the account of the drawer was charged with the amount paid, and the check was returned to the drawer. * * * The transaction as set forth in the declaration would support a count for money had and received. The check was the bank's authority for paying to the plaintiff from the account of Virgin & Carter the amount of money named in the check. The drawer of the check had the necessary funds on deposit, and the bank was solvent. Therefore, when the bank took from the funds on hand, or from the funds of Virgin & Carter on deposit, the amount stated in the check, it had in its possession for that instant of time money which it should have paid to the plaintiff; but the bank took the responsibility of saying that a payment to Weekly was a payment to the plaintiff. * * * The defendant took up the check and

returned it to the drawer without authority from the owner to do so. This was an interference with plaintiff's property and constitutes a conversion, because, when the bank undertook to return the check to the maker, it exercised ownership over it. * * * This unauthorized act of ownership deprived the plaintiff of the use and possession of the check. Lord Ellenborough, C. J., said: 'It might be a hardship upon the defendant, but that by law a person is guilty of a conversion who intermeddles with my property and disposes of it; and it is no answer that he acted under authority of another who himself had no authority to dispose of it.' *Stephens v. Elwall*, 4 M. & S. 259. * * * The section in the Negotiable Instruments Law, providing that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and that the bank is not liable to the holder unless and until it accepts or certifies the check (section 3098, General Statutes), does not apply. The plaintiff is not suing the bank for breach of a contract in not paying the check. It is suing the bank, because the latter has undertaken to exercise ownership over a check which belonged to the plaintiff without its authority—because the bank had in its possession funds, the proceeds of the check, which it should have paid to the plaintiff, but negligently failed to do so."

In the case of *Thomson v. Gortner*, 73 Md. 474, 21 Atl. 371, the Supreme Court of that state, in discussing the question when trover will lie for the conversion of a promissory note or other negotiable instrument, said:

"It is well-settled law that trover will lie for the conversion of a promissory note or other negotiable instrument, as well as for any other article of personal property. *Winner v. Penniman*, 35 Md. 163; *Brown et al. v. Bokee*, Adm'r, 53 Md. 170."

In *Kansas City Casualty Co. v. Westport Ave. Bank*, 191 Mo. App. 287, 177 S. W. 1092, the court said:

"We concede that there was no privity of contract between the Inter-City Grocery Company and defendant, and hence no right to sue defendant upon a contract existed or was assigned to this plaintiff; and thus we fully recognize the soundness of that class of authority in which *Grocer Co. v. Bank*, supra, has placed the courts of this state. But the present action is not *ex contractu*; it is *ex delicto*. Defendant bank has not contracted to pay the Inter-City Grocery Company the amount of the checks in controversy, but it has wrongfully intermeddled with them to the exclusion and in disregard of the rights of the true owners, and that is a conversion. A conversion is 'any distinct act of dominion wrongfully exerted over one's property, in denial of his right, or inconsistent with it.' 2 *Cooley on Torts*, 859. * * * And the measure of damages is *prima facie* the face value of the paper converted. * * * The grocery company had a choice of remedies; one of them being for the wrong done by defendant. The suggestion is well disposed of in *Salomon v. Bank*, 59 N. Y. Supp. 407, in these words: 'A person or corporation who converts a promissory note or check to his or its own use is liable in damages for the conversion in an amount equal to the amount due on the promissory note or check [citing authorities]. This action is in no sense an action on contract. Undoubtedly, the plaintiffs had a right to sue the makers of the checks, respectively; but they have elected to avoid the burden of bringing 24 suits against the drawers of the checks, respectively, all but one of which suits would be against nonresidents of this state, and they have sued the defendant, and seek to recover as damages the amount of all the checks in one action. A person whose property has been wrongfully converted is not bound to take the same back. He may abandon it from the moment of its conversion, and sue for its value.'"

The cases of *Graton, etc., v. Redelsheimer*, 28 Wash. 370, 68 Pac. 879, *Robinson v. Bank*, 86 N. Y. 404, and *Blum v. Whipple*, 194 Mass.

253, 80 N. E. 501, 13 L. R. A. (N. S.) 211, 120 Am. St. Rep. 553, are very much in point, and sustain the contention of the plaintiff. The South Carolina courts recognize this principle. In the case of *Fogarties & Stillman v. State Bank*, 12 Rich. 518, 78 Am. Dec. 468, the Supreme Court of that state said:

"It is enough if it appears that *ex aequo et bono*, the plaintiffs are entitled, as between the parties to the suit, and to the instrument, to the money. If so, an action lies for money had and received to their use."

[2] It is contended by counsel for defendant that for a number of years Mr. Mordecai had built up a very large practice in the city of Charleston, and had appeared before this court in numbers of cases, and that until the crash came he enjoyed the confidence and acted as attorney and agent for many of the best people of this country, and that plaintiff never limited his authority until this particular case, and that it now seeks to visit upon the Bank of Charleston the consequences of a dereliction in duty of their own agent, who for many years enjoyed their fullest confidence.

This argument cannot avail the defendant. The fact that Mr. Mordecai at one time enjoyed the confidence of the plaintiff, as well as the defendant, under the pleadings of this case, is not material, and could not be considered on a demurrer. It may or may not avail the defendant as a defense to the action, but in no view of the case could we consider the same as having any material bearing upon the question now before us.

[3] It is insisted by counsel that the allegations of the complaint are not sufficient to fully inform defendant as to the transactions referred to therein. In response to this contention, it may be said that the defendant would be entitled under the rule to have the complaint amended as respects this point, if, when the case comes on for trial in the court below, defendant may be so advised.

In none of the cases relied upon by defendant does it appear that the bank at the time of the payment of the check, was aware of the fact that the indorsement was unauthorized. The facts as alleged in the complaint, we think, are sufficient to raise an issue involving the question as to whether the defendant is liable for conversion, which should be submitted to the jury.

For the reasons stated, we are of opinion that the court below erred in overruling the demurrer. The judgment of the lower court is therefore reversed.

ROSE, District Judge (dissenting). I think the difference between the courts as to the liability of a drawee of a check to the payee for an unauthorized payment upon it does not turn upon the form of action. The Supreme Court, as I understand it, holds that the drawee is not liable to the payee for a mispayment due to simple negligence, un-mixed with any element of bad faith. If the allegation in the declaration that the bank knew it had no right to pay the check was unqualified, it would doubtless be good; but the plaintiff was not willing to undertake the burden of proving so much, and so, after the statement that the bank knew, it added "or should have known," and that may amount to nothing more than a charge of carelessness.

THE HERM. THE R. W. McDONALD. THE COASTWISE.*

(Circuit Court of Appeals, Fourth Circuit. April 12, 1920.)

No. 1758.

1. Collision ⚡70—Ordinarily not negligence for moored vessel to extend beyond pier.

It is not negligence for a vessel to extend into the channel beyond the end of the pier to which she is moored, unless it prevents or obstructs navigation, or special circumstances make the position dangerous.

2. Collision ⚡71(3)—Vessel held at fault for mooring with stern projecting into fairway.

A vessel *held at fault* for mooring, at a time when her master knew that drifting ice made it difficult to keep the anchored vessels from dragging, at a pier in such a manner that she projected about 40 feet into the fairway, when anchored barges, liable to be dragged by the drifting ice upon her, were within plain view.

3. Collision ⚡22—Collision after both parties used proper skill to avoid it is "inevitable accident."

A collision is not inevitable merely because it might have happened if all the barges involved had used due care; but "inevitable accident" means a collision which occurs when the parties have endeavored by every means in their power, with due care and caution, and proper display of nautical skill, to prevent the occurrence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inevitable Accident.]

4. Collision ⚡71(2)—Barges which did not drop additional anchor held at fault for collision with moored vessel.

Two barges, which dragged their anchors under the pressure of drifting ice for an hour or more, and which did not drop the extra anchor which each barge had, and one of which was left at a time of danger in charge of an inexperienced seaman, *held at fault* for collision with a vessel moored at a pier, so as to extend into the fairway; but a third barge, which had no extra anchor available, *held not negligent*.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Libel by E. Andersen, as master of the steamship *Herm*, against W. T. Reed, master of the barge *R. W. McDonald*, and others, for damages arising from collision. From a decree holding libellant solely at fault, libellant appeals. Modified, to charge damages equally against libellant and two of the three barges.

Leon T. Seawell, of Norfolk, Va., and Stephen C. Fordham, of New York City (Hughes, Little & Seawell, of Norfolk, Va., and Duncan & Mount and O. D. Duncan, all of New York City, on the brief), for appellant.

Edward R. Baird, Jr., of Norfolk, Va. (Baird & White, of Norfolk, Va., on the brief), for the *R. W. McDonald*.

George W. P. Whip, of Baltimore, Md., and Floyd Hughes, of Norfolk, Va. (Hughes, Vandeventer & Eggleston, of Norfolk, Va., and Lord & Whip and J. Walter Lord, all of Baltimore, Md., on the brief), for Barge No. 19.

Israel A. Washburne, of New York City (Harrington, Bigham &

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied July 10, 1920.

Englar, of New York City, and Harry E. McCoy, of Norfolk, Va., on the brief), for the Coastwise.

Before PRITCHARD and WOODS, Circuit Judges, and WATKINS, District Judge.

WOODS, Circuit Judge. On the evening of January 6, 1918, the Norwegian steamship *Herm* was moored on the north side of the Chesapeake & Ohio coal pier No. 12 at Newport News. Another steamer, moored ahead at the same dock, took up so much space that the *Herm* extended beyond the pier 35 to 40 feet. A Holland steamer, moored on the south side, extended about the same distance beyond the pier. Several days before, at different times, the barges McDonald, Coastwise, and No. 19 had anchored about a quarter of a mile below the pier. Owing to the unusual severity of the weather, the ice in Norfolk harbor for a week or more had been causing vessels to drag their anchors, thus bringing upon mariners much difficulty and anxiety. About 3 or 4 o'clock on the morning of January 7 the three barges began to drag toward the pier at which the *Herm* was moored; the McDonald being nearest the pier, and the Coastwise between the McDonald and the No. 19. Upon reaching the south side of the pier, the McDonald struck the Holland steamer, and immediately after collided with the *Herm*, doing her considerable damage.

The *Herm* libeled the McDonald, alleging negligence in her navigation in several particulars. The McDonald, denying negligence on her part, brought in the Coastwise and the No. 19, alleging that through their negligent navigation she was forced upon the *Herm*. Upon evidence taken by deposition, the District Judge dismissed the libel without a formal opinion, saying in his decree, however, that the *Herm* alone was negligent.

[1, 2] We think the evidence clearly convicts the *Herm* of negligence. It is true that under ordinary circumstances it is not negligent for a vessel to extend into the channel beyond the end of the pier, unless it prevents or obstructs navigation, or other circumstances make the position dangerous. *Chesapeake Steamship Co. v. Frank Hand, Master of British Steamship Hawkhead* (C. C. A.) 266 Fed. 641; *The Wm. M. Hoag* (D. C.) 101 Fed. 846; *The Jason* (D. C.) 257 Fed. 438; *The Johannes*, Fed. Cas. No. 7332, 10 Blatchford, 478; *The Canima* (C. C.) 32 Fed. 302. In this case, however, the master of the *Herm* knew that the ice conditions in the harbor had caused his vessel and many others to drag. Without any emergency requiring it, he left a safe anchorage and moored at a dock, with his vessel extending 35 or 40 feet into the fairway, seeing the three barges a short distance away, unable to control themselves by their own power, and all liable to be dragged helplessly upon him. This seems to us negligent seamanship.

[3] All the barges claim that their participation in the collision was due to inevitable accident. It is true the accident might have happened if all the barges had used due care, but that is not sufficient to make out the defense.

"Inevitable accident, as applied to cases of this description, must be understood to mean 'a collision which occurs when both parties have endeavored by every means in their power, with due care and caution, and proper display of nautical skill, to prevent the occurrence of the accident. The *Locklibo*, 3 W. Rob. 318; The *John Frazer*, 21 How. 184.'" *Union Steamship Co. v. N. Y. & Va. Steamship Co.*, 24 How. 307, 16 L. Ed. 699; The *Mabey*, 81 U. S. (14 Wall.) 204, 20 L. Ed. 881.

While there is conflict in the testimony on the point, it is certain that the three barges, while dragging, came together, and that the pressure of the *Coastwise* and the No. 19 influenced the movement of the *McDonald* and contributed to the collision.

[4] The dangerous ice conditions existing in the harbor for about a week had put the master of every vessel anchored there on notice that his vessel was liable to drag and come in collision with other vessels. Ordinary care required every master thus warned to be ready, and to use all his skill and every available appliance and method to hold his anchorage. So far from discharging this duty, both the master and the mate of the *McDonald* left her in charge of *Dowler*, a comparatively inexperienced seaman about 19 years old, from whom capacity to meet an emergency was not to be expected. Assuming the reason of the master for going ashore to be sufficient, the evidence leaves no doubt that by proper effort he could have returned after the dangerous conditions became manifest. The mate left on the day before the collision, in the midst of the dangerous conditions, to get food. He gave no excuse for not sending for food, and remaining in charge of his vessel. Young *Dowler*, instead of keeping watch, was asleep while the *McDonald* was dragging, until a very short time before the collision. For the one anchor used he had out only 50 fathoms of chain, when he had available at least 110 fathoms. The expert testimony is undisputed that, the longer the chain, the greater the power of the anchor to hold the vessel.

The *McDonald* and the *Coastwise* had two anchors, but no effort was made to use more than one. The masters of the three barges charged with negligence testified that one anchor will hold a vessel against moving ice better than two, for the reason that the anchor chains are apt to get crossed, and that then they will not cut the ice as well as one chain. *Carmichael*, a disinterested expert, testified strongly to the contrary, saying that, if the anchor chains are properly put out, not only will the two anchors hold better, but the two chains will cut the drifting ice more effectively; and *Peterson*, another barge master of experience, testified that, while there was a difference of opinion on the subject, it was better to put down both anchors. The weight of the evidence seems strongly in favor of the use of two anchors.

Assuming doubt, however, on that question, and assuming that there may be conditions of the ice in which one anchor will hold better than two, under the conditions which confronted the masters of the barges, it seems plain that, when they found they could not hold their vessels with one anchor, they should have used two. This was admitted even by the masters of the *McDonald* and the *Coastwise*. The dragging was very slow, and for an hour or more the navigators of the barges had every opportunity to know that they were menacing the *Holland steamer* and the *Herm*. We can see no excuse for failing to try to stop their

vessels by the use of two anchors. The Sapphire, 11 Wall. 164, 170, 20 L. Ed. 127; The Anerly (D. C.) 58 Fed. 794, and authorities cited; The Ciudad De Reus, 185 Fed. 391, 107 C. C. A. 447. This failure to use every means in their power to hold their vessels was negligence on the part of the navigators of the McDonald and the Coastwise. The drift of the ice floes ceased immediately after the collision, and it is highly probable that the use of two anchors would have at least so retarded the movement of the barges that the force of the drift would have been spent before they reached the Herm, and the collision would not have occurred.

The No. 19 must be acquitted of negligence. She had lost an anchor the night before, and had had no opportunity to procure another.

A decree will be entered, charging the damages equally on the Herm, the McDonald, and the Coastwise.

Modified.

SOUTHERN RY. CO. v. MILLER.*

(Circuit Court of Appeals, Fourth Circuit. April 23, 1920.)

No. 1754.

1. Master and servant ⇨286(8)—Negligence in not using insulating shield held question for jury.

Evidence that an employé on a railroad pile driver was required to work within 2½ feet of a highly charged uninsulated wire of an electric block signal system, and that there was on the market a safety device which could have been put over the wire for his protection, *held* sufficient to go to the jury on the issue of the railroad's negligence, though the company was shown to have done all that is customarily done by other railroads in like circumstances.

2. Master and servant ⇨288(5)—Assumption of risk held question for jury.

In an action for the death of a railroad employé, killed by an electric wire touched while working on a pile driver, evidence that he had general knowledge of the danger and received some warning, which was uncertain as to the time of the warning and as to whether it was calculated to give him a real sense of his peril, does not establish assumption of risk as a matter of law.

3. Death ⇨79—Surviving wife, though separated from husband, may recover substantial damages.

A wife, who had separated from her husband soon after their marriage, and had thereafter received no support from him, but who was not divorced, can recover substantial damages for his death.

4. New trial ⇨162(1)—Judgment after remittitur affirmed.

Where, in death action, widow was awarded \$3,500, and child \$7,000, and court, on motion for new trial for excessive recovery, affirmed award as to widow, but reduced award to child to \$3,500, and granted a new trial as to child unless abatement of excess of verdict be filed, judgment entered after filing of abatement affirmed.

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied August 3, 1920.

Action by Alma R. Miller, as administratrix of the estate of E. L. Miller, deceased, against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Certiorari denied 254 U. S. —, 41 Sup. Ct. 15, 65 L. Ed. —.

Thomas B. Gay, of Richmond, Va. (Munford, Hunton, Williams & Anderson, of Richmond, Va., on the brief), for plaintiff in error.

Robert H. Talley and D. C. O'Flaherty, both of Richmond, Va., for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and WATKINS, District Judge.

KNAPP, Circuit Judge. The suit grows out of an accident which happened in this way:

In July, 1917, plaintiff in error, defendant below, was constructing a passing track along the easterly side of its main tracks near Gilbert's Station, Va. The passing track crossed a small stream, which had to be bridged, and this made it necessary to drive a number of piles. The pile driver was mounted on the end of a flat car, which was pushed in from the north on the passing track to the proper point for driving the piles. The apparatus consisted of two metal leads about 42' feet high, between which the piles were hoisted and held in position for driving. The leads could be so moved as to allow piles to be driven at any point on the circumference of a circle around the end of the car. A steel ladder some 10 or 12 inches wide, with rungs about 12 inches apart, extended along the outside of the east lead nearly to its top. In operating the pile driver it was necessary for a man to climb the ladder and place an iron cap or bell on the top of a pile, after it was put in position, so that the heavy weight used for driving, when set in motion, would strike the bell and drive the pile down without injury. Miller, plaintiff's intestate, was engaged in this work when he met his death in the manner presently to be described. He was about 36, a man of intelligence, had been a member of defendant's "bridge gang" for several years, held the position of assistant foreman, and was familiar with the duties of his employment. He was married in December, 1912, but lived with his wife only 3 or 4 months; a child born the following September he had never seen; and at no time had he contributed in any way to the support of wife or child.

The movement of trains on this portion of defendant's road was controlled by an electric block signal system, which had been installed a few months before. In the operation of this system an electric current of some 4,400 volts was transmitted over three uninsulated wires supported by porcelain holders mounted on wooden cross arms affixed to chestnut poles about 200 feet apart. As nearly as we can make out, the line of poles at the point where the accident occurred was east of and a little less than 10 feet from the eastern rail of the passing track; the nearest wire was 23 feet and more above, that is, higher than this rail, and 31 feet from the ground. This signal system is the same as that used by many of the leading railroads of the country; it was not claimed to be defective from improper construction or want of repair.

On the day in question two piles had been safely driven, one after the other, at points further away from the electric wires. The leads were then turned or moved to the proper position for driving a third, nearer the wires, and secured in that position. The third pile was thereupon hoisted between the leads, and Miller went up the ladder, as he had twice before that morning, to put the bell on top of the pile. Some of the men observed him in the act of placing the bell, and just after he had done so, and started down, and one witness testifies that he called out, "All right," or something to that effect. Then for a brief space it appears that no one was looking, and precisely what happened can only be conjectured. A few moments later a peculiar sound was heard, and Miller was seen with his feet on the ladder and the back of his head on the live wire, his body rigid and leaning from the ladder at an angle of about 45 degrees. He died almost immediately.

Witnesses who saw him differ in their estimates of Miller's distance from the wire when he was putting the bell on the pile; one or more of them saying that it was about $2\frac{1}{2}$ feet. It would seem quite as important to know how much clear room he had in which to do his work. Bibb, the foreman, a witness for defendant, says that the ladder was 4 feet 8 inches from the nearest wire, and evidently the distance could not have been greater. Indeed, the fact that Miller's body, in the position and at the angle described, reached from ladder to wire, indicates that they were even closer together. At any rate the margin of safety, so to speak, did not exceed, and was perhaps considerably less, than $4\frac{2}{3}$ feet. To work in a space of such narrow limits was undoubtedly dangerous.

The negligence set up in the declaration, repeated in various forms in the several counts, is in substance that defendant failed to provide Miller with a reasonably safe place for doing his work, in that it required him to work in close proximity to a highly charged wire, contact with which would be fatal, without insulating the wire at that point or otherwise protecting him from danger, and plaintiff asserts that such protection should have been afforded in one or another of the ways mentioned in testimony.

[1] The fact that Miller was put to work in a dangerous place did not of itself show or permit the inference that defendant was negligent. To maintain the suit it was therefore incumbent upon plaintiff to point out some feasible means which defendant might have employed, and reasonably ought to have employed, for safeguarding its employé in the performance of a hazardous task; and the immediate question is whether the evidence in that regard was sufficient to raise an issue of fact for submission to the jury. It is said in the first place, as must be obvious, that these wires might have been rendered harmless by turning off the electric current during the time needed for driving the piles. But this "would result in the suspension of the automatic block system" on that section of the road, as a witness for plaintiff testified, and thus prevent or interrupt the movement of trains. In view of the consequences of stopping the operation of the signal system, we are clearly of opinion, without discussing the

point, that defendant was not required to neutralize the wires by cutting off the current, and that it is not chargeable with negligence for failure to adopt this means of protection.

Again, it is said that the wires could have been temporarily moved to a greater distance from the passing track, and thereby ample space provided for Miller's work. But this method of securing safety was shown to be impracticable, because the wires in question were closely paralleled on the east by the main line of the Postal Telegraph Company carrying numerous through wires between Washington and Atlanta. The existing conditions in this respect are undisputed, and it is enough to say, without going into details, that it was not feasible, and defendant could not reasonably have been expected, to move these wires further away in order to protect Miller from the risk of accident. It must therefore be held that negligence cannot be predicated upon the fact that the wires were not removed.

A third method of protection which might have been adopted, as plaintiff alleges, is described by one of her witnesses, an electrical engineer, as follows:

"Then there can be a protecting device furnished the men, such as, the most feasible, the Marshall line protectors. That is merely a device made of rubber and canvas, which can be placed over the wire, held on by straps on the end, and when that is in place, you may say for any reasonable voltage, I mean except extremely high voltage, that it is a perfectly practically safe protection, and they remain so very satisfactorily. The Marshall shield is a quite commonly used device. * * * I think the Marshall line protector shield has been used in this country, or has been on the market, for about ten years. They started first about 1908, I think. They have been extensively advertised, and I have seen lists prepared—of course, I have no way of knowing how many central stations use them, but I have seen lists of over 100 light companies, and also some railroads, the New York Central, for example, who use them in their work; and I should think it would be a device used among electrical engineers from the amount of advertising they do."

On cross-examination the witness admitted that the ordinary usage of the Marshall shield "is not so much on transmission lines," with which he was not familiar, "as in the more congested distribution centers," and that he "never heard of a man being similarly situated as Mr. Miller was at the time of the accident using one of these devices." Expert witnesses for defendant stated that this shield was used only by skilled electricians working on the charged wires themselves, and not for the protection of persons doing other work in the vicinity of such wires; and one of them also said that the shield could not be used with safety in such a place as Miller was at work, because of its liability from causes mentioned to lose its protective quality.

Was plaintiff entitled, on the proofs above outlined, to go to the jury on the issue of defendant's negligence? The case is exceedingly close on this issue, and no conclusion can be free from doubt; but we are constrained to hold, after painstaking study of the whole record, that the court below did not err in refusing to direct a verdict for defendant. The duty of affording reasonable protection to an employé is measured by the nature and degree of peril to which the employé is exposed. Very much therefore depends, as seems to us, upon the amount of clear space that Miller actually had for doing

his work. If the ladder alongside the lead was nowhere nearer to a charged wire than 4 feet 8 inches, as the foreman testified, it fairly might be said, and perhaps should be held, that he had room enough for belling the pile without serious risk, save from his own gross negligence, and that defendant was not under obligation, in the exercise of reasonable prudence and caution, to save him from the unlikely chance of contact by some method of insulation.

On the other hand, if the proper performance of his task brought his body within $2\frac{1}{2}$ feet of the wire, as the jury may have believed, he was put to work in a place of such extreme and manifest danger as warranted a finding that defendant was negligent in failing to do more than warn him of the risk. In short, we think there was sufficient testimony to furnish a basis for inferring that defendant ought to have protected the wire in some way, and we also think that enough was shown in relation to the Marshall shield to sustain the further finding that this device was a "known and practical way" for safeguarding Miller in the performance of a dangerous task.

It is argued at length and with much earnestness that defendant is shown to have done all that is customarily done in like circumstances and therefore should stand excused. There are two answers to the contention: Evidence of custom is always competent and often highly persuasive, but it cannot be held to be conclusive. The true test, after all, is what would be done by a reasonably prudent employer in the particular situation, and where that situation is peculiar and unusual the rule of custom has but limited application, because the basis for reliable comparison is wanting. In driving these few piles in close proximity to wires of high voltage, defendant was not carrying on a common and familiar occupation, but doing a transient piece of work under exceptional conditions, and the duty it owed to Miller is to be estimated, not by what other railroads do in cases of some general similarity, but by the exigency which it had brought about at that particular time and place. Whilst defendant was not chargeable with negligence for failing to cut off the current or move the wires, it was of course at liberty to make the place safe in either of those ways; but, since it elected not to do so, it may well be held under obligation to resort to some other method of safeguarding its employé; and we are of opinion, as already stated, that there was testimony from which the jury were authorized to find that the insulating shield in question ought to have been utilized for Miller's protection.

[2] It is further argued that Miller assumed the risk, with full knowledge of the danger, and therefore the defendant was without liability. It is true that Miller was a laboring man of intelligence and long familiar with the operation of pile driving; but it appears that he had never until that morning been called upon to do his work in any place which exposed him to the risk of contact with these transmission wires. That he had general knowledge of the danger must be assumed, and that he had some warning is undisputed; but the testimony is rather uncertain as to the time when that warning was given or repeated, and especially as to whether it was calculated to impress him with a real and abiding sense of the peril he was about

to encounter. In short, we are of opinion that the testimony does not warrant us in holding that the defense of assumption of risk was established as matter of law. As the Supreme Court said in *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 504, 34 Sup. Ct. 635, 640 (58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475):

"On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employé. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work."

See, also, the pertinent comments of Judge Learned Hand on contributory negligence and assumption of risk under the Employers' Liability Act (Comp. St. §§ 8657-8665) in the recent case of *Anzolotti v. McAdoo*, Director General (D. C.) 262 Fed. 568.

This in effect disposes of the principal questions raised by defendant, and sufficiently answers the argument based on exceptions to instructions to the jury, both those given and those refused. To take up these numerous exceptions would unduly extend this opinion and serve no useful purpose. We therefore content ourselves with saying that they have been carefully examined and found not to involve reversible error.

[3] The court was asked to rule that only nominal damages could be recovered, because Miller and his wife had separated soon after their marriage, and he had not thereafter contributed to her support. But there had been no divorce, and nothing appears to show that she might not at any time have enforced her conjugal rights under the laws of Virginia. This being so, she was entitled to substantial damages, if the jury found in her favor, as seems to be plainly held by the Supreme Court in *New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367, 372, 38 Sup. Ct. 535, 62 L. Ed. 1167.

[4] The jury returned a verdict in favor of plaintiff for \$10,000, and directed that \$3,000 thereof be paid to the widow and \$7,000 to the infant child. On motion for a new trial the court cut down the verdict in favor of the child to \$3,500, and ordered that judgment be entered "in favor of the widow for the amount of the verdict, \$3,000, and for the child in the sum of \$3,500 upon condition that an abatement to that amount will be assented to; if not as to the child, the verdict will be set aside." Such an abatement was filed in due form and judgment entered accordingly. This is assigned as error. It is sufficient to say that affirmance of the judgment eliminates the question.

Affirmed.

TWIN FALLS SALMON RIVER LAND & WATER CO. v. DAVIS et al.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1920.)

No. 3476.

1. Waters and water courses ⇨222—Carey Act gives no lien on lands for which there is not sufficient water.

Under Act June 11, 1896, c. 420, modifying the original Carey Act Aug. 18, 1894, c. 301, § 4 (Comp. St. § 4685), and authorizing the state to create a lien against the land reclaimed for the actual cost and expenses of reclamation, and Rev. Codes Idaho, § 1629, giving a company furnishing water a first lien on the land, a company which constructed under contract with the state an irrigation system to water lands withdrawn under the Carey Act acquired a lien on such lands only to the extent that the available water supply was sufficient to reclaim them.

2. Waters and water courses ⇨222—Sufficiency of water for land under Carey Act finally decided by General Land Office.

The determination of the quantity of land which may be irrigated from the water supplied under a Carey Act project is a question of fact, on which the determination of the General Land Office is conclusive on the courts, so that the relinquishment of reserved land in excess of the amount which can be irrigated cannot be restrained in a suit by the corporation constructing the project.

3. Waters and water courses ⇨222—Approval of project does not estop state from relinquishing lands in excess of quantity supplied with water.

The approval of the Carey Act project by the state engineer, under Rev. Codes Idaho, § 1618, which requires the engineer to determine whether there is sufficient water, does not estop the state from thereafter relinquishing land in excess of that for which water was supplied, since the construction company did not act on the engineer's representation, but determined the supply of water for themselves in their application, and therefore the action of the state land board and the Secretary of the Interior in approving the withdrawal of the quantity of land stated did not give the construction company a lien on the total quantity.

Appeal from the District Court of the United States for the Southern Division of the District of Idaho.

Suit by the Twin Falls Salmon River Land & Water Company against D. W. Davis and others. From a decree dismissing the complaint (260 Fed. 270), plaintiff appeals. Affirmed.

This is an appeal from a decree dismissing the complaint. Plaintiff, appellant here, a corporation formed under the Carey Act, and its assignors, under contract with the state of Idaho, constructed what is known as the Salmon River Carey Act project. The statutes of the United States which have to do with Carey Act projects are 28 Stat. 372, 422, c. 301, § 4 (Comp. St. § 4685); 29 Stat. 414, 434; 31 Stat. 1133, 1188, c. 853, § 3 (Comp. St. § 4687); Resolution May 25, 1908, No. 28, 35 Stat. 577 (Comp. St. § 4688); 35 Stat. 347; and the sections of the Revised Codes of Idaho which relate to the projects are 149, 150, 1558, 1613, up to and inclusive of section 1634. Features of the contract involved here and the construction of the irrigating system are more fully explained in *Twin Falls Salmon River Land & Water Co. et al. v. Caldwell et al.*, 242 Fed. 177, 155 C. C. A. 17, and in *Twin Falls Salmon River Land & Water Co. et al. v. Caldwell et al.*, 30 Idaho, 41, 190 Pac. 220. The defendants represent the state of Idaho in public matters pertaining to Carey Act projects. The commissioner of reclamation was substituted for the state land board by virtue of section 44, chapter 8, page 67 of the 1919 Session Laws of Idaho.

The complaint with much detail alleges that in 1911 the plaintiff substantially completed the project and fulfilled its contract of 1908, but that the defendants have unreasonably neglected to approve the work or to accept the system, and will not act in the premises, but have harassed plaintiff and delayed and are encouraging settlers to refuse payments under their contracts for water rights. The original contract contemplated irrigation of approximately 150,000 acres. Before the contract was entered into the state board caused an examination to be made by the state engineer of available water supply for the project. The state engineer reported a water supply that was adequate, and the land board approved this report. Plaintiff alleged that it relied upon the report of the state engineer when it made the construction contract, but that after bond had been given for the construction of the works, and work had been commenced, the board concluded that the water supply was much below the reported quantity, and plaintiff was directed to limit the sale of water rights in the system to about 75,000 acres. Plaintiff alleged that this operated to deprive plaintiff of the right to sell water for upwards of 75,000 acres, without provision being made for any increase in the price of water for the smaller acreage, or for reimbursing plaintiff for loss on account of the reduction of the project. It is also alleged that the project was further reduced until about the time of the trial, when there were outstanding water contracts with settlers for some 60,283 acres, and that the price as originally fixed for the entire acreage was \$40 per acre, payable in installments extending over a period of 11 years, although appellant had expended in construction more than \$3,500,000, relying upon the report of the state engineer and the approval thereof by the state board, and the provisions of the contract with the state board that the irrigable acreage was 150,000 acres. By supplemental complaint, filed in 1918, plaintiff alleges that defendants intend to apply for patent for about 35,000 acres of land included within the project, and to relinquish approximately 20,000 acres for which plaintiff has sold water rights, and upon which plaintiff claims liens to secure the payment of the purchase price of the lands. The prayer is for injunction against such relinquishment, or any act that could impair plaintiff's lien.

The answer admits the proposed relinquishment of about 25,000 acres of segregated lands, denies that water rights have been sold for all of the acreage proposed to be relinquished, denies any lien in favor of plaintiff, and alleges that the Commissioner of the General Land Office of the United States, in company with the state land board, examined the project for the purpose of arriving at a determination as to what action should be taken with reference to it, and that in October, 1917, the Commissioner submitted a communication to the land board, stating in effect that the then present available water supply was sufficient to irrigate 34,600 acres, which could be slightly increased by certain modifications, and advising the board to contract the project to approximately 35,000 acres. Defendants deny that the lands were all filed upon or paid for, deny reclamation, and plead that any action taken by defendants was in pursuance of the direction of the Commissioner of the General Land Office, that determination had not been made as to what particular lands should be relinquished, and that defendants were having an examination made and a report as to what lands should be retained, and for which water was available, and that before the adoption of any report the settlers, under the system, would have an opportunity to appear and show cause why the plaintiff's proposed plan should not be adopted, and that March 12, 1918, was fixed as the date for hearing.

Evidence, principally records, was offered by plaintiff. Defendants introduced no evidence, except the minutes of the meeting of the board of land commissioners held October 18, 1917, whereat a communication from the Commissioner of the General Land Office was read to the board and adopted, and a resolution was adopted by the board in conformity with the communication. The substance of the resolution was that the total irrigable acres in the project should not exceed 35,000 irrigable acres, and the state board should not apply to the United States government for patent to lands within

the project, which added to any lands already patented, or state lands theretofore sold, or desert entries remaining within the project, which would make a total acreage receiving water from the system, and within the project, of over 35,000 acres. The resolution further provided that the state board should proceed and adjust the Twin Falls project and the Oakley project in accord with the recommendations of the Commissioner of the General Land Office and the resolution previously passed by the board.

Richards & Haga, of Boise, Idaho, for appellant.

Roy L. Black, Atty. Gen., of Idaho, and Dean Driscoll, First Asst. Atty. Gen., of Idaho, for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The appellant's argument has led it to state the following conclusions: (1) That the approval of the water supply by the state engineer and the state land board before the project was undertaken is binding upon the state, and that the defendants, appellees, cannot relinquish to the United States the lands in question after plaintiff has constructed the works for the reclamation in accordance with its contract with the state. (2) That the approval of the water supply and the feasibility of the project by the Secretary of the Interior at the time the lands were segregated for reclamation under the Carey Act cannot be affected or modified, after the works have been constructed and the lands entered and are occupied by settlers who have made improvements thereon. (3) That the appellant, having constructed the works as required by the contract, has a lien upon the lands, and that such lien is vested, not to be disturbed by the authorities of the state or of the United States.

Examination of chapter 301 (28 Stat. 422, § 4), approved August 18, 1894, will aid in a better comprehension of the underlying purposes of the Carey Act. It was therein provided:

"That to aid the public land states in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior, with the approval of the President, be and hereby is authorized and empowered, upon proper application of the state, to contract and agree * * * with each of the states in which there may be situated desert lands, * * * binding the United States to donate, grant and patent to the state, free of cost for survey or price, such desert lands, not exceeding 1,000,000 acres of land in each state, as the state may cause to be irrigated, reclaimed [and] occupied, and not less than twenty acres of each one hundred and sixty acre tract cultivated by actual settlers, within ten years next after the passage of this act, as thoroughly as is required of citizens who may enter under the said desert land law."

Further provision is that before any application is allowed, or agreement is executed, or segregation is made, the state must file a map of the lands proposed to be irrigated, showing the plan of the contemplated irrigation, the plan to be sufficient to "thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops." The Secretary of the Interior, in the event of his approval, is directed to reserve the land from the date of filing the plans, and the state is authorized by the act of Congress to make contracts and cause the lands "to be reclaimed, and to induce their set-

tlement and cultivation in accordance with the subject of the provision of this section," but the state is not authorized to lease any of the lands, or to use or dispose of them in any manner, except to secure their "reclamation, cultivation and settlement." The act provides also that, as fast as the state shall furnish satisfactory proof that any of the lands are irrigated, reclaimed, and occupied by actual settlers, patents shall issue to the state for such lands. By Act June 11, 1896, c. 420, 29 Stat. 434, Congress modified the original act and provided that a lien might be created by the state to which lands are granted, and when created should be valid on and against the separate legal subdivisions of land reclaimed for the actual cost and expenses of reclamation and interest thereon from the date of reclamation until disposed of to actual settlers, "and when an ample supply of water is actually furnished in a substantial ditch or canal * * * to reclaim a particular tract or tracts of such lands, then patent shall issue for the same to such state without regard to settlement or cultivation."

By legislation heretofore referred to, the state of Idaho, after accepting the provisions of the acts of Congress, provided (section 1615) that any one who desired to undertake the construction of irrigation works to reclaim land under the provisions of the Carey Act should file with the state board "a request for the selection, on behalf of the state, by the board, of the land to be reclaimed, designating said land by legal subdivisions." This request must be accompanied by proposal to construct works "necessary for the complete reclamation of the lands asked to be selected," and must be accompanied by a certificate of the state engineer "that application for permit to appropriate water has been filed." There shall also be given definite information as to the source of the water supply, location and character of the proposed works, estimated cost thereof, price per acre at which water rights are to be sold to settlers, name of the company, amount of capital, and other facts. The request and proposal must then be referred to the state engineer (section 1618), who must examine it and make a written report, stating whether or not the proposed works are feasible, and whether the work will be beneficial to the public interests, whether there is sufficient water unappropriated from the source of supply, whether he approves the permit, whether the capacity of the proposed works is adequate to reclaim the lands described, whether the cost of construction is reasonable, whether the lands are desert in character, and whether application is made under the provisions of the act of Congress and the rules and regulations of the Department of the Interior. If the state engineer should disapprove, the board could not approve; but if that official approved of the request and proposal, upon approval by the board that body should proceed to file in the local land office a request for the withdrawal of the lands described in the proposal (section 1619).

Upon withdrawal of the lands by the Department of the Interior, it becomes the duty of the board to make a contract with the parties who submitted the proposal (section 1621), the contract not to be entered into on the part of the state until the withdrawal of the lands

by the Interior Department and the filing of a satisfactory bond by the contractor. After withdrawal of the lands for the state by the Interior Department, and the inauguration of work by the contractor, the board is authorized to give notice that the land, or any part thereof, as the board may deem best, is open for settlement at a price under which settlers can purchase water rights or shares (section 1625). It is provided by section 1626 what the qualifications of applicants may be, and how they shall make application. By section 1628 the time within which proof may be made is provided for. In making final proof the settler shall furnish evidence of reclamation, settlement, and occupation, of the shares he may have in the works which entitle him to a water right for his entire tract "sufficient in volume for the complete irrigation and reclamation thereof," and that he has cultivated and irrigated not less than one-eighth part of the tract he is seeking to prove up on. After proofs in due form have been received by the board and final payment is made, the settler shall be entitled to his patent; but if the land shall not be embraced within any patent theretofore issued to the state by the United States, the proofs are to be forwarded to the Secretary of the Interior, with a request that a patent to the lands be issued to the state. It is also provided (section 1628) that when the works shall be so far completed as to "actually furnish an ample supply of water" to reclaim any particular tract, the state, through the board, shall make proof of such fact and apply for patent, as might be provided by the regulations of the Interior Department.

By section 1629, when patent is issued to any land by the United States to the state, the settler is to be notified, and the board is directed to issue a patent from the state to the settler. By section 3018, Comp. Stat. Idaho, water rights to lands acquired under the Carey Act shall attach to and become appurtenant to the land as soon as title passes from the United States to the state, and any company furnishing water for any tract shall have a first and prior lien on the water right and land upon which the water is used for all deferred payments for said water right. The lien shall remain effective until the last deferred payment for the water right is paid and satisfied according to the terms of the contract. Section 3019.

In accordance with the requirements of the statutes just referred to, the state board referred the application of the predecessors of the appellant to the state engineer, who upon the same day reported favorably under date of August 12, 1907, and thereafter, upon application to the United States for the segregation of the lands, order of segregation was granted and contract made for construction. The provisions of the contract call for completion, for the sale of shares of water rights to persons filing, for the transfer of ownership and control of the system to the settlers, and on the part of the state it was agreed that the lands would be thrown open for settlement, and that sale should be made to applicants at 50 cents per acre. In the contract the authorized capital stock of the corporation is fixed at 150,000 shares, intended to represent one share for each acre of land irrigated from the proposed canal. The works were completed, but,

instead of having a water supply capable of irrigating 150,000 acres, there is not more than enough to irrigate 35,000 acres; that is, the state board has so found. The proper authorities of the state, by formal order on January 2, 1920, accepted the works as completed with certain minor exceptions, subject, however, "to such obligation or obligations of said Twin Falls Salmon River Land & Water Company as may exist thereunder in said state contract or settlers' contracts, by reason of the alleged insufficiency of water supply."

With the foregoing statement of fact and citation of statutory authority, we are to consider the following case: The project, as shown by the complaint, was created to irrigate 150,000 acres, but thereafter by mutual agreement was constructed to irrigate approximately 60,000 acres, for which quantity of land water rights were sold. Appellees assert that water is only available for about 35,000 acres, and therefore that the project should be contracted to such smaller area. Accordingly the state authorities intend to relinquish 25,000 acres to the United States. Plaintiff objects to such contemplated act, and takes the position heretofore stated.

[1] The particular injury which plaintiff alleges is that the officers of the state propose to relinquish certain lands which have been segregated; the purpose being to restore such lands to the authority of the United States. Inasmuch as the only interest which the appellant corporation has in such lands is the lien which it urges exists in its favor as security for the purchase price of rights to the use of water which it may furnish to users, we inquire whether or not there is such a lien at all in its favor. Reverting to the statute (heretofore cited) which creates a lien, we find that a lien shall be valid against the separate legal subdivisions of lands "reclaimed" for cost of expenses "of reclamation" and interest "from the date of reclamation" until disposed of to the actual settlers. No lien is created against lands which may be, but are not, reclaimed. Again, the statute expressly provides that, when "an ample supply of water is actually furnished" in a ditch or canal or reservoir "to reclaim a particular tract or tracts of such lands," then patents shall issue for the same to such state, without regard to settlement or cultivation. Without an ample supply of water, not to be estimated or furnished at some future time, but actually furnished, no patent can lawfully issue to the state. The legislation of the state is in harmony with this view. In section 1629, Idaho Code, it is provided that any company, "furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used," etc.

Again, by Act March 3, 1901, c. 853, 31 Stat. 1188, Congress provided that in the event of a failure by the state, within 10 years after segregation, to cause the lands segregated to be "irrigated and reclaimed," the Secretary of the Interior may, in his discretion, continue the segregation, not to exceed 5 years, "or restore the land to the public domain." This authority vested in the Secretary of the Interior to use his discretion either to continue the segregation, not to exceed 5 years, or to "restore" the land to the public domain, greatly helps to gather the true meaning of the congressional act, for it is

most improbable that it was intended that a power to restore land to the public domain, in the event of failure on the part of a construction company to cause lands to be irrigated and reclaimed, should be used if, by reason of the construction of the works, a lien was vested in the construction company. It would give rise to confusion to restore subject to the lien; while, if there could be no restoration, the statute would be meaningless.

In *Adams v. Twin Falls Oakley Land & Water Co.*, 29 Idaho, 357, 161 Pac. 322, decided in 1916 by the Supreme Court of Idaho, the court analyzed the Carey Act in respect to the creation of a lien to insure to the construction company a return of the initial cost of construction and a reasonable profit on the investment, and after stating that there was a lien on the land itself, which attached when the necessary proof shall have been made by the entryman and patent issued to the state, and a conveyance passed by the state to the entryman, said:

"The existence of this lien depends primarily upon the completion of the construction works and the delivery of water through the works by the construction company as stipulated in its contracts with both the state and the entryman."

In the earlier case of *Childs v. Neitzel*, 26 Idaho, 116, 141 Pac. 77, decided in 1914, the same learned court regarded the lien to be created by the state upon such lands as are granted to the state under the Carey Act, and as provided for by the amendment approved June 11, 1896, as valid on and against the separate legal subdivisions of land reclaimed. The court said:

"That provision for a lien contemplates an ample supply of water shall have been actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim such land in order to create a lien."

Again, in *Idaho Irrigation Co., Ltd., v. Pew et al.*, 26 Idaho, 272, 141 Pac. 1099, the court, through Judge Ailshie, speaking in respect to the lien against a single purchaser of water right under the Carey Act, said:

"The essential thing that concerns the particular landowner and purchaser of a water right is whether or not the reservoir and main canal have been so far completed as to enable the company to regularly and permanently supply him with water for the irrigation of his land, and that the company has commenced and continues to do so."

The court also held that the statute implied that the issuance of patent for any one tract is not dependent on the completion of the whole reclamation system, but on the "actual furnishing of a permanent supply of water to that particular tract." That there must be an actual furnishing of an ample supply of water to reclaim is further evidenced by section 1628 of the Idaho Code, where it is provided that, when the works designated shall be so far completed as to actually furnish "an ample supply of water in a substantial ditch or canal to reclaim," etc., the state, through the board, shall make proof and apply for a patent. In *McKinney v. Big Horn Basin Development Co.*, 167 Fed. 770, 93 C. C. A. 258, the Court of Appeals for the Eighth Circuit, in writing of the Carey Act, held that the

law did not make the grant to the state of the lands in mass to take effect in praesenti, and said:

"The state was first to furnish satisfactory evidence to the Secretary of the Interior that the lands are irrigated, reclaimed, and occupied by actual settlers before any patent therefor should issue."

Now, if it be a fact, and we must take it to be a fact from the pleadings herein, that there has not been an ample supply of water actually furnished for the reclamation of large tracts of the land embraced in the project, and there has been no actual reclamation, it follows that the appellant company has not been injured, and is not, therefore, in a position to maintain the suit against the officials of the state.

[2] But what authority is to decide whether or not the lands have been reclaimed? Clearly determination of the question is one of fact intrusted under the law to the General Land Office, and not to the courts. In *Twin Falls Salmon River Land & Water Co. v. Caldwell*, 242 Fed. 193, 155 C. C. A. 17, the point was involved, and we held that whether or not there was a supply of water such as is required by the statute is a pure question of fact, and one for the exclusive determination by the Land Department. To that opinion we now adhere; hence it must follow that if there has been a decision to the effect that there has been no reclamation, the courts will not interfere, and cannot hold that a lien exists. *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62. In this connection it is evident that the officials of the Land Department of the United States are now proceeding upon the basis that the water supply is only sufficient to reclaim approximately 35,000 acres, which is very much less than those first interested contemplated. The situation was referred to by the Governor of the state in 1916 in a report to the board, as follows:

"By some miscalculation or through unavoidable circumstances there was a larger segregation of land made than it is possible to irrigate from the run-off waters of the Salmon river."

And the board made a finding that the water supply was inadequate to irrigate land in excess of 40,000 acres, as evidenced by the report of the Commissioner of the General Land Office, and that 2.26 acre feet is the highest possible duty of water that can be advantageously employed on the project.

[3] We are of the opinion that the officials of the state are not bound by principle of estoppel merely because, when the original application for segregation was made by plaintiff's predecessors, the state engineer (in 1907) reported to the state board that the supply of water was adequate and that the project was feasible. The application then made by plaintiff's assignors contained the statement that 150,000 acres could be irrigated under the projected scheme. Evidently they were in error in the very initial step they took. The board, for its information, referred the proposal to the state engineer; but the report of that official cannot be held to have been information upon which plaintiff entered into the contract. The state of Idaho made no representations to the original projectors in reliance upon which they were induced to enter upon a project pursuant to the Carey Act. The record shows that certain individuals made a written

proposal to the state land board, and set forth that they had been engaged in surveying and estimating upon the Salmon river project, and wished to build irrigation works to cover and irrigate and make the lands fit for agriculture. They asked the board to have the land segregated, and stated that, if their application were approved, they would have a corporation formed to undertake the work. In due course their proposal was accepted, and then they, or their assignee, this plaintiff, became bound.

We cannot see that, by action of the state land board and the Secretary of the Interior in approval of the original project, rights became vested in the appellant, and precluded inquiry into the ultimate fact of reclamation when application was made for patent, and, as incidental to the investigation, into the amount of water required to reclaim.

The District Court refrained from ruling upon the question of the power of the state board or of the Secretary of the Interior, over the objection of settlers upon excluded lands, to reduce the area of the project in the manner proposed, and until that question directly arises it should not be decided. But we do affirm the view that the right of lien of the appellant only reaches to the acreage for which it furnishes an ample quantity of water, and that under the showing made it is not entitled to equitable relief.

Affirmed.

COUNCIL OF DEFENSE OF STATE OF NEW MEXICO et al. v. INTERNATIONAL MAGAZINE CO.

(Circuit Court of Appeals, Eighth Circuit. May 24, 1920.)

No. 5254.

1. Courts ⇨101—Preliminary injunction suit not within requirement of hearing by three judges; "suit to restrain enforcement or operation of state statute."

A suit against a state council of defense and its members, to enjoin acts alleged to be outside of and beyond the powers conferred on them by the statute creating such council, *held* not one to restrain the enforcement or operation of a state statute, within the meaning of Judicial Code, § 266 (Comp. St. § 1243), requiring an application for preliminary injunction in such case to be heard and determined by three judges.

2. War ⇨4—Action by state council of defense not action by Governor.

That proposed action by a state council of defense was made known to and approved by the Governor, before it was taken, *held* not to render such action that of the Governor in the exercise of special war powers conferred on him by statute.

3. Equity ⇨65(3)—Corporation not subject to defense of unclean hands because of acts of stockholder.

A claim that a corporation complainant comes into court with unclean hands cannot be predicated on acts of a stockholder, unconnected with any action by the corporation.

4. Monopolies ⇨17(1)—Unlawful interference with interstate trade in magazines.

The action of the state council of defense of New Mexico, not authorized by anything in the statute creating it, in appealing through a paper pub-

lished by its authority to newsdealers and citizens of the state not to sell or read magazines published by complainant corporation in New York and sent into the state for sale by newsdealers under contracts, and in otherwise inducing such newsdealers to cancel their contracts and refuse to handle complainant's magazines, *held* an unlawful interference with interstate commerce, in violation of the Sherman Act, not justified on the ground that the majority stockholder of complainant, through newspapers owned or controlled by him, was expressing disloyal and pro-German sentiments, calculated to interfere with successful prosecution of the war; no claim being made that complainant's magazines contained objectionable matter.

Appeal from the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Suit in equity by International Magazine Company against the Council of Defense of the State of New Mexico and others. Defendants appeal from an order granting a preliminary injunction. Affirmed.

James M. Hervey, of Roswell, N. M., and A. B. Renehan, of Santa Fé, N. M., for appellants.

Francis C. Wilson, of Santa Fé, N. M., for appellee.

Before CARLAND and STONE, Circuit Judges, and AMIDON, District Judge.

STONE, Circuit Judge. This is an appeal by various individuals, who were the Governor and Attorney General of the state of New Mexico, and members, officials, or agents of the Councils of Defense of the state and of Bernalillo county, from a preliminary order enjoining them from interfering with the sale and distribution in New Mexico of magazines published and sold by appellee, the International Magazine Company. The importance and character of the issues necessitate a full statement of the controversy, which may be gained from the complaint and a portion of the statement of the case by appellants. The complaint is as follows:

"International Magazine Company, a corporation duly organized and existing under the laws of the state of New York, having its principal office and place of business in the city of New York, in said state, and a resident and citizen of the state of New York, brings this bill against the Council of Defense of the State of New Mexico, organized and existing under the laws of the state of New Mexico, Secundino Romero, W. A. Hawkins, C. R. Brice, J. M. Sully, Eufrazio Gallegos, Charles Springer, B. C. Hernandez, Eduardo M. Otero, Walter M. Danburg, Guthrie Smith, Alfred Grunsfeld, Max Nordhaus, Jesus Romero, Nestor Montoya, Rafael Garcia, W. C. Oestreich, W. C. Reid, A. B. McMillen, P. G. Redington, L. A. McRae, Felix Baca, H. E. Rogers, the Council of Defense of the County of Bernalillo, W. E. Lindsey, and Harry L. Patton, all of them being residents and citizens of the state of New Mexico.

"(1) And thereupon your orator complains and says that it is, and for some years last past has been, a corporation duly organized, created, and established by and under the laws of the state of New York, for the purpose of carrying on the business of owning, publishing, editing, preparing, and selling magazines, and is now, and has been at all times material hereto, the owner and publisher of certain magazines of general circulation throughout the United States and the state of New Mexico, known to the reading public, and owned, printed, and published by your orator under certain names registered under the trade-mark laws of the United States of America, as follows, to wit: Hearst's, Cosmopolitan, Good Housekeeping, Harper's Bazaar, Motor,

Motor Boating, and Puck—each of which magazines is printed, published, and prepared for sale monthly by your orator in the city and state of New York, and through its general agents in all the large cities of the United States, including Los Angeles, Cal., distributed and sold to local dealers throughout the state of New Mexico, and by them sold and distributed to the trade in said state; and your orator further alleges and shows that prior to the commission of the acts hereinafter complained of your orator enjoyed a large and lucrative sale of said magazines throughout the said state of New Mexico, which was of increasing value to it by virtue of a growing subscription list and an annual increase in sales by newsdealers throughout the state, whereby the right at all times material hereto, and in the future, of unrestricted access to the markets of New Mexico, and the right to sell its product in the ordinary course of trade and business and through the usual channels in said state, in fair and untrammelled competition with products of a similar or of the same character, is of great value to your orator, to wit, of a value far in excess of \$3,000, and that the loss and damage, both past and prospective, to your orator, by reason of the acts of the defendants herein complained of, is not less, and in truth and in fact is far in excess of, said amount.

"(2) Your orator further gives your honor to be informed that the defendant the Council of Defense of the State of New Mexico was created by an extraordinary session of the Legislature of the said state of 1917, by an act of the said Legislature approved May 8, 1917, entitled 'An act to provide for the public defense,' the pertinent provisions of which, relating to the creation of the said State Council of Defense, being as follows, to wit:

"There is hereby created a council to be known as the Council of Defense of the State of New Mexico, consisting of nine (9) members, to be appointed by the Governor by and with the advice and consent of the Senate, who shall serve during the time of the present war, and for such further time thereafter as the Governor may deem necessary. The Governor shall have power to fill any vacancy that may occur on such council by the death, resignation, or inability to serve of any member thereof, and may remove any member for cause and appoint some person to fill such vacancy.

"Said council shall hold its meetings at the city of Santa Fé, or at such other place or places as it may deem necessary, and a majority of the council shall constitute a quorum to do business, and the affirmative vote of a majority of such quorum shall be required and shall be sufficient to adopt or pass any motion or resolution authorizing or directing any act or thing within the power of the council. Any number less than a quorum may meet and adjourn from day to day until a quorum be present. The council may determine the rules of its procedure, and with the approval of the Governor, may make any and all regulations necessary for the carrying out of the provisions of this act.

"The council, as soon as it is organized, shall communicate at once with the National Council of Defense, and offer its co-operation and state that it is organized and is ready to receive information and to carry out within the state of New Mexico such plans as will mutually be agreed upon for the defense of the nation, and shall, in every way possible, co-operate with such National Council of Defense. It shall get into communication with defense bodies representing other states and shall co-operate with them as far as may be practicable.

"The council, after consultation with the National Council of Defense, shall gather at once through its committees or otherwise, statistics, facts and other information found necessary, and shall arrange them in an orderly and accessible manner. They shall supervise and direct investigations and make recommendations to the Governor and to the Legislature.

"The members of the council shall be paid five dollars (\$5.00) per day and necessary traveling expenses for the time they are actually engaged in the performance of their duties as members of such council, to be paid out of the state war fund. The council shall cause to be kept an accurate record or journal of its proceedings, and the original thereof shall be filed with the secretary of state at the termination of the term of service of the said council.'

(267 F.)

"That pursuant to the provisions of said act the defendants Secundino Romero, W. A. Hawkins, C. R. Brice, J. M. Sully, Eufracio Gallegos, Charles Springer, B. C. Hernandez, and Eduardo M. Otero were duly appointed by the Governor, and their appointments confirmed by the Senate of the state of New Mexico, as members of the said Council of Defense of the State of New Mexico, and said defendants are now, and at all times material hereto were, members of said council; that the defendant Walter M. Danburg is general secretary of said Council of Defense, and defendant Guthrie Smith is, and was at all times material hereto, the publicity agent thereof, and editor of a weekly newspaper known as the 'New Mexico War News,' which was at all times material hereto and now is printed, published, issued, and distributed throughout the state of New Mexico by the said Council of Defense in the manner hereinafter set forth; that the Council of Defense of Bernalillo County is an organization, the members of which are selected by the State Council of Defense and appointed by said W. E. Lindsay, as governor of New Mexico, from residence of Bernalillo county, and organized for the purpose of co-operating with the State Council of Defense in promoting patriotism and the purposes of the government of the United States in the prosecution of the war with the Central Powers; that the defendants Alfred Grunsfeld, Max Nordhaus, Jesus Romero, Nestor Montoya, Rafael Garcia, W. C. Oestreich, W. C. Reid, A. B. McMillen, P. G. Redington, L. A. McRae, Felix Baca, and H. E. Rogers are, and were at all times material hereto, members of said organization appointed by the Governor as aforesaid; that the defendant Washington E. Lindsey is the duly elected and acting Governor of the state of New Mexico, and as such chief executive of said state has, under and by virtue of the said act of New Mexico Legislature, the power of appointment and removal of members of said council, and supervisory and advisory powers over the acts, matters, and things done by said Council of Defense; and the defendant Harry L. Patton is the duly elected and acting Attorney General of said state, and as such head of the legal department of said state.

"(3) And your orator gives your honor further to be informed that certain of the individual defendants, to wit, Secundino Romero, W. A. Hawkins, C. R. Brice, J. M. Sully, Eufracio Gallegos, Charles Springer, B. C. Hernandez, and Eduardo M. Otero, as members of the said Council of Defense in New Mexico, have created an executive committee, composed of the said defendants Charles Springer, B. C. Hernandez, and C. R. Brice, which said executive committee, in the name and by authority of said Council of Defense, directly supervises, controls, edits, publishes, and issues the said weekly paper known as 'New Mexico War News,' which is now, and has been at all times material hereto, circulated free of charge generally throughout the state of New Mexico, and is widely read as the official medium of the said Council of Defense, and as such medium has great weight and authority with the people of New Mexico upon all questions relating to the war and war measures, and affords a ready, convenient, powerful, and effective vehicle and instrument for the dissemination of publicity concerning the war and war measures.

"(4) Your orator further informs your honor that it is informed and believes, and accordingly so alleges the fact to be, that the defendants Secundino Romero, W. A. Hawkins, J. M. Sully, Eufracio Gallegos, Charles Springer, B. C. Hernandez, Eduardo M. Otero, Washington E. Lindsey, Guthrie Smith, Walter M. Danburg, Harry L. Patton, and many other persons whose names are to your orator unknown, combining and confederating together, engaged, and are now engaged, and threaten to continue to engage, in a scheme and an effort to unite all of the newsdealers, county councils of defense, community councils of defense, and social organizations in the state of New Mexico in a movement or combination and confederacy with said defendants to boycott and prevent the sale and distribution of the magazines of your orator throughout the state in any manner whatsoever, and to interfere with, prevent, restrict, and restrain the free access of your orator to the markets of New Mexico for its said magazines, and the sale and distribution of the same through the ordinary, usual, and customary channels employed by it and its competitors in said state, and to utterly destroy its trade, business, and commerce in said

state, and to prevent it from carrying out and performing its contracts with said newsdealers, and in furtherance of and to achieve the said scheme and purpose the said defendants did the several acts hereinafter stated, either by themselves or their agents, by them thereto fully authorized.

"(5) That the said defendant C. R. Brice had no part in the action of the said defendants named in the preceding paragraph, and had no knowledge of the proposed purpose and intent of the said combination and confederation, until the issue of said New Mexico War News of June 6, 1918, and upon becoming acquainted with the same utterly disclaimed any support of said scheme and purpose, and condemned the same in vigorous terms in a written communication to said defendant Washington E. Lindsey, as Governor of said state, and advising the immediate cessation of the purpose of said combination, condemning the effort as illegal, unlawful, un-American, and wholly unjustifiable; and your orator gives your honor to be informed that, in case the acts of such of the defendants as are members of said Council of Defense of New Mexico should be held to be without authority in law or otherwise, and not binding upon the said Brice as a member thereof, that it is the desire and purpose of your orator to dismiss this proceeding as to the said defendant C. R. Brice.

"(6) On or about June 6, 1918, and thereafter upon dates hereinafter set forth, the said defendants named in the second preceding paragraph, individually and collectively, and as members of said combination and confederation, in furtherance of their general scheme and purpose, announced their purpose and intent as hereinbefore alleged, and caused the same to be printed, published, and circulated in said New Mexico War News in the issue of June 6, 1918, as follows, to wit:

"Another Roll of Honor.

Zook's Pharmacy
Weltmer & Burrows
Capital Pharmacy
All of Santa Fé

"These companies, composed of New Mexicans who assay 100 per cent. in Americanism, have declared that they will not sell any more Hearst publications, either newspapers or magazines, for the period of the war. The July number of the monthly magazines will be the last one to be sold. The July Cosmopolitan has been received, and the July numbers of others are on the way, therefore not subject to cancellation.

"Hearst newspapers have been anti-British ever since there have been any Hearst newspapers. When President Wilson asked the Congress to amend the Canal Tolls Act, Hearst made a long series of savage attacks upon the President. He asserted that the President had unconditionally surrendered to Great Britain; that he never had been anything better than a servile tool of the Empire; that he was a traitor to American interests.

"What Hearst has said since America entered the war has been anti-British every day, and as openly un-American and pro-German as he dared to be. What he has said has been told in part in these columns, from time to time, and more of it will be related in subsequent issues.

"Having prepared the evidence of sufficient strength, the New Mexico Council of Defense made its initial move by asking the newsdealers of Santa Fé to stop the sale of the publications. Their immediate response was most gratifying and the Council will ask every newsdealer in the state to stop the sale of all the publications for the period of the war. This request will go through the county and community councils of defense, but no newsdealers, hearing of the move, need wait until he receives the request from his county or community council.

"A placard announcing that no more Hearst publications will be sold during the period of the war will be furnished by the Council of Defense for use by the dealers. The War News will continue to print each week in the honor roll, the names of the dealers as they fall into line. The newspapers published by Hearst are the following:

Atlanta American
Atlanta Georgian
Boston Advertiser
Boston American
Chicago American
Chicago Herald & Examiner
Los Angeles Examiner
New York American
New York Journal
San Francisco Examiner

"The Hearst Magazines are as follows:

Hearst's
Cosmopolitan
Good Housekeeping
Harper's Bazar
Motor
Motor Boating
Puck

"The Council of Defense calls upon every loyal, patriotic citizen of New Mexico not only to quit asking for the Hearst publications at the newsdealers, but to stop taking them on subscription, and to stop reading them; in other words, to say to Herr Wilhelm von Hearst, the Hearst publications and Hearstism in general: Good Night!"

"That thereafter, on, to wit, the 13th day of June, 1918, and in pursuance of the same general scheme and purpose, the said defendants caused to be published and circulated in said New Mexico War News, the following placard and notice:

"Hearst's

"Newspapers and Magazines

"Not Sold Here

"For Period of the War

"The New Mexico Council of Defense and the County Council of defense of this county have convinced us that Hearst's newspapers have been anti-British, un-American and pro-German since America entered the world war.

"Hearst's Newspapers

Atlanta American
Atlanta Georgian
Boston Advertiser
Boston American
Chicago American
Chicago Herald & Examiner
Los Angeles Examiner
New York American
New York Journal
San Francisco Examiner

Hearst's Magazines

Hearst's
Cosmopolitan
Good Housekeeping
Harper's Bazar
Motor
Motor Boating
Puck

"The Council of Defense calls upon every true American New Mexican not only not to ask the newstands for the Hearst publications, but not to receive them on subscription and to quit reading them altogether.

"Governor Lindsey and Attorney General Patton approve and indorse this move to rid the state of Hearst publications and Hearstism."

—and thereafter printed said placard or notice on cardboard or heavy paper, and caused the same to be distributed by their agents throughout the state of New Mexico, to newsdealers who had the magazines of the complainant for sale and distribution under the terms and conditions of written contracts or agreements with your orator, with the request that the said placard be displayed and that the said newsdealers abstain from and refuse to handle, sell, or distribute the said magazines.

"That thereafter, to wit, on the 20th day of June, 1918, and in pursuance of the same general scheme and purpose, the said defendants caused to be

published and circulated in said New Mexico War News, the following article, to wit:

"The New Honor Roll.

Zook's Pharmacy
Weltmer & Burrows
Capital Pharmacy
All of Santa Fé
Post Office News Stand of Clovis
F. C. Rolland
W. E. Warren
Of Alamogordo
Rio Grande Drug Co. of Taos

"There are real Americans who will sell no more Hearst publications for the period of the war. Having been convinced that Hearst has wielded all of his enormous influence in favor of Germany and against Great Britain and the United States, since the United States entered the war, these par patriots have decided it is time to put the offender into the enemy camp and to make substantial reductions in his influence.

"The action of the Council of Defense, backed by Governor Lindsey and Attorney General Patton, in declaring war on Hearst publications, is causing some uneasiness in the mind of Kaiser Wilhelm's notorious satellite in America. Howard E. Morton, city editor of the Los Angeles Examiner, came to Santa Fé last Thursday morning and called on Charles Springer, chairman of the executive committee. Mr. Springer told the Hearst emissary that he had seen enough evidence to be convinced that Hearst has been unpatriotic since America entered the war. "However," said Mr. Springer, "you may go and talk with our publicity manager, who has been working on the investigation for some months."

"Mr. Morton made the call. At the end of a conference lasting more than two hours, he was informed that the fight would be pressed, so far as the publicity department was concerned. Friday night Mr. Morton had another conference with Mr. Springer. At the close of the conference Mr. Springer said he was still not convinced of Hearst's patriotism; that in spite of Hearst's apparent support of the war at this time, he believed that in the event of a peace conference all the Hearst influences would be wielded against Great Britain in an effort to leave Germany dominant in Europe.'

"That thereafter, to wit, on the 25th day of June, 1918, and in pursuance of the same general scheme and purpose, the said defendants caused to be published and circulated in said New Mexico War News the following article, to wit:

"The New Honor Roll.

Zook's Pharmacy
Weltmer & Burrows
Capital Pharmacy
All of Santa Fé
Post Office News Stand of Clovis
F. C. Rolland
W. E. Warren
Of Alamogordo
Rio Grande Drug Co. of Taos
Matson's Book Store
Strong's Book Store
Sturges' Cigar Stand
Griggs' Pharmacy
Highland Pharmacy
George Bryan, local agent for Los Angeles Examiner
All of Albuquerque
R. E. Dick
Harry Braden
Milton Smith
Of Carlsbad

"Additions are being made to the new honor roll as fast as information is placed before the loyal men who sell newspapers in New Mexico. The six Albuquerque dealers are reported in the Albuquerque Journal as having declared they will handle no more of the Hearst publications during the period of the war and placards will be furnished by George C. Taylor, who received a supply when he was at headquarters recently.'

"(7) And your orator further informs you honor that in pursuance and furtherance of the same general scheme and purpose, the said defendants individually and collectively, so combining and confederating together, by force of the overwhelming influence of the said Council of Defense, of New Mexico and the prominence of the members thereof and the great weight attached to the leadership of said State Council, and the prestige of the said Washington E. Lindsey as Governor of said state, and of said Harry L. Patton, as Attorney General of said state, and by inducing them to believe that if they did not join in with the movement to exclude the said magazines from New Mexico they would be branded before the people of New Mexico as unpatriotic and disloyal, prevailed upon and persuaded by said coercive measures and means the said defendants Alfred Grunsfeld, Max Nordhaus, Jesus Romero, Nestor Montoya, Rafael Garcia, W. C. Oestreich, W. C. Reid, A. B. McMillen, P. G. Redington, L. A. McRae, Felix Baca, and H. E. Rogers, as members of the County Council of Defense of Bernalillo County, to pass a resolution in the name of said County Council of Defense as follows, to wit:

"Be it resolved, by the Bernalillo County Council of Defense, at a meeting held June 25, 1918, that the council heartily indorses the action of the New Mexico State Council of Defense in condemning as unpatriotic the attitude and sentiments of William Randolph Hearst; and

"Be it further resolved that the people of Bernalillo county are urged to discontinue their patronage of the Hearst publications and that news dealers are requested to cease selling these publications from their news stands'—and through the medium of certain of said defendants, who were then and are now members of two social organizations of great influence in the city of Albuquerque, known as the Rotary Club and the Kiwanis Club, prevailed upon and persuaded said clubs to pass resolutions, of which that passed by said Rotary Club reads as follows:

"Whereas, the New Mexico State Council of Defense has requested the newsdealers of New Mexico to stop the sale of the Hearst publications for the period of the war, and every loyal citizen of New Mexico not only to quit asking for the publications at the newsdealers, but to stop taking them on subscription, and to stop reading them:

"Now, therefore, be it resolved by the Albuquerque Rotary Club that the action of the New Mexico State Council of Defense be and is hereby heartily indorsed, and that the club will assist and co-operate with the State Defense Council in making its request effective'

—and in many other particulars, as your orator is informed and believes, and accordingly states the facts so to be, combined and confederated with the defendants named in paragraph 4 to bring about said common scheme and purpose.

"(8) And your orator further informs your honor that on or about June 6, 1918, the said defendants, through their publicity agent and editor, the said defendant Guthrie Smith, maliciously and with the intent of injuring the business of your orator in the country at large, and in furtherance and in pursuance of the common scheme and purpose of said combination and confederation, and to further coerce the people and the newsdealers of the state of New Mexico by wide publicity into the belief that the measures and means employed by said defendants were proper and appropriate and should have their co-operation and assistance, and to attempt to gain widespread notoriety for the action of said defendants, and to obtain the support of powerful influential papers throughout the United States, and to influence public opinion within the state against your orator, and to obtain the co-operation and support of other State Councils of Defense, sent telegrams to large and influential newspapers throughout the country (amongst others, the Los Angeles Times and the New York Tribune), announcing the scheme and purpose of

said combination, which said telegrams were of uniform context as follows, to wit:

"All newsdealers of the capital city of New Mexico, patriotically complying with the request of the State Council of Defense, agreed to-day to stop selling all Hearst newspapers and magazines for the period of the war, holding these publications to be so anti-British, un-American and pro-German as to constitute a menace to the Allied cause.

"The council, through the county and community councils of defense, will urge every newsdealer in New Mexico to follow the same course."

"(9) That certain of the newsdealers in New Mexico, to wit, Zook's Pharmacy, a corporation, and Weltmer-Burrows Drug Company, Incorporated, both doing business in Santa Fé, New Mexico, Rio Grande Drug Company, doing business at Taos, New Mexico, F. C. Rolland and W. K. Warren, of Alamogordo, Sturges Hotel Company, a corporation, Strong's Book Store, a corporation, O. A. Matson and H. Emory Davis, partners doing business under the firm name and style of O. A. Matson & Co., E. H. Briggs, doing business under the name and style of Briggs' Pharmacy, L. A. Rice, doing business under the name and style of Highland Pharmacy, all of Albuquerque, New Mexico, and R. M. Bishop, of Clovis, New Mexico, all newsdealers and sellers and distributors of the said magazines of your orator, and under contract with it for said purpose, in fear of being considered disloyal and un-American, and of not assaying '100 per cent. Americanism,' and of losing the patronage of patriotic Americans if they did not comply with the request and the demands of the said defendants, and without personal knowledge of any alleged disloyalty of the said magazines of your orator, permitted themselves to be intimidated, coerced, and were intimidated and coerced by said defendants, and the matters and things done, said, printed, and published by said defendants, into acting in concert with the said defendants in their scheme and purpose, and, so intimidated and coerced, the said newsdealers, in order to aid the defendants in their purpose of bringing about the entire exclusion of the said magazines from New Mexico, and of closing the said state to the complainant as a territory within which it might compete with other owners of similar magazines through the regular, usual, and customary channels of trade without restraint and restriction, canceled their contracts with your orator for the said magazines, and notified the agent of your orator in Los Angeles that they would no longer handle, sell, and distribute such magazines in New Mexico, which said condition has ever since and does now continue, and in furtherance of said common purpose and scheme placed in their show or display windows, as your orator is informed and believes, and therefore states the fact to be, the placard printed and furnished to them by the said defendants, as set forth above, and in words and figures as it appears hereinbefore; and upon information and belief your orator informs your honor that many other newsdealers and subscribers, too numerous to set forth herein, throughout the state of New Mexico, as a result of said propaganda, intimidation, and coercion of the said defendants, have canceled their contracts with your orator, and have refused and do now refuse to receive said magazines, or to sell and distribute them to their patrons and customers.

"(10) That all of the said acts, matters, and things done by said defendants, their agents and servants, individually and collectively, and as members of said combination and confederation, and by such other persons, whose names are now unknown to your orator, who may be associated with defendants in said scheme and purpose, were done with intent, as your orator is informed and believes, and thus states the facts to be, willfully, wantonly, and maliciously to injure and have injured your orator in its property and business, and to render unsalable its magazines in the state of New Mexico, and to prevent, restrict, and restrain the introduction of said magazines into the state of New Mexico from other states, and especially the state of New York.

"(11) That all of the said acts, matters, and things done by said defendants, their agents and servants, individually and collectively, and as members of said combination and confederation, and by such other persons, whose names are now unknown to your orator, who may be associated with the defendants, and the said general scheme and purpose of boycotting the said magazines of your orator and the blacklisting of the same, and of preventing your ora-

tor from having that free access to the markets of New Mexico for the sale of its magazines assured to it by the laws of the state of New Mexico and the United States of America, are unlawful, contrary to, and in violation of section 1685 of the codification of 1915 of the laws of New Mexico, which in words is, as follows, to wit:

"Every contract or combination between individuals, associations or corporations, having for its object or which shall operate to restrict trade or commerce or control the quantity, price or exchange of any article of manufacture or product of the soil or mine, is hereby declared to be illegal.

"Every person, whether as individual or agent or officer or stockholder of any corporation or association who shall make any such contract or engage in any such combination, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars nor less than one hundred dollars, and by imprisonment at hard labor not exceeding one year, or until such fine has been paid'—and the provisions of the act of Congress approved July 2, 1890 (26 Stat. at Large, 209, c. 647), entitled 'An act to protect trade and commerce against unlawful restraints and monopolies.'

"(12) And your orator avers and further informs your honor that the said acts, matters, and things alleged to have been done by such of the defendants who are and were at all times material hereto members of the defendant the Council of Defense of the State of New Mexico, in the name and by authority of said Council of Defense, were done without power or authority to act in their behalf under the law creating said Council of Defense, and the use of the name of said Council of Defense was without legal right, justification, or valid excuse, and as your orator is informed and believes, and so states the facts to be, for the sole purpose of promoting and furthering said unlawful and malicious scheme to destroy the business and property of your orator.

"(13) Your orator further avers and informs your honor that the acts of said defendants, as hereinbefore set forth, are un-American, opposed to the policy of government of the United States of America in the present war with the Central Powers, subversive of law and order, and in general opposed to public policy, in that the said defendants, without judicial power or authority and under the cloak of patriotic organizations and patriotic purposes, have constituted themselves judges and prosecutors, and, having convicted your orator without a hearing, now seek to conduct a journalistic lynching with your orator as the victim, by means of a boycott and blacklisting of its publications, and in such wise to abridge and to restrain its right guaranteed to it by the Constitution of the United States, and the Constitution of the state of New Mexico, as contained in section 17, article II, of the Constitution of said state, whereby it is free to publish within said state its sentiments on all subjects, being responsible only for the abuse of that right, and the said defendants seek by their said unlawful, oppressive, and coercive acts to drive your orator's publications from New Mexico, and by this means to dictate to the people of New Mexico and to control what they should or should not read.

"(14) Your orator further alleges and shows unto your honor that it is, and at the time of the commission of the acts hereinabove complained of was, the owner and proprietor, by purchase from or employment of the author or authors, of each and every article or picture, in any of said above-named magazines, save as may have been otherwise indicated in connection with the publication of a particular article or picture; that your orator, as such, successor to said authors and as the proprietor and owner desiring to secure a copyright upon the aforesaid magazines, so published by it throughout the period of the commission of the acts herein complained of, and upon the various articles, stories, and pictures therein contained in accordance with the statutes of the United States in such case made and provided, published each of said magazines, and the articles, stories, and pictures therein contained, in each of which said magazines your orator caused to be printed and published in each separate number thereof, upon its title-page, the notice of copyright in the form and manner required by law, to wit, 'Copyright, 1918, International Magazine Company;' that after the publication of said magazines with notice

of copyright therein contained as hereinabove alleged, your orator promptly in each instance duly deposited in the mail within the United States, to wit, at the city of New York, in the state of New York, two complete copies of the best edition of each issue of said magazines, addressed to the Register of Copyrights, Washington, District of Columbia, accompanied in each instance by a claim of copyright. Your orator further avers and says that each of such copyrighted periodicals and the articles, stories and pictures contained therein were printed from type set within the limits of the United States, or from plates made within the limits of the United States from type set therein, and that the printing of the text and the binding of the aforesaid magazines, and each and every issue thereof, was and is performed within the limits of the United States; and your orator avers that it has done all acts and complied with all legal requirements necessary to establish its right to the aforesaid copyrights, under the statutes of the United States in such case made and provided. Your orator further shows that it has caused to be printed and inserted in the several copies of each volume or issue of each of said magazines, on the title-page thereof, the word 'Copyright,' together with the year said copyright was acquired, and the words 'International Magazine Company,' as required by law.

"Your orator further avers and shows unto your honor that the course and practice hereinabove set forth, with reference to the publication of notice of copyright, the depositing in the mail of copies of said copyrighted magazines, and the place of the printing, publishing, and binding thereof, and the doing of each and every other matter and thing necessary and required by it to be done, in order to entitle it to a copyright of the aforesaid magazines, and the articles, stories, and pictures therein contained, are pursued by it with reference to the publication of each and every issue of all of the above-named and described magazines, so that your orator acquires and becomes the proprietor of a copyright as to each of said magazines and every issue thereof.

"Your orator further represents and shows unto your honor that, under and by virtue of the provisions of the copyright laws of the United States, it is guaranteed an unrestricted right to vend its copyrighted publications throughout the United States and in each and every state thereof, and that this court is given jurisdiction under the provisions of said copyright law, upon bill in equity filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by said law.

"Your orator further avers and says that, by reason of the wrongful, willful, oppressive, and malicious acts of the defendants hereinabove complained of, it has been, and is now, and in the future will be, denied the right, guaranteed to it by virtue of said laws, to vend its copyrighted publications in the state of New Mexico, and will be continuously so prevented from the exercise and enjoyment of its said right guaranteed to it under said act, to its irreparable damage, unless this court exercise the power and authority granted in said act to restrain and enjoin the said defendants.

"And your orator further avers and informs your honor that because of the nature of the illegal acts of the defendants, and the methods employed by them to accomplish their scheme and purpose, and the great number of persons who have combined with the said defendants in the said illegal, unlawful, and oppressive combination and confederation, your orator has suffered and is now suffering irreparable damage and mischief; and has no adequate remedy at law, and further that any attempt to obtain such remedy would involve a multiplicity of suits. In consideration whereof, and forasmuch as your orator can only have adequate relief in the premises in a court of equity, where matters of this nature are properly cognizable and remediable, and to the end that such relief may be granted, your orator prays the court:

"1. To grant it a writ of injunction, enjoining and restraining the said defendants Council of Defense of the State of New Mexico, Secundino Romero, W. A. Hawkins, C. R. Brice, J. M. Sully, Eufrazio Gallegos, Charles Springer, B. C. Hernandez, Eduardo M. Otero, Walter M. Danburg, Guthrie Smith, W. E. Lindsey, Harry L. Patton, the Council of Defense of the County of Bernalillo, Alfred Grunsfeld, Max Nordhaus, Jesus Romero, Nestor Montoya, Rafael Garcia, W. C. Oestreich, W. C. Reid, A. B. McMillen, P. G. Redington, L. A. McRae, Felix Baca, H. E. Rogers, their attorneys, agents, and

representatives, individually and collectively, from boycotting and black-listing the complainant and its magazines, from restraining the complainant from selling and distributing its magazines to the newsdealers within the state of New Mexico, and to its subscribers within said state, and restricting the business and commerce of the complainant within said state, from restraining the complainant from shipping its magazines into the state of New Mexico from other states, from acting in the name of the Council of Defense of the State of New Mexico, or the County Council of Defense of Bernalillo County, in furtherance of the scheme and purpose of defendants to boycott and blacklist the complainant and its magazines in the state of New Mexico, from printing and circulating placards in the state of New Mexico in furtherance of said boycott, or using any other methods whereby the property of your complainant, or its business, or the interests of those dealing with it, might be damaged or injured, until the further order of the court.

"2. For such other and further relief as may be properly granted you complainant in a court of equity, including its costs and expenses in this behalf most wrongfully sustained."

A portion of the statement of the case by appellants, with immaterial alterations, is as follows:

The defendant Patton made return to the rule on August 8th, admitting his official position of Attorney General; disclaiming knowledge whether the complainant is owner and publisher of the magazines named; denying that damage to the extent of \$3,000 has been done to the complainant; admitting the allegations of paragraph 2 of the bill; admitting the personnel of the State Council of Defense and of its executive committee; denying knowledge whether the said executive committee supervised, etc., the War News, or whether that journal is generally circulated in New Mexico; denying the allegations of the fourth paragraph of the bill, generally and specifically; denying knowledge of the matters alleged in paragraph 5 of the bill; denying that on or about June 6, 1918, or at any other time, he either individually or in connection with any other person entered into any combination or conspiracy, or that in furtherance of any combination, scheme or purpose he caused such announcement to be published in the War News of June 6, 1918; denies that he had any knowledge of or connection with the said publication, and denies that the publication of the said article was in furtherance of any scheme or combination, etc.; makes like denials and allegations with reference to the War News items of June 6, 13, and 20, 1918; denies that he individually or in connection with any other person or persons induced, led, or persuaded by any influence or means whatsoever the Bernalillo County Council of Defense and its members to pass the resolution set forth; and makes like denials with reference to the resolutions of the Rotary Club and the Kiwanis Club. He denies that he was connected with the passage of the said resolution by said clubs, if they were passed, and that his influence as Attorney General influenced the passage of such resolutions. He denies knowledge of the allegations of the eighth paragraph of the bill, and says that if Guthrie Smith sent such telegrams he was not acting in any way for or under any authority from "this defendant." He denies that the sending of said telegrams was in pursuance of any scheme, purpose, combination, or federation to coerce the people and newsdealers, etc., and denies any connection with the sending of such telegrams. He denies that the newsdealers named, for fear of being

considered disloyal, etc., were intimidated, coerced, or influenced by him to refuse to handle, sell, or distribute the plaintiff's magazines. He denies all intimidation or coercion on his part. He denies that he in any way tried to injure or has injured the property and business of the plaintiff in New Mexico, or rendered unsalable its magazines, or restrained their introduction into this state. He denies that he has done any act individually or in connection with others as a general scheme, to boycott the plaintiff's magazines, etc. He neither admits nor denies the allegations of the twelfth paragraph of the bill, because he has not been at any time and is not now a member of the Council of Defense of the State of New Mexico, nor has he had any connection with such organization. He denies all the material allegations of paragraph 13 of the bill. He denies that he has done, and avers that he will not do, any act which in any way will deny to the plaintiff any right granted to it by virtue of the laws of the United States of America, giving it the right to vend its copyrighted publications in the state of New Mexico. He denies that any of his acts have been for the purpose of forming any unlawful oppressing combination or federation, or that the plaintiff has suffered or is now suffering any damage or mischief whatsoever by any act of his.

Further answering, he alleges: That he has in no wise acted against the plaintiff to its damage or detriment; that his approval as chief law officer of the state of any acts of the State Council of Defense or other defendants, as mentioned in the bill, in no wise referred to or concerned the plaintiff or any of its magazines, but that he intended to approve and did approve the condemnation of the Hearst newspapers, induced thereto by reading extracts from editorials and articles appearing in said newspapers, some of which extracts were as follows, to wit:

"If this country is going to be plunged into war, we do not want a school-master in the White House, but a soldier."

"We do not want a theoretical man like Wilson, but a practical man like Roosevelt, for the President is the commander in chief of our military forces."

"If we are going to make war with Germany, we want a commander in chief who knows his business, and not a vacillating incompetent, who doesn't know either his business or his own mind."

"If we are compelled to mingle in this conflict of European powers, this newspaper desires to declare right now that the one man it will support for the President under such circumstances is Theodore Roosevelt."

"But this newspaper sincerely hopes that this country will not be projected into the European turmoil, and that Mr. Wilson will realize the folly of such a course."

"We must say that we think Congress should go slow in this matter or spending our money in such large sums for ALLIED preparedness."

"We have AMERICAN preparedness to pay for. * * *

"Neither do we think that many Americans feel that we should pay the war cost of these nations in ADDITION TO OUR OWN—America First."

"The painful truth is that we are being practically used as a mere reinforcement of England's warfare and England's aggrandizement."

"It is plain enough that the bond issue is not being eagerly taken to say the least. The banks have gone to their limit with commendable alacrity, but the people are not buying bonds. The government will doubtless eventually dispose of the two billion issue. But who can say as much for the next issue?"

"* * * All the Allies are begging us for cash. England wants money—in heaps at 3½ per cent., while she pays her own people 5 per cent., and

demands 5 per cent. for the money she lends France, Italy, Russia, Canada, and Australia."

"The best peace for all concerned is a peace without victory."

"Further service in the war should be a matter of choice for Americans. * * *"

"These papers have said consistently, and will continue to maintain, that the American soldiers who go to France should go as volunteers, and not as conscripted men sent by the will of government."

"It is neither necessary nor right that the flower of our young American manhood should be sent as a sacrifice offering to the Red Moloch of slaughter, while England has men enough to fight her own battles for many months ahead."

He avers that the reading of such articles, together with other extracts of similar import, convinced him that the policy and sentiment of said newspapers were un-American and unpatriotic, and therefore he condemned, and gave public approval to the condemnation by others of the said daily newspapers. He prays that as to him the said bill may be dismissed and that he recover his costs.

The County Council of Defense of Bernalillo County seems not to have appeared or answered.

The Council of Defense of the State of New Mexico and the members and officers thereof impleaded made return to the rule jointly, except Harry L. Patton, Attorney General, who made separate return. The joint return of the State Council and its members denied information of the corporate character of the plaintiff, its ownership and publication of the magazines mentioned, and of their registration under the copyright laws, but averred that they are owned and dominated by William Randolph Hearst. They denied large and lucrative sales of said magazines in New Mexico, and their increasing value, and especially the jurisdictional amount of \$3,000. They denied injury, loss, or damage, past or prospective, in the sum of \$3,000, or any other sum, and if in fact the plaintiff has suffered any loss or damage it was less than \$500. They deny the creation by the State Council of an executive committee, but assert the appointment of such committee by the Governor under resolution of the State Council.

They deny the allegations of paragraph 4 of the bill, substantially, that they were engaged in a confederation and scheme to unite all newsdealers, county councils of defense, community councils of defense, and social organizations to boycott and prevent the sale and distribution of the plaintiff's magazines, and to interfere with, restrict, etc., the plaintiff's free access to the New Mexico markets for its publications, and destroy its trade and commerce, and to prevent the performance of its contracts with newsdealers, and in furtherance of said scheme or acts alleged.

They deny the materiality of paragraph 5 of the bill.

They admit that the said executive committee, by the approval of the Governor, caused to be published the articles in the War News set forth in paragraph 6 of the bill, and deny all else in said paragraph. They say that none of the placards set forth in said paragraph were ever allowed to be circulated by the committee, but that the committee authorized and published a placard, advising the newsdealers through the War News that such placards could be obtained upon

request, and that such authorized placard is the same as the one set forth in the said paragraph, omitting the words in the first line, "and the County Council of Defense of this county." They aver that no placards were given out, except upon request.

They admit the adoption by the County Council of Defense of Bernalillo County of the resolution stated in the seventh paragraph, and the adoption by the Rotary Club and the Kiwanis Club of the resolution set out in said paragraph, denying all other allegations therein. They admit the sending of the telegram mentioned in the eighth paragraph, denying all else therein, and expressly that the said Guthrie Smith acted for or on behalf of any of the other defendants, but that said telegram was sent by him as correspondent of several large newspapers outside of New Mexico which he represented.

They deny information that newsdealers canceled contracts or notified plaintiff's agent that they would no longer handle said magazines, and deny that such condition has since continued, averring that the newsdealers' action was not caused by fear of being considered disloyal, or un-American, or of losing patronage. They deny that the newsdealers acted without personal knowledge of disloyalty of any of the said magazines, or that they were coerced or intimidated by the defendants, or by any of the matters and things done, printed, or published by them or under their authority, or that the newsdealers acted in concert with any scheme of these defendants. They deny that they, the defendants, in any manner intimidated or coerced, or undertook to intimidate or coerce, newsdealers to assist in the exclusion of the magazines. They deny knowledge of the display of the said placard by the newsdealers. They deny that they caused them to obtain and display such placards other than by the publications in the War News.

They deny that their alleged acts were done to injure or did injure the plaintiff in its property and business, and to prevent, restrict, and restrain the introduction of said magazines into this state, as alleged in the tenth paragraph of the bill.

They deny that their alleged acts were in violation of section 1685 of the New Mexico codification of 1915, and of the act of Congress approved July 2, 1890 (Comp. St. §§ 8820-8823, 8827-8830), to wit, "An act to protect trade and commerce against any unlawful restraints and monopolies," as alleged in the eleventh paragraph of the bill. They deny that their said alleged acts were done without authority under the law creating said Council of Defense and that the use of the name of the counsel was without legal right, justification, or valid excuse, or for the purpose of promoting the alleged malicious scheme to destroy the plaintiff's property, as stated in the twelfth paragraph of the bill.

They deny that their said alleged acts are un-American, or opposed to the policy of the government in the present war, subversive of law and order, or in general opposed to public policy, or that, without judicial power or under the cloak of patriotic organizations and purposes, they have constituted themselves judges and prosecutors, and convicted the plaintiff without a hearing, in restraint and abridgment

of the plaintiff's rights under the Constitution of the United States and the Constitution of New Mexico (section 17, art. 2), concerning the freedom of the press, as alleged in the thirteenth paragraph of the bill.

They deny that the plaintiff has been deprived of any right granted to it to vend its copyrighted publications, or that it will be continuously prevented from the enjoyment of any right to which it was entitled under said act.

They deny that any such right by any wrongful, willful, oppressive, or malicious acts of these defendants has been interfered with or denied, or that the plaintiff has suffered or is suffering irreparable damage or mischief by reason of any acts of the defendants, or any methods employed by them, or by reason of any combination or federation, as alleged in the fourteenth paragraph of the bill. They deny all other allegations of said paragraph.

Affirmatively, these defendants assert, upon information and belief, that the plaintiff is owned and controlled by William R. Hearst, who dominates the policy of the plaintiff corporation and its publications; that the State Council of Defense was instructed by circulars and bulletins from the National Council of Defense to investigate and keep close watch upon all newspapers and publications which were pro-German prior to our entrance into the war and suspected of disloyalty since then; that they investigated the publications of said Hearst, his magazines and newspapers, and found that said publications, through their editorials, articles, and general policy, were exerting a dangerous influence upon the people of this state, tending to undermine the morale of the people in their support of the war, and to hamper the State Council in the stimulation of loyalty, obstructing the State Council in the co-ordination and organization of the state's resources for the war and defense, and particularly the efforts of the State Council in the promotion of Liberty Loans; that said publications were strongly pro-German anterior to the war and have since made frequent attacks upon our Allies, particularly England and Japan, and have advocated policies approved and formerly advocated by the German government and the so-called Central Powers; that as a result of the said investigation the said executive committee requested the newsdealers of the state of New Mexico not to handle any of the so-called Hearst publications, its said request being previously discussed with the Governor and by him authorized and approved, and that the request was published in the War News; that their action was official under the laws of New Mexico and acts of Congress designed to protect the country, stimulate loyalty, organize the country's resources for our common defense and welfare, and was not in any way actuated by a desire to injure Hearst, his associates, or the plaintiff; that they refer to the affidavits of the Governor of New Mexico and of Charles Springer, chairman of the executive committee, attached to the answer or return, setting forth the information upon which these defendants acted, and showing the policy of the Hearst publications and their reputation as given by other newspapers, periodicals, institutions, clubs, organizations, and individuals; that at the time said

action was taken, and prior thereto, the Hearst publications, by attacks upon the administration, its conduct of the war, the President of the United States, members of his cabinet, our Allies, and the advocacy of German policies, exerted a dangerous influence upon the people of this state, and the said executive committee and the Governor considered it their duty, and still consider it their duty, to advise and request the people of this state not to encourage the circulation of such publications, which would tend to aid and comfort our enemies, and strengthen and upbuild the Hearst institutions, and contribute to the success of Hearst in his pro-German and anti-Ally propaganda; that attached newspaper articles and letters, statements by Hearst managers, in writing, show that the plaintiff has suffered no material damage by the action of the State Council complained of, and that no substantial damage is likely to ensue; that they have at no time ordered or demanded the newsdealers or individuals that they cease to handle, read, or sell the so-called Hearst publications, and have used no threats, coercion, or intimidation whatever, but have simply made request, leaving decision to the individual will of each dealer and subscriber. They attach affidavits of a great number of said dealers, showing that they have acted entirely of their own will, and without fear instilled by any source; that the defendants' acts are valid exercise of the state's police powers; that what they have done is within the protection of the freedom of speech and freedom of the press clauses of the New Mexico and federal Constitutions; that the plaintiff has an adequate remedy at law; that the suit is in effect one against this state, and therefore beyond the court's jurisdiction; that their acts were done in the reasonable exercise of discretion under state and national laws.

The excerpts from newspapers and other publications and the other documentary evidence attached to the return are too extensive to be condensed in this statement, but are set out at large in the return to the rule and its supporting affidavits.

They made a supplemental return to the supplemental motion for a return to the injunction, admitting the publication in the War News of July 26, 1918, of the statement:

"No ordinance or legislative act is needed in New Mexico. The newsdealers and the individuals, acting as patriotic citizens defending America and the Allied cause, have power enough to drive Hearst and Hearstism from New Mexico. And they are exercising that power!"

—but deny that it indicated a malicious or intentional injury and a furtherance of the scheme mentioned in the bill, but claim that the article is proper newspaper comment under the freedom of speech and freedom of the press clauses of state and national Constitutions. They admit the publication of the "Herr Hearst" article in the same issue, and aver that it is a true statement, denying that it is an indication of malicious and intentional injury to the plaintiff, and in furtherance of the alleged scheme, and further allege that it is proper newspaper comment under the said Constitutions. They deny knowledge of the article quoted from the State Record of August 2, 1918, and deny its materiality. They say that they are in no wise respon-

sible for the said article. They aver that Guthrie Smith has no connection with the State Record. They deny that the quotation from the State Record is for the purpose of creating further prejudice against the plaintiff.

They deny the allegations of the fourth paragraph of the said supplemental motion, with the exception that they believe their legal position to be sound and uncontrovertible.

They admit that the statement quoted from the State Record of August 2, 1918, appeared therein, but deny responsibility therefor.

It was urged on the hearing that the court, under section 266 of the Judicial Code (Comp. St. § 1243), was without power to grant a preliminary injunction. A preliminary injunction was granted, restraining and enjoining the defendants, and each of them, and their representatives, in furtherance of the scheme and purpose of the said combination, from boycotting and blacklisting the plaintiff and its magazines, from attempting to restrain or restraining the plaintiff from selling and distributing its magazines to newsdealers and subscribers, and from attempting to restrain or restraining the business and commerce of the complainant within the said state, from attempting to restrain or restraining the complainant from shipping its magazines into the state of New Mexico from other states, from acting in the name or using the name of the State Council of Defense or the Bernalillo County Council of Defense in furtherance of the scheme and purpose of the defendants to boycott the complainant and its magazines, from printing and circulating placards in the state of New Mexico in furtherance of said scheme and purpose, or using any other methods in furtherance of said scheme and purpose, whereby the property of said complainant or its business, or the interest of those dealing with it, might be damaged or injured pending the final hearing herein, and until the further order of the court.

The preliminary injunction, before it was signed, was objected to on many grounds, among them one challenging the jurisdiction of a single judge to grant a preliminary injunction, in view of section 266 of the Judicial Code. The objections to the order for a preliminary injunction were overruled, save a modification of the language "restraining and enjoining them, individually and collectively," so that it finally read "restraining them, and each of them, in furtherance of said scheme and purpose of said combination, from boycotting," etc. Exception was allowed to the ruling.

An appeal was prayed with due formality and allowed to this court. It was agreed and ordered that the trial of the case on the merits should await decision on the appeal.

[1] The issues presented in this court are briefly as follows: (a) Whether the constitutionality of state statutes is involved, thus necessitating a hearing of the application for this preliminary order by three judges; (b) whether the complainant comes with clean hands into a court of equity; (c) whether state statutes creating the Council of Defense and granting war emergency powers to the Governor apply to this controversy, and, if so, whether they protect the defendants in their action; (d) whether the freedom of speech and publica-

tion provisions of the national and state Constitutions protect defendants in their actions; (e) whether, if none of the above propositions is held to be present, so as to bar the complaint, defendants have been guilty either of violating the state statute against unlawful combinations, or the Sherman Act, have been guilty of a common-law conspiracy, have violated complainant's rights under the copyright law, or have violated its state and federal constitutional rights of free speech and publication.

The first issue arises in this wise: The State Council of Defense was created by the Legislature of New Mexico, and its powers and duties defined in the following act (Laws Ex. Sess. 1917, c. 5, § 6):

"There is hereby created a council to be known as the Council of Defense of the State of New Mexico, consisting of nine (9) members, to be appointed by the Governor, by and with the advice and consent of the Senate, who shall serve during the time of the present war, and for such further time thereafter as the Governor may deem necessary. The Governor shall have power to fill any vacancy that may occur on said council by the death, resignation, or inability to serve of any member thereof, and may remove any member for cause and appoint some person to fill such vacancy.

"Said council shall hold its meetings at the city of Santa Fé, or at such other place or places as it may deem necessary, and a majority of the council shall constitute a quorum to do business, and the affirmative vote of the majority of such quorum shall be required and shall be sufficient to adopt or pass any motion or resolution authorizing or directing any act or thing within the power of the council. Any number less than a quorum may meet and adjourn from day to day until a quorum be present. The council may determine the rules of its procedure, and, with the approval of the Governor, may make any and all regulations necessary for the carrying out of the provisions of this act.

"The council, as soon as it is organized, shall communicate at once with the National Council of Defense, and offer its co-operation and state that it is organized and is ready to receive information and to carry out within the state of New Mexico such plans as will be mutually agreed upon for the defense of the nation, and shall, in every way possible, co-operate with such National Council of Defense. It shall get into communication with defense bodies representing other states and shall co-operate with them as far as may be practicable.

"The council, after consultation with the National Council of Defense, shall gather at once through its committees or otherwise, statistics, facts and other information found necessary, and shall arrange them in an orderly and accessible manner. They shall supervise and direct investigations and make recommendations to the Governor and to the Legislature.

"The members of the council shall be paid five dollars (\$5.00) per day and necessary traveling expenses for the time they are actually engaged in the performance of their duties as members of such council, to be paid out of the state war fund. The council shall cause to be kept an accurate record or journal of its proceedings, and the original thereof shall be filed with the secretary of state at the termination of the term of service of the said council."

[2] The same session enacted a law (Laws Ex. Sess. 1917, c. 3) placing certain war emergency powers in the Governor, as follows:

"Section 1. The Governor is directed to render to the government of the United States in the present crisis any assistance within the power of the state, and he is authorized, either to that end, or for the purpose of providing for the public health, safety and welfare, to organize and employ any and all resources within the state, whether of men, property, or instrumentalities, and for any of these purposes to exercise any and all power which in his judgment may be convenient or necessary.

"Sec. 2. It shall be the duty of every public official in the state to furnish to the Governor such information and assistance as he may require in the execution of the power conferred by this act."

The appellants claim little in their brief and argument under the powers granted through the act creating the council. They are obviously correct in this position, for the action here involved, taken by the members of the council, is beyond the gathering and arrangement of statistics, facts, and other information, the supervision and direction of investigations, and the making of recommendations to the Governor and Legislature, which is all the council is empowered to do under that act. Appellants claim the protection of the broader act granting power to the Governor. This they do upon the theory, as stated in the printed argument, that—

"The proposed action of the State Council of Defense in warning the public against the Hearst publications and in endeavoring to discourage their publication, was made known to him [the Governor] before it was taken, and that he sanctioned and approved the same. We deem this to be tantamount to ordering it, within the terms of the provisions of the foregoing act. That act empowers the Governor to provide for the common defense, safety, and welfare of the people of the state. In other words, the Legislature has conferred, for the period of the war at least, upon the Governor the authority and the right to exercise the police powers of the state, and our contention is that the action of the State Council of Defense, authorized and directed by the Governor under this act, is justified by the police power of the state, and is a legal prerogative."

Appellee challenges this claim that the council was acting under the authority and direction of the Governor and as his instrument, under the powers conferred upon him by the above act. We think this challenge well grounded. While what the council did was with the knowledge and approval of the Governor, it is clear that it was acting upon its own initiative and in no sense as the instrument of the Governor in the exercise of the powers granted to him. As the appellee confines itself to claiming that the members of the council acted outside of and beyond the powers and duties contained in the statute creating it, and does not question the validity of that law, there is no constitutional question of the character requiring a three judge court, under section 266 of the Judicial Code.

[3] The issue that the complainant comes with unclean hands is not well taken. It is clear that the ownership of the magazines here involved was in the International Magazine Company, a corporation. In the absence of statutory provision, the corporation cannot be answerable for the action of a stockholder unconnected with the action of the corporation. They are separate entities in this respect, and each is answerable for his or its own acts, and for such alone. The alleged reprehensible attitude and conduct of Hearst was in no way reflected in any publication or action of the corporation. There is no showing whatsoever that any objectionable matter ever appeared in any of the magazines. The mere apprehension that this policy might be altered can furnish no firm ground to proceed against the corporation and its publications.

The applicability of the two state statutes creating the council and granting war emergency powers to the Governor has been discussed above and the latter statute eliminated. It has also been said above that the former statute gave no such powers to the council as its members exercised against complainant. While the action of the members was official in form and intent, it is long-established law that an official who acts outside of his legal powers is, as to such acts, a private individual, who has that far placed himself beyond the protection of his official status.

[4] It therefore becomes essential to determine wherein, if at all, appellants acted beyond their official status, and the legal character and effect of such acts. This discussion will involve all of the remaining issues in the case. The record establishes that W. R. Hearst owned or controlled the policy of various large newspapers, located in several of the principal cities in the United States, and that he owned a large majority of the corporate stock of complainant company, which was engaged exclusively in publishing and selling certain magazines. The nearest of these newspapers were published in Los Angeles and San Francisco. Because it required about 36 hours for such papers to reach New Mexico, and because metropolitan papers from Denver and El Paso were much nearer, the Hearst newspapers had but a limited circulation in New Mexico. The magazines of the complainant had a large circulation in the state. The State Council of Defense became convinced that Hearst was un-American, anti-British, and pro-German in his sympathies, and that he was promoting an active propaganda of that character in his newspapers. The magazines were free from this unpatriotic matter. Moved by the conviction that the circulation in New Mexico of these newspapers and magazines would exert a dangerous influence upon the people of the state during the war, would tend to give aid and comfort to the enemy, "would tend to strengthen and upbuild the projects and institutions of the said William R. Hearst as a publisher," and that the "handling, purchase, sale, and reading of the magazines of the plaintiff, as well as all other Hearst publications, would contribute directly to the upbuilding and the success of the said William R. Hearst in his campaign of spreading pro-German and anti-Ally propaganda throughout the United States," the members of the council acted.

This action began August 7, 1917, with editorial warnings in the War News declaring, according to the affidavit of defendant Guthrie Smith, "that Hearst publications were shrieking through big headlines that it was a crime to send American troops to Europe to be slaughtered." Mr. Smith further says that there were subsequent references to Hearst in the War News to keep the people advised as to the un-American attitude of the Hearst publications, but that—

"It was not any part of the plan of the New Mexico State Council of Defense nor of the New Mexico War News to ask all the people of New Mexico to stop supporting the said Hearst by buying and reading Hearst publications, nor to ask the newsdealers to stop selling the Hearst publications, until Hearst's New York American of May 12, 1918, struck the prayer for victory in the war from President Wilson's Memorial Day proclamation."

He adds that—

"This deletion of the President's proclamation made it impossible for the Governor of New Mexico, or the said State Council of Defense, or for its members and employes, to believe that Hearst had any real or sincere desire to carry on a vigorous campaign for the successful prosecution of the war."

Smith was the publicity agent of the State Council, and, as such editor of the War News. Conceiving it to be his duty "to make such plans and arrangements as might be necessary to protect the people of New Mexico against the un-American poison which was being scattered broadcast by the Hearst publications" he deemed the best way to proceed was "to prevail upon the people of New Mexico to quit reading the Hearst publications." The attitude of himself and the other defendants was that it would be unintelligent to attempt to remedy the evil by attacking only such of the Hearst publications as published objectionable matter, but that all publications in which Hearst was interested should go. He says:

"Holding Hearst, Hearstism, and the Hearst publications to be anti-British, un-American, and pro-German, affiant says that affiant and the other defendants in this cause desired to strike at the root of the evil; that the root of Hearstism and the Hearst publications is Hearst himself; that to strike intelligently and effectively at the root of the evil it was necessary to stop reading and supporting every publication controlled or dominated by William Randolph Hearst; that therefore the appeal made by the said State Council of Defense and the other defendants in this cause, through the said New Mexico War News, was to the loyal, patriotic men and women of New Mexico not to continue support of Hearst, but instead to stop reading *all* of the Hearst publications for the period of the war; and to the patriotic newsdealers of the said state of New Mexico to stop selling or otherwise handling or distributing *all* Hearst publications for the period of the war."

Plans to this end were carefully considered, and from time to time discussed with two of the three members of the executive committee of the State Council, and the general secretary. The several steps proposed were laid before the Governor and approved by him, and the state Attorney General consulted "with respect to the matter of asking the people of the state of New Mexico not to read the Hearst publications, and asking the newsdealers of New Mexico not to sell or handle the said Hearst publications." The placard proposed to be used by newsdealers in announcing discontinuance of the sale of Hearst publications for the war was submitted to and approved by the Attorney General. Then followed the publication in the War News of the articles set forth in the complaint, which continued until this action was filed, and even afterwards, until shortly before the order was entered for the preliminary injunction.

Whatever may have been the derelictions of Hearst as an individual or in his newspapers, it is absolutely clear that complainant, which was engaged solely in publishing and selling magazines, had published no objectionable matter in its magazines, and it had nothing to do with the Hearst newspapers, nor any interest in them. The declared and obvious purpose was to destroy complainant's business in New Mexico. This purpose was proceeding toward success, when halted by the injunction of the court below. The various defendants were planning and acting together to effectuate the above pur-

pose. They were doing so without legal warrant or protection. Their acts amounted to a conspiracy to boycott or blacklist the magazines published by complainant. All of these publications came into the state through interstate commerce. The only purpose of shipping the magazines into New Mexico was for sale there; hence a movement which sought to prevent, and was succeeding in preventing, newsdealers, who were here the importers, from receiving, handling, and selling such magazines, directly interfered with that commerce. We think this situation within the prohibition of the Sherman Act, as shown by *Lawlor v. Loewe*, 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341; *Eastern, etc., Lumber Association v. United States*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788; *Gompers v. Buck Stove Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; *United States v. American Tobacco Co.*, 221 U. S. 179, 31 Sup. Ct. 632, 55 L. Ed. 663; *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; *Montague v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608.

Any contention that appellants were within their constitutional rights of free speech in saying, writing, and publishing the objectionable matter, is answered by *Gompers v. Buck Stove Co.*, *supra*. What has been said above renders unnecessary consideration of other grounds for relief alleged in the complaint and pressed upon this appeal.

The action of the trial court in the issuance of the temporary injunction was correct, and the judgment is affirmed.

UNDERWOOD v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1920.)

No. 3379.

1. Post office ☞49—Evidence held not to show fraudulent use of mails.

A count charging that defendant, pursuant to a scheme to defraud, sent through the mails an application for employment at a salary of \$2,500 and travel expenses, in which he made false statements and representations in respect to his age, character, qualifications, and present salary, conceding that it charged an offense, *held* not supported by the evidence, which showed that the obtaining of the salary was not the object of the application.

2. Post office ☞48(4)—Indictment for using mails to defraud insufficient.

A count charging that defendant, pursuant to a scheme to defraud the United States, sent through the mails an application for employment, for the purpose of obtaining, by virtue of the position which he sought, exemption from military service, *held* not to charge an offense, where it alleged no facts showing that defendant was a person subject to the Selective Draft Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2019a, 2019b, 2044a-2044k), and where the position for which he applied would not, as matter of law, exempt him from selection under such act.

3. Criminal law ☞564(1)—In prosecution for using mails to defraud, place of mailing letter held not proved.

Under an indictment for using the mails to defraud, proof that defendant resided in the city where a letter was alleged to have been mailed

held insufficient alone to sustain such allegation, or to prove the venue as laid.

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Criminal prosecution by the United States against John Allen Underwood. Judgment of conviction, and defendant brings error. Reversed.

Charles E. Belcher, of Columbus, Ohio, and Sherman T. McPherson, of Cincinnati, Ohio (Sherman T. McPherson, of Cincinnati, Ohio, and Belcher & Connor, of Columbus, Ohio, on the brief), for plaintiff in error.

Stuart R. Bolin, Sp. Asst. Atty. Gen. (Stuart R. Bolin, of Columbus, Ohio, on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. The plaintiff in error was convicted in the United States District Court for the Southern District of Ohio on both counts of an indictment charging him with using the United States mail in the furtherance of a scheme to defraud. The defendant filed a general demurrer to each count of the indictment, which demurrer was overruled by the court, and exceptions noted.

[1] The first count charges in effect that John Allen Underwood devised a scheme or plan for the purpose of obtaining through false and fraudulent representations, from the Young Men's Christian Association, \$2,500 and travel expenses; that in furtherance of this fraudulent intent he made false statements relating to his personal character, age, education, church affiliations, experience in business, and in social and charitable work, and that he fraudulently represented that Edgar A. Todd had signed a certain paper writing purporting to recommend him to the Young Men's Christian Association, and answering certain questions in reference to his character, habits, education, and ability for charitable and social work; that John Allen Underwood did on or about the 1st day of December, 1917, place and cause to be placed in the post office of the United States, situated in the state of Ohio, city of Piqua, county of Miami, within the Western division of the Southern Judicial district of Ohio, and within the jurisdiction of the District Court of that judicial district, to be sent and delivered by the post office establishment of the United States, a certain letter, together with the false statement in writing, signed by him, and the written recommendation purporting to have been signed by Edgar A. Todd. These several papers are copied in full in this count of the indictment. The letter is as follows:

"December 1, 1919.

"Mr. Raymond P. Kaighn, Nat'l War Work Council, Y. M. C. A., New York City—Dear Mr. Kaighn: Please pardon the delay in reply to your letter of November 20th, which has been due to my absence in Washington, looking after this company's business with the government in cantonment hearing. I am returning herewith the information blank you sent me, completely filled out as you request. You will also find the only available photograph of myself inclosed. Please see that this is returned to me as soon as possible. 1

am confident that my experience and information can be made of some use and value in association war work, and I hope you will give my application the fullest measure of consideration.

"Yours sincerely,
"JAU ESF"

J. A. Underwood.

Next follows a copy of the written recommendation purporting to have been made by Edgar A. Todd. This consists of questions and answers, undoubtedly on a blank prepared by the Young Men's Christian Association for this purpose. The heading is as follows:

"Concerning: John Allen Underwood, 220 Green St., W., Piqua, Ohio.

"Filled in by: Edgar A. Todd, 726 N. Downing St., Piqua, Ohio."

Then follow the questions and answers. The answers are extremely favorable to Underwood, and unequivocally recommend him to the managing officers of the Young Men's Christian Association for honesty, ability, integrity, experience, character, religious affiliation, religious and social activities, and capacity to fill any important executive or administrative office.

The other paper, claimed to have been written by Underwood himself, is under the heading "Application Blank," and consists of questions and answers. The answers to these questions are substantially all favorable to the applicant, particularly in reference to his education, habits, health, business ability, church affiliations, and experience in promoting educational and social activities. In response to the inquiry as to his present salary the answer is "\$7,500." As to age the answer is, "31 years." The answer to question 11, "What salary would you accept in present emergency work?" is "\$2,500 and travel expenses." Then in parenthesis the following: "Turn over, page 2." On page 2 is the further answer to question 11:

"I am not taking any interest in the financial compensation of Assoc. War Work. I am willing to make any sacrifice in income in order to be of service. I have indicated the amount (\$2,500 and traveling expenses) on the other side, because I figured I will require about that amount to pay insurance, taxes, and living expenses. I am willing to accept whatever the Assoc. believes is fair, and what it is accustomed to pay."

In answer to question 35, "Give names and addresses of three other persons whom we may ask as to your experience and qualifications for this work," the following appears:

"Edgar A. Todd, Treas. Atlas Underwear Co., Piqua, Ohio. Otto A. Simon, 313 N. Downing St., Piqua, Ohio. Paul J. Weaver, 410 De Baliviere, St. Louis, Mo. [Over.]"

Later in the paper is a further answer to questions 34 and 35 as follows:

"Any bank in Piqua can give you unquestioned reference as to my integrity, honesty, and reputation. The gentlemen whom I have mentioned know me personally and have for years."

The indictment further avers that Edgar A. Todd did not then, or at any other time, make any such recommendation, either orally or in writing, and that the answers of Underwood to the questions in the application blank were untrue in reference to his age, the salary

he had been receiving, his church membership, the amount of goods he had marketed yearly for the period of eight years, his membership in organizations promoting social and religious activities, his prior connection with and understanding of the retail business, and his management of a department store, and that he was not, as set forth in this statement, qualified for service in the Young Men's Christian Association activities in war work, and that he did not at the time set forth possess the qualifications which he claimed he did possess for such work.

It is claimed on behalf of Underwood that this count does not state with sufficient particularity the facts upon which the charge in the indictment is based. On the contrary, it would seem that it does fully state every fact and circumstance upon which the government expects to rely in the prosecution of this case. The more important question presented by the demurrer to this count is whether the facts as stated therein constitute the offense charged. Counsel for the government has, in his brief, fairly and clearly stated the natural and necessary conclusion to be reached from the reading of this count in the indictment. His statement in that respect is as follows:

"It must be admitted that the \$2,500 per year and traveling expenses was not to be the direct result of the alleged pretenses, but was to be compensation for services under the contract for the employment which he was attempting to secure by such pretenses."

This statement concedes that the primary purpose of Underwood was to secure employment, and that the salary and traveling expenses were merely incident thereto, and that in furtherance of his purposes to secure such employment he made the false and fraudulent statements charged in the indictment. It is claimed, however, that the immediate purpose in the mind of Underwood necessarily included a purpose and intent on his part to defraud the Young Men's Christian Association out of the compensation to be paid for his services under the contract of employment. There is no averment in this indictment that Underwood did not intend to perform any services, or that whatever services he might perform by reason of such employment would have been of no value or of materially less value to the Young Men's Christian Association than \$2,500 per year and traveling expenses.

It is claimed on behalf of plaintiff in error that, in the absence of such averments, the immediate purpose of the fraudulent scheme and false representation must control the construction of this count of the indictment, and proof that the fraud was practiced for the purpose of securing employment cannot be accepted as proof of the offense charged in the indictment, viz. to defraud the Young Men's Christian Association out of \$2,500 per year and traveling expenses, without averment and proof that such employment would necessarily have accomplished such result.

In many cases, perhaps usually, the intent to defraud the employer out of the salary to be paid would be so far incidental to and necessarily flowing from the intent to defraud the employer into giving employment that the two would merge, and proof of guilt of the latter

would show guilt of the former. The present case is peculiar, in that the facts recited in detail in the indictment, and the inferences necessarily drawn from the omission of statements naturally to be expected, compel the conclusion that the pleader regarded the getting of the money as the gravamen of the fraud, but stated facts which at least strongly indicate that it was not. In so far as there may be doubt about the conclusion that the facts stated are inconsistent with the guilt charged, an equivalent result is reached by consideration of the evidence, which puts it beyond any doubt that to get the money of the Y. M. C. A. was not Underwood's purpose. In any event, the motion for a directed verdict of not guilty upon the first count should have been granted, and since it is not suggested that upon this feature of the case there is or can be any evidence for the government which was not given on the first trial, and there seems to be no practical difference to Underwood between this course and the sustaining of the demurrer to the indictment, we do not decide whether or not the demurrer should have been overruled.

If it should be thought that the indictment is open to more than one construction, as to whether it charges intent to defraud in getting employment or intent to defraud in getting a salary, this doubt is removed by the charge of the court. The question submitted to the jury was sharply and clearly the latter one—the intent to defraud the Y. M. C. A. out of \$2,500 in money.

[2] The second count charges that the defendant did devise and intend to devise a scheme and artifice to defraud the United States government, and that in furtherance of such scheme he used the United States mail for the purpose of forwarding to the Young Men's Christian Association the false and fraudulent statements, representations, and promises contained in the letter, the recommendation purporting to be signed by Todd, and the application, copied into the first and second counts of this indictment, and that the purpose of the defendant in making such false representations was to defraud the United States by reason of his employment by the Young Men's Christian Association, thus exempting himself from military duty under the Selective Service Law Act May 18, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2019a, 2019b, 2044a–2044k).

At the time alleged in the indictment the Selective Service Law contained no provision whatever exempting an employé of the Young Men's Christian Association from its terms and provisions. Had Underwood succeeded in securing employment with the Young Men's Christian Association through any fraudulent scheme or artifice, the fact that he was so employed would not then in any way have operated to exempt him from military duty under the provisions of that act or in any way to hinder or delay the United States government in raising an army and navy for its defense.

It is claimed on the part of the government that it is not important that such result would not have been possible under the law, if in fact Underwood believed it was possible to secure exemption in this way, and that under this indictment the only thing important is the fraudulent purpose and intent of Underwood, regardless of whether such

purpose was possible of accomplishment. There is a clear distinction between cases of this character and one depending upon facts for the success of a scheme or purpose to defraud. *Weeber v. United States* (C. C.) 62 Fed. 741.

In cases of that character the success of the plan depends upon the intelligence or lack of intelligence of the public or of the particular individual sought to be defrauded. In cases of this character the law is fixed and certain. The government could not be defrauded of its right to select Underwood for military duty by reason of his employment by the Young Men's Christian Association. No presumption obtains that the government or that the officers charged with the enforcement of the Selective Service Act did not fully understand the law under which they were acting.

On the other hand, no presumption obtains that Underwood did not know the law. Every citizen is presumed to know the law of the land in which he lives, and ignorance of the law is no excuse for an offense against its terms and provisions. Certainly the reverse of this proposition must be true; that is to say, that a citizen will not be held guilty of an offense he could not commit because of the fact that on account of his ignorance of the law he believed that an act perfectly lawful was an offense against the law. In other words, the presumption that all citizens know the law of the land in which they live obtains for the defense of the accused as well as for his conviction.

This count does not allege that the defendant was a male person between the ages of 21 and 30 years, or that he was a citizen of the United States or a person not an alien enemy who had declared his intention to become such citizen; so it wholly fails to state that he was liable to military duty under the Selective Service Act. In the case of *Ruthenberg v. United States*, 245 U. S. 480, 483, 38 Sup. Ct. 168, 62 L. Ed. 414, it was held, in a prosecution under the law requiring male persons between the ages of 21 and 30 years to register, that it was necessary to state that the delinquent was a male person between those ages, but not necessary to allege that he was a citizen of the United States or that he had declared his intention to become such citizen; but that was upon the theory that "these matters go only to the liability to military duty and not to the duty to register." In this case the question is as to the liability of the defendant to military duty, for, unless he was liable to such duty, he could not be guilty of any fraud in attempting to evade the same.

It is also claimed that the verdict is not sustained by the evidence. There is practically no conflict of evidence in this case. It is clear that the defendant did not deliver to the post office establishment of the United States the recommendation purporting to have been filled in by Edgar A. Todd, nor was it inclosed in the letter of December 1, 1917, with the application blank. On the contrary, the proof is positive and undisputed that this recommendation blank reached Mr. Todd's home in his absence; that his wife and daughter opened the same and wrote therein the answers to the questions; that these answers were without any consultation with Underwood, except as he was asked in reference to one or two questions regarding his business

position; that these answers were filled in after he had left the Todd home that evening; and that after they were filled in the letter was mailed by Miss Todd. Of course, it is not important who mailed it, if the defendant caused it to be mailed; but the evidence claimed to support that inference is unsatisfactory.

[3] There is no evidence whatever, aside from the mere presumption that arises from the place of defendant's residence, that the letter of December 1, 1917, and the application blank were mailed at any post office located in the Western division of the Southern judicial district of Ohio. There is some evidence in the record that the letters were received by the Young Men's Christian Association through the mail, but none whatever as to where the letters were actually mailed. The envelope containing the same had been destroyed. The defendant could not be convicted on the presumption that he mailed this letter at his usual place of residence, unless there is some evidence showing that he was in the city of Piqua, Ohio, during the time between the date it was written and its receipt in New York; and there is none. On the other hand, there is some evidence that the letter was not written at Piqua, Ohio, at least not in the office of the company in whose employ he then was. A witness for the government testified that she was employed as a stenographer in the office of that company, and the initials in the lower left corner of the page are the stenographer's initials, but that she did not remember a stenographer with such initials in the employ of the company at that time. This evidence would at least tend to show that the letter was not written by the defendant in his office at Piqua, but must have been dictated to some other stenographer, either in Piqua or at some other place. The evidence also showed that in the discharge of his duty as sales manager for the Favorite Stove & Range Company he was required to travel to many places outside the district. The evidence wholly fails to prove the venue as laid in the indictment. *Vernon v. United States*, 146 Fed. 121, 126, 76 C. C. A. 547; *Moran v. United States* (C. C. A. 6) 264 Fed. 768, decided April 6, 1920.

In what we have said we have assumed that an attempt to get employment by making false statements, even though accompanied by an intent to render faithful service, would constitute the scheme or artifice to defraud contemplated by section 215 of the Criminal Code (Comp. St. § 10385), and we likewise have assumed that the existence of such a scheme might be predicated upon a mere intent to violate a public criminal statute in a way that did not carry fraud upon or injury to any individual. Neither of these matters is involved in the present case, in the view that we have taken of other questions, and we do not intend to indicate any opinion upon either of them.

For the reasons above stated the judgment of the District Court is reversed and remanded, with directions to sustain the demurrer to the second count of the indictment, and for further proceedings according to law.

AMERICAN FILM CO., Inc., v. MOYE.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1920. Rehearing Denied October 18, 1920.)

No. 3475.

1. Highways ⚡184(2)—Evidence held sufficient to authorize testimony as to condition two days later.

It was not error to admit testimony of a witness as to the marks on a highway at the place of an automobile collision two days after the collision, where there was testimony as to the condition of the highway immediately after the collision, from which the jury could determine whether the condition two days later was the same as immediately after the collision.

2. Appeal and error ⚡979(1)—New trial ⚡6—Denial of new trial rests in discretion of trial court.

The granting or denial of a new trial is intrusted to the discretion of the trial court, and the exercise of such discretion is not reviewable on appeal, where there is evidence to support the verdict.

3. Appeal and error ⚡1004(1)—Amount of damages supported by evidence not reviewable.

Where the evidence supports the verdict, an objection that the verdict is excessive cannot be considered on appeal.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippe, Judge.

Action by Gideon L. Moye against the American Film Company, Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

Ford & Bodkin, of Los Angeles, Cal., and Thompson & Robertson, of Santa Barbara, Cal., for plaintiff in error.

C. L. Kilgore and Duke Stone, both of Los Angeles, Cal., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This action was brought by Gideon L. Moye against the American Film Company, Incorporated, a Virginia corporation. Gideon L. Moye was the plaintiff in the court below, and the American Film Company, Incorporated, a corporation, was the defendant therein, and they will be so referred to in this opinion.

The complaint alleges that on November 27, 1918, a certain automobile, owned by the plaintiff and while being driven by his agent, on the "Rincon road" north of Ventura city, was struck with great force by an automobile owned by the defendant, traveling northerly, which automobile was so negligently operated that plaintiff's automobile and the automobile of the defendant collided, and plaintiff's automobile, by reason of the negligence of the driver of defendant's automobile, was broken, injured, and demolished, and the same was rendered entirely useless, and could not be run or operated, and was injured be-

yond repair; that by reason thereof plaintiff was damaged in the sum of \$3,210.50, for which he asks judgment and costs of suit.

The defendant filed an answer, denying specifically the allegations of the complaint, and as additional defense alleged that the injuries to said automobile and the resulting damage to plaintiff was caused solely through the negligence of the driver of plaintiff's automobile in driving said automobile at a rate of speed in excess of 30 miles per hour and to the left of the center of said highway, and as a third and separate defense that the damage to plaintiff's automobile, if any, was proximately contributed to by the negligence and lack of care of plaintiff and his agents, which contributory negligence consisted of driving said automobile on said highway in excess of 30 miles per hour on the left side of the highway.

Defendant also filed a cross-complaint against plaintiff, charging negligence and liability for the damage to defendant's automobile, to which plaintiff filed his answer, denying negligence on his part and the alleged damage to defendant's automobile. During the course of the trial plaintiff by leave of court filed an amendment to his answer to the cross-complaint, alleging that the injury to defendant's car was due to the negligence of defendant, its employés or agents, in that they operated defendant's car at a greater speed than was reasonable and proper at the time and place, and without using ordinary care to keep a lookout for passing vehicles, and operated it on the wrong side of the road in the direction in which they were traveling, which acts plaintiff alleges were negligent and unlawful, and were the sole and proximate cause of the accident and injuries to defendant's car.

The case was tried before a jury, and a verdict was returned in favor of plaintiff and against defendant for damages in the sum of \$1,500, and judgment was entered accordingly. From this judgment defendant prosecutes this writ of error.

The plaintiff was the owner of an automobile, which on November 27, 1918, was being driven by an agent or employé engaged in carrying passengers for a stage company running on the state highway between Santa Barbara and Los Angeles. The car was traveling south in the direction of Los Angeles. The defendant was also the owner of an automobile, which on the same date was being driven along the state highway by an agent or employé, carrying other employés as passengers. The car was traveling north in the direction of Santa Barbara.

There is testimony tending to prove that plaintiff's car was running at the rate of 35 to 40 miles per hour, and defendant's car was running at about 25 miles per hour. At a point about 22 miles south of Santa Barbara, and about 6 miles north of Ventura, at about 7 o'clock in the evening, these two cars, carrying lights, met in collision on the highway. Where the collision occurred the highway is paved. The paved portion is about 16 feet in width, slightly elevated in the center, and was in perfect condition. The ground on the west side of the paved portion was 3 or 4 inches below the edge of the pavement. In the collision, the respective left front wheels on each of the automobiles were driven into the other, the direction of the cars

reversed, and plaintiff's automobile was almost completely demolished. There was evidence tending to show that the driver of plaintiff's car turned the car off the pavement to the right in an effort to avoid collision, and ran off of the pavement for some distance, and that two passengers on the car felt the jar going off the pavement. On the other hand, the driver of the defendant's car testified that he pulled his car off the highway to the right to avoid the collision; that his car was about a foot off the highway. The actual collision condemns the testimony for either the plaintiff or defendant as being untrue.

[1] The testimony of the witnesses to the accident being in absolute conflict, resort was had to the testimony of witnesses describing the appearance of the cars, the track, and the skidding marks on the road, observed immediately following the accident. From this testimony the jury drew the conclusion that the defendant was at fault, and awarded its verdict in favor of the plaintiff. Objection was made to the testimony of one of the witnesses on the question relating to the condition of the road and certain marks thereon two days after the accident, without laying a proper foundation to show that the road was in the same condition on that day that it was immediately following the accident.

Witnesses had testified as to the condition of the road and marks thereon immediately following the accident, and they had been cross-examined as to every detail. The jury was authorized to draw the proper inference from this evidence as to whether the condition of the road was the same at the time this witness saw it as it was at the time of the accident, or, if it had been changed by the weather or passing traffic, the extent of such change. This was a sufficient foundation for the testimony under all the circumstances. We do not see how the testimony could have been prejudicial.

[2] The objection that the court overruled defendant's motion for a new trial seems to again call for the often repeated statement of the rule that in the federal courts the denial of a motion for a new trial is in the discretion of the court, and where that discretion has been exercised, and there is evidence to support the verdict, as in this case, motion for a new trial is not reviewable in this court. *Maryland Casualty Co. v. Orchard Land & Timber Co.*, 240 Fed. 364-367, 153 C. C. A. 290; *Chicago, M. & St. P. Railway Co. v. Chamberlain*, 253 Fed. 429-431, 165 C. C. A. 171.

[3] The objection that the verdict of the jury was excessive must also be overruled. There was evidence proper for the consideration of the jury, where the law has placed the power and duty of dealing with this question. The evidence supports the verdict, and this is the extent of our inquiry. *Herencia v. Guzman*, 219 U. S. 44, 45, 31 Sup. Ct. 135, 55 L. Ed. 81; *Phoenix Ry. Co. v. Landis*, 231 U. S. 578-581, 34 Sup. Ct. 179, 58 L. Ed. 377; *Southern Ry. Co. v. Bennett*, 233 U. S. 80-87, 34 Sup. Ct. 566, 58 L. Ed. 860; *St. Louis & Iron Mt. Ry. Co. v. Craft*, 237 U. S. 648-661, 35 Sup. Ct. 704, 59 L. Ed. 1160.

Finding no error in the record, the judgment of the District Court is affirmed.

DALTON ADDING MACH. CO. et al. v. ROCKFORD MILLING MACH. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 27, 1920.)

No. 2689.

1. Patents ¶177—Novel combination of invention of others is limited to particular form of adaptation shown.

One who selects and combines elements from the inventions of others into a new structure, adapted to accomplish the old results, is entitled to a patent only for his particular form of adaptation, and there is room for such an adapter to have only a specific patent for his particular form of adaptation, and he is not privileged to exclude others from gleaning in the same general field.

2. Patents ¶20—Doctrine of "reversal" stated.

The doctrine of reversal can properly be applied only when the reversal can be made without change of parts or functions of parts, and if the claimed reversal involves the addition or subtraction or modification of parts, or if the movements essential to one of the machines be required to give way to different movements of the other machine, there is no reversal of movement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reversal.]

3. Patents ¶177—Use of prior device does not give patentee exclusive right thereto.

That an inventor embodied the concept of a prior inventor in his reorganization of an old machine does not entitle the subsequent inventor to that degree of dominion in the art which the prior inventor might have exercised.

4. Patents ¶328—1,039,130, writing and adding machine patent, held not infringed.

The Hopkins patent, No. 1,039,130, for an adding and writing machine, held not infringed by a machine made under the Sundstrand patent, No. 1,198,487.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Arthur L. Sanborn, Judge.

Suit by the Dalton Adding Machine Company and the Addograph Manufacturing Company against the Rockford Milling Machine Company and others. From a decree for defendants (253 Fed. 187), plaintiffs appeal. Affirmed.

Thomas A. Banning and Samuel Banning, both of Chicago, Ill., for appellants.

Luther L. Miller, George L. Chindahl, W. Clyde Jones, and Lincoln B. Smith, all of Chicago, Ill., for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. Appellants, owners of patent No. 1,039,130, which was issued on September 24, 1912, to Hopkins, for a combined writing and adding machine, sought unsuccessfully in the trial court to suppress an adding machine made by appellees under the Sundstrand patent, No. 1,198,487, September 19, 1916.

Claims to the number of 284 are contained in the Hopkins patent.

Of these 44 were insisted upon at the trial and are here under the assignments of error. Following the oral argument, an extended consideration of 1,983 pages of record and 528 pages of briefs, and examinations of numerous physical exhibits, have finally led to the view that all the issues in the case are to be disposed of by stating and answering one question.

Burroughs was the founder of the adding machine art. His machine comprises, broadly, a setting-up mechanism, by which the operator positions stops to determine the numbers that are to be recorded and added; a printing mechanism, by which the selected numbers are recorded on paper; an adding mechanism, by which the totals are accumulated; and an operating mechanism, that sets in motion the various parts through which the addition is recorded.

As we are not herein concerned with the adding and operating mechanisms, we note that the Burroughs setting-up and printing mechanisms employ the following five elements, viewed broadly: A keyboard; a field of stops; a printing device; connections between the keys of the keyboard and the field of stops; and connections between the field of stops and the printing device.

The Burroughs keyboard contains nine rows, of nine keys in each. The bottom row is made up of 1's the next of 2's and so on. In the other direction, beginning at the right hand, the rows represent the ordinal values of the numerals. (Separate provision is made for printing ciphers without the use of a key.) In the field of stops, the frame of which is stationary, there are nine rows of nine stops. When the operator depresses a numeral key, a stop of corresponding cardinal and ordinal value is set up in the field of stops by means of the interposed connections. When the stops representing the selected number have been set up, the operator moves a lever, which through its connections brings the type carriers into the positions determined by the set-up stops, and then a farther movement of the lever causes the printing to be done. The Burroughs printing mechanism consists of a platen, movable type, and hammers to strike the type; the paper being interposed between the type and the platen.

Prior to Hopkins many detailed improvements upon the Burroughs machine had been made. But no invention of a primary character appeared until the issuance of the Helmick patent, No. 630,053, August 1, 1899. Helmick's invention of the 10-key adding machine could not found a new art, but it exhibited a radically new start at a vital point in the older machines. No one has been able to get away from the field of 81 stops. That has remained as an essential means of placing the type in printing position. Burroughs used 81 keys and 81 connections to control the 81 stops. Helmick found that he could control the 81 stops with 10 keys and 10 connections. The 10 keys represent the cardinal values of the numerals; ordinal values are obtained by giving to the field of stops a step-by-step movement. When a key is depressed, the corresponding stop in the foremost row is set up, and at the same time, by means of an escapement mechanism, the field of stops is moved to a new position, in which the row of stops containing the stop set up by the depression of the key is in line with the right-hand type

carrier, and the second row of stops is brought into operative relation with the keys. Successive operations of the keys result in repetitions of this movement, until the selected number has been set up in the traveling field of stops, when, by the operation of the lever, the type carriers are moved to the positions permitted by the stops, as in the Burroughs machine, and then the printing follows. In his printing mechanism Helmick did not employ the Burroughs platen, but interposed the paper between the hammers and the type.

Hopkins not only knew of the Burroughs and Helmick adding machines; he was also acquainted with typewriting machines. In his patent for a combined adding and writing machine, many claims, presumptively valid, are devoted to the combined operations. Claims relating to the setting-up and printing mechanisms of an adding machine are divided by appellants into four groups.

The first group, 20 some in number, covers all of the specific features which Hopkins developed in bringing together the foundational inventions of Burroughs and Helmick. We assume that they are sufficient in number and scope to afford appellants ample protection against the unauthorized use of any of those specific features or their fair equivalents. And we accept appellants' concession that the machine of appellee does not infringe any of these claims.

The second group, 20 in number, comprises various combinations of setting-up and printing mechanisms, in which the traveling field of stops is called a carriage, and is characterized by one of its functions. Claim 141, which is typical of this group, is as follows:

- "The combination with,
- "1. A series of type carriers;
- "2. Hammers co-operating with the type on said type carriers to record;
- "3. Means for causing said hammers to operate incidentally to the operation of the corresponding type carriers;
- "Each hammer remaining idle when the corresponding type carrier is idle; and
- "4. A carriage operable to select the number of type carriers which may be operated; of
- "5. A paper carriage arranged to feed a sheet of paper to said type carriers; and
- "6. Means for holding said carriage in different lateral adjustments to present different columns of paper to said type carriers."

Terms of broader scope can hardly be imagined. But none of the elements, so generically stated, was brought into being by Hopkins. Elements 1, 2, 3, 5, and 6 were old with Burroughs and his improvers, prior to Hopkins. Element 4 in every generic sense was the property of Helmick.

The third group, 13 in number, is similar to the second group, except that it characterizes the "carriage" by another function. Claim 31, which is typical of this group, is as follows:

- "In an adding machine,
- "1. Racks;
- "2. Type carriers in connection with said racks;
- "3. A carriage whose operation is necessary before said racks and type carriers may be operated;
- "4. Mechanism for operating said type carriers and racks;

- "5. Adding mechanism operated by said racks;
- "6. Movable elements limiting backward movement of said racks;
- "7. Trips operated by said adding mechanism for moving said movable elements effectively to release said racks; and
- "8. Means for operating said racks effectively to transfer or carry from lower to higher orders in said adding mechanism."

If for the third element there be substituted the Burroughs means for setting up the stops in the field of stops, the entire combination is found in the Burroughs machine for the same purpose and effecting the same result. The "carriage" of the third element originated with Helmick.

In the fourth group, 11 in number, no "carriage" element is directly named. Claim 184, which is typical of this group, is as follows:

- "A recording mechanism comprising,
- "1. A revoluble platen arranged to hold paper;
- "2. A series of type carriers;
- "3. A key;
- "4. Mechanism operable to move the type carriers toward the platen;
- "5. A series of parts equal in number to the number of type carriers arranged to be moved at a time when said key is successively operated;
- "6. Means whereby a number of type carriers equal to the number of said parts so moved will be stopped side by side adjacent to the platen when said type carriers are moved;
- "7. Automatic means to record on the platen after said type carriers stop;
- and
- "8. Automatic means to rotate said platen to feed paper in line spacing."

In his struggle to get broader and broader claims, the applicant has here arrived at generalities from which it is difficult to extract his meaning. So far as this record informs us, the setting-up and printing mechanisms of an adding machine cannot exist without a field of stops. In the Hopkins machine the traveling field of stops is the "carriage" element. The claim might be held void for nebulousity. If the sixth element does not bring in the "carriage" as the indispensable field of stops, then the claim, even though it be taken as merely a subcombination in the setting-up and printing mechanisms, is void for inoperative-ness. If the "carriage" is brought in, then the question is the same as that presented by the other groups of claims.

It is now necessary to see what the appellants by this suit are endeavoring to suppress. In producing the setting-up and printing mechanisms, with which alone we are here concerned, Sundstrand, of course, utilized the necessary five broad elements: Keyboard; field of stops; printing device; connections between the keys and the field of stops; and connections between the field of stops and the printing device. He took the Burroughs printing device and the Burroughs stationary field of stops. He took the Helmick keyboard of 10 keys. But when it came to bringing the keys, the stops, and the printing device into operative relationships, Sundstrand devised specific means which we find nowhere in the prior art. In all prior machines there was a direct and laterally immovable series of connecting links between the keys and the field of stops, and also a direct and laterally immovable series of connecting links between the respective rows of stops and the printing device. But in the Sundstrand machine there is in each

instance a series of connecting links which are fixed with relation to the keys and the type bars, but are laterally movable with relation to the field of stops. For use with the Burroughs stationary field of 81 stops and the Helmick stationary board of 10 keys, Sundstrand devised a swinging frame, containing a series of 9 push pins or fingers, which are adapted to be actuated by corresponding keys. In their initial position these fingers are in operative relationship with the first row of stops in the field of stops, and on the depression of a key the corresponding stop in that row is set up. Then, by means of a toothed ratchet bar, the fingers swing so as to bring their ends opposite the second row of stops, and so on. When stops representing the selected number have been set up, movement of the operating lever carries the type to the required positions and the printing is done.

The question is: Did Hopkins make and disclose an invention which in substance is broad enough to support the claims which in words cover the Sundstrand machine?

Burroughs achieved a new result by new means. His thought was the foundation of a new art.

Helmick achieved an old result, but by different means in part. His thought was the foundation of the 10-key branch of the adding machine art. In connection with the Burroughs adding mechanism and a non-Burroughs printing device, he utilized his new keyboard by changing the indispensable Burroughs field of 81 stops from stationary to movable.

Hopkins achieved an old result by means which were generically old. He availed himself of the Burroughs patents. He took the Helmick 10-key invention. He followed Helmick in utilizing the new keyboard by changing the Burroughs field of stops from stationary to movable. But, ceasing to follow Helmick, he reverted to the Burroughs type of printing device. In thus combining Burroughs and Helmick, he introduced into the setting-up and printing mechanisms many specific changes, some of them probably necessitated by his bringing typewriting mechanism into the organization; but, so far as the adding machine art alone is concerned, the results were all old, the fundamental concepts were all old, and the means considered generically were all old.

Sundstrand achieved an old result by means which were generically old. He took, we may say for the purposes of this case, the whole of his machine, including the stationary field of stops, from Burroughs, except the keyboard which he took from Helmick, and except the new connections between keys, stops, and type bars, which he created. The swinging fingers and their mode of operation were specifically new; they were generically old only in the sense that between the swinging fingers and the stationary stops there was relativity of movement, and relativity of movement generically had been devised by Helmick. For Sundstrand's specifically new concept we find no anticipatory suggestion in Burroughs or Helmick or Hopkins.

[1] Hopkins showed one way of combining and improving upon Burroughs and Helmick; Sundstrand found another way, which depends upon no thought or teaching of Hopkins. One who selects and combines elements from the inventions of others into a new structure

adapted to accomplish the old results is entitled to a patent only for his own particular form of adaptation. There is room for such an adapter to have only a specific patent for his particular form of adaptation and he is not privileged to exclude others from gleanings in the same general field. *Milwaukee Carving Co. v. Brunswick-Balke-Collender Co.*, 126 Fed. 171, 61 C. C. A. 175; *Loew Supply & Mfg. Co. v. Fred Miller Brewing Co.*, 138 Fed. 886, 71 C. C. A. 266; *National Regulator Co. v. Powers Regulator Co.*, 160 Fed. 460, 87 C. C. A. 444.

[2] Appellants' whole insistence upon a right to escape from the rule above cited is centered in the oft-repeated assertion that to change from the Hopkins movable to the Sundstrand stationary field of stops involved merely a reversal of movement of the same parts in the two machines. The doctrine of reversal can properly be applied only when the reversal can be made without change of parts or the functions of parts. If the reversal involves the addition or subtraction or modification of parts, or if any of the movements essential to one of the machines be required to give way to different movements of the other machine, it is obviously not a mere reversal of movement that has resulted. To effect a reversal of movement in the Hopkins machine, it would be necessary to hold the field of stops stationary and to move the racks and type carriers on the one hand and the keyboard on the other. Sundstrand did not do this. He held the racks and type carriers and also the keyboard stationary, and, in order to have them properly cooperate with the stationary field of stops, he devised the novel connecting means hereinbefore described. So we find that Sundstrand did not merely reverse the movements of the same or corresponding parts in Hopkins.

[3, 4] But there is a worse vice in the contention than its lack of basis in fact. That vice inheres in the claim of Hopkins that, because he embodied the Helmick concept in his reorganization of the Burroughs machine, he is entitled to that degree of dominion in the art which Helmick might have exercised. Compare *Stromberg Motor Devices Co. v. Zenith Carburetor Co.*, 254 Fed. 68, at page 82, 165 C. C. A. 478, where the owner of the Richard patent for a carburetor, which employed a fundamental invention by Ahara, was endeavoring to suppress a rival carburetor which also embodied the Ahara concept.) We have hereinbefore granted that Sundstrand uses relativity of movement. But the answer to appellants is that dominance over relativity of movement was the right of Helmick and not of their assignor Hopkins.

Our conclusion is that appellants should not be permitted through the Hopkins patent to take the dead hands of Burroughs and Helmick with which to throttle the live offspring of Sundstrand's conception.

The decree is affirmed.

JUENGST v. HILL PUB. CO.

(District Court, S. D. New York. August 1, 1919.)

1. Patents ¶17—Ability of other inventors in art to make combination does not disprove invention.

The fact that other inventors working in the same art would have been able to make the combination made by patentee does not disprove invention, if the ordinary journeyman in the art could not have made such combination.

2. Patents ¶20—Invention may lie in adaptation of tools of intermittent process to continuous process.

Though the change from an intermittent to a continuous process is not invention, the adaptation of the tools used in the intermittent process to the continuous process may involve invention.

3. Patents ¶241—Adaptation of old tools can be infringed only if same means are used.

Where the invention consists only in the adaptation of tools used in the intermittent process to a continuous process, there can be no infringement, unless the same means are used to accomplish the synchronization of the movements.

4. Patents ¶328—1,193,395, for book binder, held valid, but infringed only as to claim 53.

The Juengst patent, No. 1,193,395, for machines for binding books by continuous process, held valid, but infringed only as to claim 53 thereof, relating to a detector to provide against a missing sheet.

In Equity. Suit for infringement of patent by Charles A. Juengst against the Hill Publishing Company. Decree rendered, holding patent valid, but infringed as to only one claim.

Decree affirmed 267 Fed. 435.

Axel V. Beeken, of New York City, for plaintiff.

Donald Campbell, of New York City, for defendant.

LEARNED HAND, District Judge. The machines involved in the patent in suit and the alleged infringement are exceedingly complicated, as well as are those which preceded them in the art. The claims are, moreover, all in somewhat abstract form, functional in fact, though not on that account necessarily bad, according to existing notions. However, it must be kept in mind that, since there was no invention in the mere idea of a continuously operating coverer, and since on this account the invention must lie in the specific means which the patentee disclosed for accomplishing that general purpose, the claims, to be valid at all, must be read upon the disclosure somewhat narrowly. In other words, the patent cannot be held to include all those means by which the results enumerated in the claims can be accomplished; they must be limited to those means which the patentee disclosed, or which were obvious equivalents, available to the ordinary skilled artisan.

Furthermore, not only was the mere idea of continuous movement not patentable, but the succession of the processes was equally not invention for the art established and required it. There remain open

for invention only changes in the terminal tools which touch the books and covers; i. e., the actual fingers of the process, and the mechanical connection of the parts, so disposed as to operate synchronously.

[1, 2] As to the last element, the defendant seems to suppose that, having once shown some similarity between the terminal tools and the prior art, all chance for invention disappears. This is not so. It may be that any one of the inventors whose patents fill the record could have successfully co-ordinated these tools; but it certainly does not follow that a journeyman artisan could do so. These men are the pick of their art, presumably, and what may be easy for them might be as impossible for the ordinary artisan as it would be for a layman. Invention may therefore lie in the adaptation of the old intermittent tools to a continuous machine.

[3] It is quite true that, if invention does lie only there, there can be no infringement, unless the same means are used to accomplish the synchronization of the movements. That, however, is only a caution when the issue of infringement arises; it does not affect invention. In such complicated machines as these it is pretty sure that almost any practicable machine, which will work continuously, requires for all its parts some genuine inventive capacity, as that word is understood. The ordinary man might easily imagine the outlines of the result, but the tangled complexities of interaction would be quite without his practical powers. An invention does not call for the genius of a Faraday, a Helmholtz, or a Kelvin; whatever is outside the powers of the ordinary journeyman, once he becomes well grounded in the art, is enough. That is not a high standard of originality.

[4] The first process with which Juengst had to deal was the feeding of his books into the conveyor or belt, in which they were to be held while the bottoms were glued, the covers pressed on, and later "broken," as the word goes; these being the three necessary processes. The Sheridan horizontal machine, though intermittent, had an endless horizontal belt, with two turns and two parallel straight stretches, exactly like the defendant's. It carried clamps, which operated upon the same principle as his; clamps holding the books firmly between two horizontal and immovable pins. The opening mechanism of these clamps is shown in Figure 1 of Bredenberg, 1,073,324, and, while it operates through fingers fixed upon an oscillating shaft, instead of by the cam, 36, of the defendant's machine, it is to be regarded as in every sense an equivalent. In so far as the patent depends for its in-feed upon its horizontal continuously moving belt with a series of clamps, the infringing machine is derived, not from it, but from the earlier Sheridan machine. Nor can it be thought any invention to keep Sheridan's belt in continuous motion; rather was invention necessary, assuming invention had anything to do with the matter, to stop the belt, so that the intermediate processes should take place.

Juengst's disclosure, in which one side of the clamps swings in a plane perpendicular to the plane of the belt, could introduce the books in the same plane as the belt and parallel in two planes to one of its straight runs. As the clamp pins in the defendant's machine were fixed, the books must be introduced from above or below, and in order

to be continuous this introduction must be gradual, which could not be effected, except by a gradual incline. But Juengst did not need to introduce the books as he disclosed in Figure 1 of the patent. It so happens that the figure shows the books arriving on an endless belt from Juengst's gatherer stitcher. They might equally have come from a platform, where they had been stacked side by side on end, as shown in Lewis. It is quite plain (page 2, lines 89-99) that the patent did not include this delivery from the gatherer stitcher, and that the in-feed does not include it.

The patent can fairly be said to begin with the finger, 28, which picks off the book and carries it until the clamp descends. Whether the in-feed feature is patentable, therefore, depends in my judgment altogether upon the opening of the clamps "at an angle with respect to the advancing movement of the conveyer," as claim 4 puts it. The finger, 28, is not patentable (see Lewis). It is a combination as a whole, which alone could be the basis of a claim. Therefore I do not read the language of the claims, "in substantially the direction of the path of movement of said clamps," as covering the defendant. I do not care whether verbally it answers or not. Mere verbal correspondence will not, of course, prove infringement; there must be functional equivalence. I cannot see that the defendant has borrowed a single element of Juengst's in-feed, and there would indeed be scarcely a plausible argument in its favor, were it not that the figures show a series of single books arriving from the gatherer. I do not, of course, mean to suggest that Juengst's in-feed was not a highly meritorious invention, taking all its coactive elements together.

Coming next to the glue pot and detector, with their attendant mechanism, we find in each the same means; i. e., a glue roller contacting with the bottom of each book as it advances. But this was not new; Lewis shows such a glue roller operating in unison with the movement of the books, and the Sheridan horizontal machine has the same thing. There was no pause at this stage of the operation in either machine. Now there is no need for a detector, where the feed is not sheet by sheet, because with a pile of covers there can be no missing, unless the pile is exhausted, a contingency not probable enough to require provision. It does not require invention merely to think of the necessity for a detector to provide against a missing sheet, and if the mechanism actually employed were at hand to accomplish the result, claim 53 would not be valid. Bascom, a detector for missing sheets in a glueing machine, is such a device, but it corresponds only partially with the device of the patent. Dexter, 602,816, is another, also unlike in structure.

Nor can I say that it required no invention for Juengst to make his detector with either Dexter or Bascom before him. Certainly a valid claim could be made, which would sustain the details of his disclosure in the face of either. Bascom is much closer, but is by no means the same. On the other hand, the differences between the defendant's detector and the plaintiff's are too small to be of any consequence. The defendant's member 227 moves in one direction out of functional connection with the bell crank, 229, and the plaintiff's member 37

moves in the opposite direction, away from its bell crank, 36. The defendant's glue pot rises and falls like Bascom's, and only the plaintiff's roller.

The infringement and validity of claim 53 therefore depends upon whether I read it to cover any detector, or limit it to substantially the detector actually described. As there appear to be no other claims which define it in detail, I am disposed to adopt a lenient attitude towards the claim, and read it to mean "substantially as described."

The next element is the cover-feeding means. This Juengst disclosed as a roller situated below the line of travel of the books, to which roller sheets were fed singly by belts and chains running below the "breaker" from a single sheet feeder not disclosed. There were a number of such single sheet feeders in the art, and Juengst (page 3, lines 40-43) assumed that any one of them could be used. Certainly his patent cannot stand upon any particular form of single sheet deliverer, and the disclosure (page 3, lines 43-70) concerns only the chains, rollers and belts which carry the sheets up to the roller. In these no invention can rest. The roller rolls the sheets directly upon the back of the freshly glued books. As an alternative, in Figure 17 Juengst disclosed diagrammatically a system by which the single sheets were carried by belts to a table, 182, which was to press them against the books before they reached the "breaker." In Figure 16 the presser and "breaker" were combined in one.

This disclosure is criticized as insufficient, but I think it was not. Such a table or platen Lewis disclosed fully, though for a pile of sheets a device which involved a very complicated mechanism for compensation as the pile was exhausted. Juengst in this patent had the right to refer to such a table as a part of the art to which builders might refer, and therefore, taken merely as matter of interpretation, and without looking at the prior art, I think that the claims which refer to the cover feeding devices would be sufficient to cover the defendant's structure. It has taken Lewis' table, eliminated the compensating element, and operated it as Juengst did his "breaker" presser, of which more hereafter.

The question of validity is therefore necessarily involved, unless the claim be narrowly construed. Before considering the possibility of so construing the claims, I must ask whether it was invention to combine Lewis' table with the single sheet feeders known in the art. If so, obviously it can be only because of some originality in the idea of serving the machine by single covers instead of by a pile of covers. Both Lewis and Pachter made continuous machines in this respect, and each provided a pile of covers upon a table needing replenishment. It may be plausibly urged that this is some proof of invention. However, the covers must be piled somewhere, either upon the table in the machine, or outside upon some one of the known cover feeders, and the pile must be replenished by hand when exhausted. I own it seems to me hard to believe that the position of that pile was actuated by more than a choice from convenience. Possibly Lewis and Pachter thought it better to have the machine complete within itself than to require a supplementary cover feed. At least the necessary compen-

sation involved highly complicated additions to the table mechanism, which would have suggested its inconvenience.

With every allowance for the fact that the earlier inventors did not disclose the combination, I must hold that the cover feed claimed is not an invention, if construed so broadly as to infringe. In view of this result, and candidly, perhaps at the expense of some logical consistency, I think I shall hold that the claims for cover feed may be narrowly construed in spite of figures 16 and 17. It will follow, however, that these claims are not infringed.

The last element, and the most important, is the cover breaker. Here the two machines separate in their structure. Juengst has a quite separate element from the roller, consisting of a base and two "breaking" jaws. The base rises and presses the cover firmly on the book, and thereafter moves in unison with it till the "breaking" is complete. The forward motion of this presser engages the two breaking jaws with opposing cams, which cause them to approach each other, thus narrowing the space between them, and so "breaking" the cover on the book. After the continued motion of the presser has carried the whole combination beyond the cams, a spring releases the jaws from each other.

The defendant's breaking is accomplished in part by the same presser member, which causes the cover to adhere to the book in the first place. This member is in contact with three books at a time, and with each book three separate times. Having pressed the cover to the book, it drops, returns, and rises again. The same book is then again in contact with it, but not at its rear end as before, but at its center. At that moment, opposed breaking jaws, which are in form precisely like Juengst's, strike it a hard blow in the arcs of circles moving in opposite directions. At the point of contact the edges of the jaws are moving in the same direction as the presser. The blow is very quick and strong, delivered by the rotation of two vertical rods on which the breaking jaws are eccentrically mounted. As the books are loosely bound pamphlets, the strong blow probably sinks a short distance into the paper, and in any event it is in the same direction as the motion of the presser.

That the forward movement with the presser makes a difference appears upon reflection. Were it not so, the jaws could be rotated in the opposite direction, which would certainly in fact prove disastrous; or the device of Sheridan's horizontal machine could be used with an instantaneous blow. It is therefore, in my judgment, no answer to say that, because the arc in which the jaws move is parallel to the presser only at the moment when the motion of the presser is tangential to it, they do not move in unison with the presser. Practically speaking, and not geometrically, there is a functional period during which the two must be moving in substantial unison, else the paper of the cover would be torn or displaced. So much for the actual operation of the defendant's cover breaker.

Is the Juengst breaker valid as invention? The terminal tool, presser, and jaws have been taken directly, so far as I can see, from the Sheridan intermittent machine. The presser and the jaws rise and fall

together, and the jaws slide reciprocally over the face of the presser. Juengst, however, had to do a very difficult thing; i. e., to keep these two relative motions while he gave to them all an added reciprocating movement in the third of all possible geometric normal planes. In doing this he had to abandon altogether the disclosure of the Sheridan machine, and so far as the motions of the presser were concerned he followed Lewis' feed table. However, he had to give the jaws their breaking movement, and this he did by a cam. It may seem simple, after this had been done, to see how it was done; but I have no doubt whatever that it was invention to do so. Bredenberg, admittedly a talented inventor, thought the breaker inoperative when he first saw it, which is ample testimony to its difficulty. The Sheridan breaker is therefore not a good reference.

The next reference is Figures 36 and 37 of Lovell and Bredenburg, which shows a "breaker." This patent discloses a moving chain carrying a series of pairs of relatively movable jaws, designed to press into the edges of a round-backed book the cloth and cotton which is to be a part of the hard cover, later applied. The mechanism is not simple, and, like the details of Juengst's breaker, can hardly be satisfactorily described without figures. "Breaking" results from the fact that the curved jaws, h^a , are raised by the contact of the rollers, J^a , with the cam track, Z^a . As the rollers rise, they bring together the jaws, and, if there be no book between them, the presser, V^2 , does not rise with them. If, however, the jaws contact with a book, the presser must rise and press against the book.

It is conceded that the jaws contact first, and it follows that there must be a downward thrust from the jaws taken by the ridge of the edge of the book, since the pressure at the bottom is only the reaction from this action. In the case of a pamphlet, which has no such sustaining ridge, there would obviously be a tendency, depending on the pressure desired at the bottom of the pamphlet, to pull off the freshly glued cover from the book, or certainly to put a crease in it at that point. I cannot see that the defendant's modification on plate 16 of Exhibit N could operate without some such tendency, and at least I am not inclined, in view of the inevitable uncertainty of such changes, to accept this "cover breaker," assuming it to be properly called such, as an anticipation of what Juengst devised.

Disclosures like Hull and Lewis and Pachter may be safely disregarded; they are not designed upon the same principle at all, and probably would never operate effectively, as the roller carries a wave or crease before it by the time it reaches the end of its course. They are tacit evidence to the difficulties inherent in the adaptation of the old intermittent breaker to a continuous machine. The device in Juengst's gatherer stitcher had a reciprocating action of the jaws coordinated with a similar reciprocation of the supporting mechanism to enable the book to continue its course while the jaws clamp it. It has no third motion of rise and fall, as the patent in suit. That Juengst borrowed from his gatherer stitcher may be true; I should rather look to the reciprocating tables of Lewis, as I have said. The means chosen by Lewis to give the tables two reciprocating motions were very simi-

lar to those chosen by Juengst in this patent, but the addition of the opening and closing of the jaws I have already said that I thought was not commonplace craftsmanship. Therefore, though the terminal, too, was old, its organization in the machine to perform a three-way motion of the jaws required substantial mechanical ingenuity.

The remaining question is whether the defendant's breaker is an infringement. Verbally I think it is, because it has a motion in unison with the belt. Certainly there can be no doubt that the presser has such a motion. As I have already said, there is also no doubt, practically speaking, as to the jaws. I shall not look closely as to the exact difference in speed between the jaws and the presser. Obviously the jaws, which move in a circle, have at every instant of time a different speed in the direction of the presser. As I have said, the real question is of their substantial unison to do the work. Is there functional, as well as verbal, equivalence? The defendant has not kept the terminal tool of the Sheridan horizontal machine, but modified it by providing for the vertical separation of the jaws from the presser while both are moving backward, and therefore in inoperative phase. The presser is reciprocated up and down and forward and back by substantially the same mechanism as Lewis, and for so much of its machine, therefore, the defendant might safely follow Juengst, as indeed it did. If it infringed at all, it infringed by the means of opening and closing the jaws.

In the form of the terminal tool Juengst made no invention, as I have said. It is clear that to a continuously operating machine it is as necessary that the jaws should move forward when in contact with the book as that the other parts should so move. That conception is merely a statement of the problem before the inventor, not its solution. There is no originality necessary in that. Therefore it can be only in the means by which the forward movement is accomplished that invention may lie. I have already stated what Juengst's means were; the defendant's appear to me *toto cœlo* different. It did not utilize the forward motion of the presser to move the jaws in unison with the book, as did Juengst, nor did it interpose in the path of the jaws a cam through which a resultant force at right angles was developed to close them. It provided, on the contrary, a quite independent source of immediate power for both movements, as well as for the return from each; i. e., the shafts which carry the jaws eccentrically. These shafts were out of all mechanical connection with the presser, and operated without regard to, though synchronously with, its movement.

To conceive and to execute these means required new inventive thought quite as new as the thought necessary to give Juengst's motion to the jaws. It was a departure in which no common element remained between Juengst and the defendant, except the same result. Certainly, if Juengst had been required to state in detail his invention upon this feature, the claim would have so clearly avoided the defendant's structure that noninfringement would have been apparent. It is no doubt true that the cam and the eccentric are oftentimes mechanical equivalents, but it would be absurd to treat all mechanisms as equivalent merely because they contained cams or eccentrics.

In conclusion, therefore, it seems to me that, with the exception of the detector, the defendant has used nothing which Juengst contributed to the art in this patent. Juengst did make the first continuous machine, and he is entitled to a monopoly upon it. I see no reason to question its validity. But the maker of the first continuous machine cannot control all other such machines, unless they have been constructed by borrowing from what the first maker did. Just as Juengst necessarily started with the existing art before him, so all others are free to start where he did. The defendant, starting at the same place, had not needed to use any of the means which Juengst invented except his detector.

I conclude, therefore, that a decree may go on claim 53, and the bill be dismissed for noninfringement upon the other claims. No costs.

JUENGST et al. v. HILL PUB. CO.

(Circuit Court of Appeals, Second Circuit. May 28, 1920.)

No. 223.

Appeal from the District Court of the United States for the Southern District of New York.

Action by Charles A. Juengst and another, a copartnership doing business under the name and style of George Juengst & Sons, against the Hill Publishing Company. From a decree (267 Fed. 428) finding the patent in suit valid, but infringed as to only one claim, plaintiffs appeal. Affirmed.

James B. Liberman (Axel V. Beeken, of New York City, of counsel), for appellants.

Rogers, Kennedy & Campbell and Robert Fletcher Rogers, all of New York City, and William B. Kerkam, of Washington, D. C. (Donald Campbell and William J. Dolan, both of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed.

KAUFFMAN v. SODEMANN HEAT & POWER CO.

(District Court, E. D. Missouri, E. D. September 20, 1920.)

No. 4942.

1. Patents ☞311—Though answer did not plead anticipation, evidence of prior patents admissible.

Notwithstanding equity rule 30 (201 Fed. v. 118 C. C. A. v) and Rev. St. § 4920 (Comp. St. § 9466), evidence of prior patents is admissible in an action for infringement notwithstanding the answer did not plead anticipation, for evidence of the prior art is necessary to show what was old, to distinguish what is new and to aid the court in construing the patent.

2. Patents ☞328—1,170,544, for an improved radiator shield held invalid.

Patent No. 1,170,544, for an improved radiator shield, comprising two vertical imperforate brackets, to be placed at the ends of the radiator to

deflect the heated air vertically, and a horizontal shield above, etc., being for mere combination and producing no new and novel result, *held* invalid for want of invention.

3. Patents ☞26(2)—Combination patent to be valid must produce a new result.

While a new combination of old elements, if it produces a new and useful result, is patentable, the result must be a product of the combination, and not a mere aggregate of several results, each a complete product of one of the combined elements.

4. Patents ☞328—Design patent, 49,149, for improved radiator shield, held infringed.

Under the rule that there is infringement, where there exists such similarity between the design and the alleged infringing article as will lead ordinary persons to think the patented and infringing articles are the same, design patent No. 49,149, for an improved radiator shield, *held* infringed.

In Equity. Bill by Samuel Kauffman against the Sodemann Heat & Power Company. Decree for defendant on claim for infringement of mechanical patent, and for complainant for infringement of design patent.

James A. Carr and John H. Bruninga, both of St. Louis, Mo., for plaintiff.

James L. Hopkins, of St. Louis, Mo., for defendant.

FARIS, District Judge. This is an action for injunction and for an accounting by the complainant, as patentee against defendant, a corporation of Missouri, for alleged infringements of the Kauffman mechanical patent, No. 1,170,544, bearing date of February 8, 1916, and the Kauffman design patents, numbered 48,939 and 49,149, bearing dates of April 25, 1916, and June 6, 1916, respectively.

The hearing was by evidence given orally before the court. This evidence tended to show infringement of claims 1, 2, and 8 of the complainant's mechanical patent, if the latter be valid, as also of both of complainant's design patents mentioned supra. Such references to this evidence as may be found necessary to make clear the views entertained will be set out in the discussion.

The case strikes me as being wholly determinable on the question of the validity of the Kauffman patent on the ground of want of novelty in the invention, in view of the state of the art at the time such patent was granted to complainant. I so conclude because I think there is no manner of doubt that, if complainant's patent is not void, defendant is guilty of a palpable infringement.

Three claims are made touching this question of novelty by the patentee. These claims vary but little, and I think, subject to an addendum explanatory of the two omitted, that claim 8, which it is urged is infringed by defendant, may be selected as typical. This claim reads thus:

"An improved radiator shield, comprising two vertical imperforate brackets adapted to be placed at the ends of the radiator in position to deflect the heated air, a vertical shield portion attached to said brackets at the rear of the radiator, and arranged to co-operate with said brackets to deflect the heated

air vertically, a horizontal shield portion extending horizontally above the radiator, a curved shield portion integrally connecting said vertical and horizontal portions, a trough integral with said horizontal portion between said brackets, a passage into said trough below said horizontal portion, and means for preventing the air from carrying the deposits out of said trough."

In addition to the alleged new features shown in claim 8, *supra*, claim 2 includes—

"a horizontal lithic top member resting upon said horizontal flanges of said brackets and elements holding said top member in position on said flanges."

The answer of defendant did not specifically plead anticipation by former patents, but upon the trial there were offered many prior patents, and also proof of the general use of imperforate side brackets and horizontal lithic tops for years prior to the date of plaintiff's patent.

[1-3] I am fully mindful of the provisions of rule 30 of the Equity Rules (201 Fed. v, 118 C. C. A. v), as also of the provision of section 4920, R. S. (Comp. St. § 9466). But, this rule and this statute notwithstanding, it has been held that—

"Evidence of the state of the art is admissible in actions at law under the general issue without a special notice, and in equity cases without any averment in the answer touching the subject. It consists of proof of what was old and in general use at the time of the alleged invention. It is received for three purposes, and none other, to show what was then old, to distinguish what was new, and to aid the court in the construction of the patent." *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200.

Considering, then, some of the patents offered, as also the proof of prior use in order to ascertain the existing state of the art when complainant took out his patent, and comparing such then existing state of the art with the new things claimed by the patentee here, I find that the "two vertical imperforate brackets adapted to be placed at the ends of the radiator," as well as "a vertical shield portion attached to said brackets at the rear of the radiator, and arranged to co-operate with said brackets to deflect the heated air vertically," are shown in the patent of Miller, No. 334,794, bearing date January 26, 1886. The patent of Goodrich, No. 462,899, bearing date of November, 1891, while specifically for an improved radiator, yet described and illustrated in the accompanying drawings a radiator shield having imperforate side brackets, and having superimposed thereon a marble slab placed on such brackets, so as to form therewith an angle of 90 degrees, just as does the lithic top of complainant in his patent before me. In the description as made in the Goodrich patent, the marble slab was raised above the radiator some inches higher than in the complainant's patent. But Goodrich's specifications did not limit this distance.

Nor does it need citation of authority for the statement that, within ordinary limitations at least, a variation in the mere distance at which a marble slab is placed above a radiator cannot constitute invention. So what is said above touching the Goodrich slab of marble, as well as the facts shown in evidence as to the construction of the radiator niches in the lobby of this court building, as also a similar top, consisting of a

horizontal shield in the English patent of Keith, No. 599,611, issued by the United States on 22d day of February, 1898, show that the "horizontal shield portion extending horizontally above the radiator" is not new, but old. The "curved shield portion integrally connected said vertical and horizontal portions" is shown in the patent of Dixon, No. 543,456, dated July 23, 1895, and in the patent of Coleman, No. 743,071, dated July 21, 1903. The "trough integral with said horizontal portion between said brackets," the "passage into said trough below said horizontal portions," and the "means for preventing the air from carrying the deposits out of said trough," are shown in the patent of Hawkins, No. 818,026, bearing date of April 7, 1906.

The superimposition above the side brackets of a slab of marble, as further claimed by complainant in his claim No. 2, has been already partially covered above, and shown to be old by a reference to the courthouse lobby radiator coverings, and to the Goodrich and Keith patents. It cannot, I take it, be urged that the method of complainant in fixing the lithic slab on top of the radiator by the use of iron pins which project from the top of the side bracket and engage in holes drilled in the marble slab is new. Such method of affixing otherwise loose lithic slabs to tables and other articles is certainly old.

It follows, I think, that there is no invention in the elements of complainant's structure. But undoubtedly complainant has selected from the old art, all of the seemingly valuable elements thereof, and has made a new combination of them, which combination has produced a shield which differs from its predecessors in the art. If there is invention, such invention consists in the combination of these old elements into a new device which as the proof shows is valuable and popular. If complainant, as an inventor, can claim novelty from the workings of some such a rule, as "He does it last who does it best," then his combination may possess novelty.

In the light of what seems to be a measure of conflict in the rule of law applicatory, the point, last above, is a close and somewhat difficult one. In the case of *Owens v. Twin City Separator Co.* (C. C.) 168 Fed. 259, it was said:

"It constitutes no anticipation and no defense to a claim of infringement that one or more elements of a patented combination, or one or more parts of a patented improvement, may be found in one old patent or publication, and others in another, and still others in a third. It is indispensable *that all of them, or their mechanical equivalents*, be found in the same description or machine, where they do substantially the same work by substantially the same means."

And likewise in the case of *Kryptok Co. v. Stead Lens Co.* (D. C.) 207 Fed. 85:

"A patent for a combination is not anticipated nor invalid for lack of invention because an expert may be able to *build up* the patented device by selecting parts taken from the prior art."

I lean, however, as in duty bound, to the rule which was more lately stated in the case of *Grinnell Washing Machine Co. v. Johnson Co.*, 247 U. S. loc. cit. 432, 38 Sup. Ct. 549, 62 L. Ed. 1196. The rule is there stated thus:

"It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. No one by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in combination.' *Hailes v. Van Wormer*, 20 Wall. 353, 368. In *Richards v. Chase Elevator Co.*, 158 U. S. 299, 302, the rule was stated as follows: 'Unless the combination accomplishes some new result, the mere multiplicity of elements does not make it patentable. So long as each element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements.' In *Specialty Manufacturing Co. v. Fenton Metallic Manufacturing Co.*, 174 U. S. 492, 498, the rule was again tersely stated: 'Where a combination of old devices produces a new result such combination is doubtless patentable, but where the combination is not only of old elements, but of old results, and no new function is evolved from such combination, it falls within the rulings of this court in *Hailes v. Van Wormer*, 20 Wall. 353, 368; *Reckendorfer v. Fabor*, 92 U. S. 347, 356; *Phillips v. Detroit*, 111 U. S. 604; *Brinkenhoff v. Aloe*, 146 U. S. 515, 517; *Palmer v. Corning*, 156 U. S. 342, 345; *Richards v. Chase Elevator Co.*, 158 U. S. 299."

I conclude that the rule quoted, *supra*, from the Supreme Court of the United States, applies to the facts here, and that upon those facts cases seemingly in conflict therewith may be readily distinguished. It is obvious that by the combination of old elements in the radiator shield of complainant no new result has been attained. In the old art the ascending current of heated air was prevented from escaping laterally by imperforate side brackets; it was kept from escaping rearwards, and thus blackening the wall from soot and dust, by a curved rear shield; this soot and dust were caught and retained in a trough or dust catcher; heated air at the breathing plane was thrown out into the room at an angle of 90 degrees with the perpendicular, and the shelf formed by the superimposition of a lithic slab is also old, and was usable for warming articles, or as an ornament to the device.

It follows, therefore, that while it is clear that the radiator shield of defendant is, to adopt the graphic language of complainant's solicitor, nothing but a "Chinese copy" of that of the complainant, no action will lie for infringement, because, in the light of the prior state of the art, there exists, in my opinion, no patentable novelty in the complainant's device.

[4] Coming to so much of the bill as concerns the alleged infringement by defendant of plaintiff's design patents numbered 48,939 and 49,149, and bearing dates, respectively, April 25, 1916, and June 6, 1916, I am of the opinion that the evidence and exhibits show infringement. In deciding whether there is infringement, the courts have announced a simple rule or test which strongly appeals to reason and common sense. That test is: Does there exist such similarity between the design and the alleged infringing article as will lead or-

dinary persons to think the articles in question are the same? *Kraus v. Fitzpatrick* (C. C.) 34 Fed. 39; *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606; *Bevin, etc., Co. v. Starr, etc., Co.* (C. C.) 114 Fed. 362; *Gorham v. White*, 81 U. S. 511, 20 L. Ed. 731. Applying this rule to the radiator shield designs of the defendant and complainant, it is obvious that the observer finds great difficulty in distinguishing one from the other.

I conclude, therefore, that defendant has infringed the design patents of complainant, numbered 48,939 and 49,149, respectively, but, for the reasons stated above herein that there is no infringement of complainant's mechanical patent, numbered 1,170,544, dated February 8, 1916. It follows that the decree for the alleged infringement of complainant's mechanical patent No. 1,170,544 should be for defendant, and that the decree for infringement of design patents of complainant numbered 48,939 and 49,149 should be for complainant.

Let decrees be drawn accordingly.

ST. LOUIS ELECTRICAL WORKS et al. v. FORE ELECTRICAL MFG. CO. et al.

(District Court, E. D. Missouri, E. D. September 21, 1920.)

No. 4780.

1. Patents $\text{\textcircled{C}}328-1,239,249$, claims 1-4, 8, for rectifier for alternating currents, held infringed.

The Ballman patent, No. 1,239,249, for a rectifier for alternating currents, if valid, is infringed by a device which merely changes the position of two of the elements, and substitutes a closed path for the air gap in the patent in suit.

2. Patents $\text{\textcircled{C}}27(2)$ —Application of old device to new use not invention.

The mere application of existing devices for the rectification of alternating electrical currents to the production of direct currents for charging storage batteries does not in itself disclose invention.

3. Patents $\text{\textcircled{C}}26(1)$ —Production of old result by new means is patentable.

The production of an old result by new means constitutes invention, and is patentable.

4. Patents $\text{\textcircled{C}}328-1,239,249$, claims 1-4, 8, for rectifier for alternating currents, held valid.

The Ballman patent, No. 1,239,249, claims 1-4, 8, for a rectifier for alternating currents, consisting of a main magnetic path, with means to form a shunt magnetic path, and to set up alternating flux, held to disclose invention, and to be valid.

5. Patents $\text{\textcircled{C}}26(1)$ —Combination of old elements to eliminate objections involves invention.

A new combination and utilization of similar parts, which had been used in previous devices to produce a similar general result, but so as to avoid waste and danger of destruction of the former devices, is invention.

6. Patents $\text{\textcircled{C}}35$ —General use of new device tends to show invention.

Though the mere fact that a device has gone into general use does not establish invention, it is a circumstance to be considered, where the question of invention is a doubtful one, and the use of the patented article has become general.

7. Patents ⇨ 283 (1)—**Patent for defendant's device no defense against infringement.**

The fact that defendant's device is manufactured under a patent granted by the Patent Office subsequent to plaintiff's patent is no defense to the charge of infringement.

In Equity. Suit by the St. Louis Electrical Works and another against the Fore Electrical Manufacturing Company and another for infringement of patent. Decree rendered for plaintiffs.

John H. Bruninga, of St. Louis, Mo., for plaintiffs.

F. R. Cornwall, of St. Louis, Mo., for defendants.

FARIS, District Judge. This is an action by plaintiffs, who are respectively the exclusive licensee and the patentee, against defendants, for the alleged infringement of the Ballman patent, No. 1,239,249, for a rectifier for alternating currents. Commercially the devices of both plaintiffs and defendants are used to convert alternating electrical currents into direct currents, so that electrical storage batteries may be charged.

The patented device of plaintiff Ballman, so far as this action is concerned, consists essentially of an ordinary horseshoe magnet, having, however, one arm thereof bent at a right angle toward the other arm, not in contact therewith, but having an air gap; to the arm of the horseshoe thus bent, there is attached at the angle of bending the ordinary electromagnet, consisting of a soft iron core about which insulated wire is wound; a vibrating armature made of thin steel, faced with soft iron is attached by a brass, or nonmagnetic, connection to the long, or unbent arm, so as to vibrate in synchronism with the cycles of the electrical current against the end or core of the electromagnet. The simple theory in operation being that a main magnetic path and a shunt magnetic path being thereby produced, the return phase of the alternating current, when passed through the device, is shunted over another path, and the direct current remains and charges the storage battery.

The claims touching this in the Ballman patent, and those alleged to be infringed, are these:

"1. A rectifier for alternating currents, comprising a permanent magnet having means adapted to form a main magnetic path and means adapted to form a shunt magnetic path, means for setting up an alternating flux in said shunt path, and a switching armature adapted to vibrate in said shunt path.

"2. A rectifier for alternating currents, comprising a permanent magnet having means adapted to form a nearly closed magnetic circuit and means adapted to form a shunt magnetic path, means for setting up an alternating flux in said shunt path, and a switching armature adapted to vibrate in said shunt path.

"3. A rectifier for alternating currents, comprising a permanent magnet, having legs and having a bridge between said legs, adapted to form a main magnetic path and means adapted to form a shunt magnetic path, an alternating current winding arranged to set up an alternating flux in said shunt path, and a switching armature adapted to vibrate in said shunt path.

"4. A rectifier for alternating currents, comprising a permanent magnet, having means adapted to form a main magnetic path and means adapted to form a shunt magnetic path, an alternating current winding arranged to set

up an alternating flux in said shunt path, and a switching armature adapted to vibrate in said shunt path and connected with said winding."

"8. An alternating current rectifier system, comprising a permanent magnet having means adapted to form a main magnetic path and means adapted to form a shunt magnetic path, an alternating current winding adapted to set up an alternating flux in said shunt path, a source of alternating current connected with said winding, a direct current circuit, and a switching armature adapted to connect said source with said circuit."

The patent of defendant Wehmeier, which was issued to him subsequent to the issuance of the Ballman patent, illustrates, and the alleged infringing device consists also essentially of, a horseshoe magnet, a similar electromagnet, and a similar vibrating armature. The sole material difference seems to consist in the position in which, relative to the horseshoe magnet, the electromagnet is placed in the devices. In the Wehmeier, or alleged infringing, device this electromagnet is placed between the legs of the horseshoe magnet. The leg, however, is not bent, but retains its usual or commercially ordinary form.

[1] The answer of defendants, so far as I need consider it, the condition of the evidence adduced being regarded, is substantially that the patent of plaintiff Ballman is void on account of anticipation for lack of invention, regard being had to the state of the prior art as disclosed by many prior patents. This state of the prior art, is, I repeat, upon the answer bottomed upon divers prior patents issued to Wilson and some thirty-three others. There is also a specific denial of the fact that the device, made by defendant corporation under the junior patent of defendant Wehmeier, infringes the device made under the senior patent to Ballman. The evidence of the experts, particularly the expert Boyden, called by plaintiffs, is to the effect that defendant's device has both a shunt path and a main path for the magnetic flux, and that these paths are produced by a mere slight change in the position in which the electromagnet is placed relative to the legs of the horseshoe magnet. Substantially this change of position is brought about by a mere turning of the electromagnet through an arc of 90 degrees and placing the same almost in contact with both poles of the permanent magnet, and effecting this contact merely (as to one end thereof) on a different side of the permanent or horseshoe magnet.

It is too plain for argument that the latter change can constitute no defense. Upon this point defendant does seem to urge, somewhat strenuously, that he has discovered that a closed path, instead of the air gap of plaintiff's device, does not interfere with the efficacy of his device. To this insistence it was urged in the oral argument that such a closed gap makes for the shorter life of the device, even if temporary efficacy is conceded. Be all this as may be, I am constrained upon the question of fact to agree with the experts of plaintiff, and to find, which I do, that the device of defendants, made under the Wehmeier patent, infringes the patent of plaintiff Ballman. It follows, therefore, that if Ballman's patent is not void by reason of anticipation, the decree ought to go for plaintiffs.

In limine, it is urged by plaintiffs that defendants are estopped to

raise the invalidity of the Ballman patent. It is obvious that this question is academic, if it should be considered that the Ballman patent is not void for anticipation. Labor may be saved, therefore, by an examination of this question before I go into the question of whether upon the facts defendants are or are not so estopped.

As stated, the answer of defendants sets up some 34 prior patents which it is urged anticipate the Ballman patent. Only 6 of these are referred to in the brief of defendants, and only 5, namely, Wilson, No. 362,135; Behrend, 648,378; Fassler, 1,131,919; Batten, 711,276, and Burlingame, 928,583, are now urged in the brief as so anticipating the Ballman patent as to render it void for lack of invention, although the patent of Pierce, No. 923,700, is attached to the brief.

[2] It is interesting also, but not determinative, that these prior inventions, with but 2 exceptions, while they were designed to convert alternating currents into direct currents, and were in fact rectifiers, were yet not designed for the commercial use of charging batteries. While interesting, this view is afield from the question before me, and need not be further discussed, since it does not bear decisively upon the legal points up for discussion. The result sought by all of the patents urged as anticipatory was that of converting an alternating current into a direct current, and I do not think there can be any invention in the mere new use of a device old in the particular art. Surely there can be no invention in a wagonjack, old in the art, by the mere change of the use thereof from lifting ox wagons to lifting automobiles.

[3, 4] If the patented device of Ballman has, however, brought about an old result by new means, it constitutes invention, and is patentable. As bearing upon this point, the claims of novelty made by the patentee in the application upon which the patent to Ballman was granted are (taking claim 1 as a type) stated thus:

"A rectifier for alternating currents, comprising a permanent magnet having means adapted to form a main magnetic path and means adapted to form a shunt magnetic path, means for setting up an alternating flux in said shunt path, and a switching armature adapted to vibrate in said shunt path."

The bent arm of the horseshoe magnet and the air gap form the main magnetic path in the Ballman patent, while the shunt path is formed by the electromagnet and the armature acting together; each of the latter furnishing part of this shunt path. In operation the major portion of the magnetic flux follows the main magnetic path. This flux is constant, because it is through a permanent magnet. The flux through the shunt path is not constant, but intermittent, because the electromagnet, which forms a part of the shunt path, is only a magnet while the electric current is passing through it.

The magnetic flux through the main magnetic path, being opposed to the alternating flow, is so strong as to prevent such flow from going through this main path, and consequently the alternating flow is forced to seek a path of less resistance. This path it finds through the shunt path, through which an opposing, but comparatively weak, constant magnetic flux is passing. This magnetic flux the alternating current flux is able to overcome, with the result, so far as I am able to under-

stand the nature of the operation, from the extremely refined nature of the technical description, that the alternating or return phase of the 60-cycle current is prevented from passing through the battery to be charged, thus in simple language leaving the direct phase as a residuum to do the work of charging the battery. In short, I gather that the direct phase of the alternating current flows with, and not against, the magnetic flux, while the return phase of the alternating current flows in a direction opposite to the magnetic flux. Being unable to make headway against the flux of the main magnetic path, this return phase of the alternating current seeks and follows the weaker shunt magnetic flux path which it is able to overcome. This path carries it through its allotted cycle, but shunts it or cuts it out of the battery to be charged.

The two chief difficulties met with in rectifiers built in accordance with the learning of the prior art seem to have been (1) that of permanent retention of the positive and negative poles, and a consequent danger of reversing the charge, the latter, I gather, being but a result of the former; and (2) consequent demagnetization of the permanent magnet. In the maze of the technical learning involved, I am in doubt whether the two results are independent, or whether they both follow and depend upon the cause noted; that is, the retention permanently of fixed and certain positive and negative poles. Legally it does not matter. If by the new method of Ballman the two inimical effects are obviated or overcome, there is invention, whether they are, as to each other, causes or effects; that is, whether they are dependent on, or interdependent of, each other. For apposite to this point Judge Vandevanter in *Heekin v. Baker*, 138 Fed. 63, loc. cit. 65, 70 C. C. A. 559, 561, says:

"None of the elements was new, and it did not produce a new result; but we think the record clearly disclosed that the combination, although of old elements, was new, and that it accomplished an old result in a more facile, economical, and efficient way. This gave it patentable novelty."

[5] Conceding, then, some of the many contentions of defendants, that there are divers rectifiers which in the main operate upon a similar principle, and utilize similar parts, if yet plaintiff Ballman, by a wholly new combination and utilization of these parts, has now produced a similar general result, though in such a way as to avoid the waste, lack of permanence, and danger of destruction of former devices, he has invented something. As the Supreme Court said in the case of *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586:

"The invention consists rather in the idea that such change could be made than in making the necessary mechanical alterations."

[6] Some extraneous considerations aiding in this view appear in the record, for it is shown that both plaintiffs and defendants have marketed, relative to similar devices, large quantities of these rectifiers. Plaintiffs, to be exact, have sold in the United States, Canada, Spain, and Australia some 12,000 rectifiers; while defendants, making, as I find, a mechanically similar device, have sold some 5,000 of

their construction. Upon this consideration, what is said by Judge Sanborn in the case of National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, loc. cit. 707, 45 C. C. A. 544, 558, is in point:

"It is true that the extensive use of a machine or combination which is clearly without novelty does not dispense with that statutory requirement, and that it will not alone sustain a patent. *McClain v. Ortmayer*, 141 U. S. 419, 428, 12 Sup. Ct. 76, 35 L. Ed. 800; *Duer v. Lock Co.*, 149 U. S. 216, 223, 18 Sup. Ct. 850, 37 L. Ed. 707; *Olin v. Timken*, 155 U. S. 141, 155, 15 Sup. Ct. 49, 39 L. Ed. 100; *Klein v. City of Seattle*, 77 Fed. 200, 204, 23 C. C. A. 114, 118, 44 U. S. App. 741, 748. But where the question of novelty is fairly open for consideration under the law, the fact that a patented device or combination has displaced others which had previously been used to perform its function, and has gone into immediate and general use, is pregnant and persuasive evidence that it involves invention."

[7] For these reasons, while the case is a fairly close one, I conclude that the device of Ballman was a patentable one, and that the later device of defendant Wehmeier is an infringement thereof. I need not consider the fact that defendant's device is also patented, but by both a later application and a later issuance. *Robinson on Patents*, 922; *Curtis on Patents*, 322; *Walker on Patents*, 347; *Clough v. Baker*, 106 U. S. 166, 1 Sup. Ct. 188, 27 L. Ed. 134; *Consolidated Safety Valve Co. v. Crosby, etc., Co.*, 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939; *Electric Candy Machine Co. v. Morris* (C. C.) 156 Fed. 972.

It follows that the relief prayed for by plaintiffs ought to be granted. Let a decree be drawn accordingly.

WEBER ELECTRIC CO. v. W. R. OSTRANDER & CO.

(District Court, S. D. New York. February 18, 1920.)

Patents 328—743,206, claims 1 and 4, and 916,812, claim 1, for electric lamp sockets, held infringed.

The Weber patents, No. 743,206, claims 1 and 4, and No. 916,812, claim 1, for an electric lamp socket adapted to automatically interlock with a snap action, held infringed.

In Equity. Suit by the Weber Electric Company against W. R. Ostrander & Co. On motions for preliminary injunction, to restrain infringement of patent, and by defendant to dismiss the bill as to one patent. Preliminary injunction ordered, and motion to dismiss the bill denied.

Decree affirmed, 267 Fed. 448.

Frank C. Curtis, of Troy, N. Y., for plaintiff.

Mitchell & Allyn, of New York City (Robert S. Allyn, of New York City, of counsel), for defendant.

KNOX, District Judge. Were it not for the prior adjudications upon these patents in this circuit, I think it altogether possible that I

should, upon the present motions for injunctions, reach a conclusion differing from the one I am about to pronounce. In view, however, of the most recent decision of the Circuit Court of Appeals, wherein the Weber patents were discussed, I feel myself bound to find infringement upon the part of the defendant. I can add nothing to the literature that has been written as to the interpretation to be placed upon claims 1 and 4 of patent No. 743,206 and claim 1 of patent No. 916,812.

Defendant's device is said to be manufactured under the Mebane patent, No. 829,027, and improvements of the Barr patent, No. 1,042,383. It is argued, at least inferentially, that since the Mebane patent was copending with the second Weber patent, and issued nearly three years prior thereto, and without any interference or reference to the first Weber patent or the Weber application, there is a strong presumption that there is here no infringement by defendant. As to this I can only remark that in my judgment the Mebane patent, under the decisions, does as a matter of fact infringe the Weber patents.

The device held to infringe in *Weber Electric Co. v. Connecticut Electric Manufacturing Co.*, 263 Fed. 583, decided by the Circuit Court of Appeals for this circuit upon January 2, 1920, was, I think, quite as dissimilar to the Weber devices as are those here alleged to infringe. By the opinion there rendered it was said:

"In the Connecticut socket there exist slit, recess, and projection 'adapted to automatically interlock with a snap action.' They are not, to be sure, principals; they are only accessories in the entire effort of fastening cap to sleeve, but that makes no difference in infringement. There is no such thing as a partial infringement."

Next it was considered what constituted "telescopically" or "telescopic," as used in the Weber claims. It was held that a "telescope screw" is a permissible locution, and also that a "straight thrust" may be "as straight on the equator as along the pole." I do not doubt the accuracy of this statement, but by the result reached I must also conclude that a straight thrust comprehends, in this instance, not only a thrust along the pole, but a thrust, however slight, along the equator as well.

Tested by the foregoing elements, which were treated as being present in the Connecticut socket, let us see what we have in this defendant's socket. We certainly have the slit—the recess and projection adapted to automatically interlock with a snap (when the circumferential thrust has progressed sufficiently).

In addition to the foregoing, defendant's socket has the circumferentially extending tongues adapted to fit in the pockets on the sleeve and thus interlock with the loops. This feature, however, would not prevent a backward rotative movement, were it not for the existence of the snap lock, and this snap lock brings into play mutually abutting cast metal edges on the respective members of defendant's device.

Certainly, the manipulation required in telescoping the cap and sleeve in defendant's socket need not necessarily be greater than that which is essential with respect to the Connecticut socket. The net result is

that, granting, as I must, the infringement of the Connecticut socket, defendant's socket also infringes.

It is true that in the Connecticut case only claim 4 of the first patent and claim 1 of the second patent were in issue, and it remains only to see whether there is an infringement of claim 1 of the first patent, which reads:

"In a device of the class described, the combination with a pair of members comprising a sheet-metal sleeve having a slotted end and introverted tongues, and a cap adapted to telescopically receive the slotted end of said sleeve, said members having interengaging parts adapted to automatically interlock with a snap action when telescopically applied to each other, and to be released by compression of said sleeve, of an insulating base for electrical fittings loosely inclosed within said sleeve in engagement with said tongues, substantially as described."

In defendant's socket there is to be found the combination of a pair of members comprising a sheet metal sleeve having a slotted end, the edges of which slot are slightly bent adjacent to a lug of the porcelain body, so as to prevent the latter from slipping. Defendant's expert says that in his opinion these bent edges do not form tongues. within the meaning of the first Weber patent. As to this I cannot agree. Whether the edges be bent much or little, the purpose to be served is the same in one case as in the other. The same result, viz. preventing the porcelain body from slipping, or preventing a rotative movement of the porcelain, is obtained in substantially the same way. In each instance there exists also the cap adapted to telescopically receive the slotted end of said sleeve; the members have interengaging parts adapted to automatically interlock with a snap action when telescopically applied to each other (this is true on the authority of the Connecticut case), and the parts are released by compression of the sleeve. There is, in addition, an insulating base for electrical fittings in engagement with said tongues.

It follows that defendant's socket treads upon the terms of claim 1 of the first patent, and by the same token must be held to infringe. As was previously intimated, the field of my consideration of the matters urged upon behalf of defendant is greatly restricted, and buttressed as the Weber patents are by adjudications which, in my judgment, include defendant's socket, I need not discuss the case at more length. I shall deny defendant's motion to dismiss the bill of complaint as to Weber patent, No. 916,812.

The usual preliminary injunction will therefore be ordered. In view, however, of the fact that the plaintiff has apparently stood by and permitted infringement by the defendant for a period of six years, I am, if the defendant so desires, disposed to suspend the issuance of the injunction pending an appeal by the defendant to the Circuit Court of Appeals. As to this I will hear counsel upon the settlement of the order.

WEBER ELECTRIC CO. v. W. R. OSTRANDER & CO.

(Circuit Court of Appeals, Second Circuit. May 28, 1920.)

No. 240.

Appeal from the District Court of the United States for the Southern District of New York.

Action by the Weber Electric Company against W. R. Ostrander & Co. for infringement of a patent. From a decree (267 Fed. 445), granting injunction against the infringement, defendant appeals. Affirmed.

Mitchell & Allyn, of New York City (R. S. Allyn, of New York City, of counsel), for appellant.

Frank C. Curtis, of Troy, N. Y. (Charles Neave, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

MANN v. MT. UNION TANNING & EXTRACT CO. et al

(District Court, M. D. Pennsylvania. September 17, 1920.)

No. 994.

1. Sales ⇨1(1)—Contract held one of sale.

A contract, consisting of plaintiff's acceptance of an offer to purchase logwood, *held*, with respect to plaintiff and the immediate purchaser, one of sale.

2. Sales ⇨3—Agreement to pay price on buyer's default held one of guaranty, and not sale.

An agreement whereby defendant jointly obligated itself for the payment of logwood to be delivered to purchaser, who was to deliver same to defendant for manufacture of extract, *held* one of guaranty, and not of sale.

3. Guaranty ⇨59—As between seller and guarantor, shipments paid for by buyer held made pursuant to the contract.

In an action against a guarantor for an alleged balance due on a contract of sale, *held*, that shipments delivered to the buyer, and for which payments were made, should be treated as made pursuant to the contract, thus reducing the extent of the guarantor's liability.

4. Guaranty ⇨59—Guarantor of price of goods entitled to credit for amount realized on resale.

In an action for an alleged balance due on a contract of sale, where the commodity which was stored was resold by the seller in the exercise of its statutory lien, *held*, that the amount realized should be credited on behalf of the guarantor.

5. Guaranty ⇨53(1)—Guarantor of price of goods released, where seller delivered goods without notice and took lien contrary to agreement.

Where the seller of logwood under a contract providing for payment at dock, delivered, without notice to the guarantor, to the buyer the bill of lading for a shipment consigned to the guarantor, and a third person advanced money on the bill of lading, the seller accepting such person's notes for the balance, the guarantor was discharged by reason of the modification of the contract, and placing of the lien.

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

At Law. Assumpsit by Henry Mann, trading as H. Mann & Co., against the Mt. Union Tanning & Extract Company and another. Judgment for plaintiff.

Michael E. Stroup, of Harrisburg, Pa., Mulford Morris and A. L. Williams, both of Wilkes-Barre, Pa., and John A. Thompson, of New York City, for plaintiff.

James S. Woods and H. H. Waite, both of Huntington, Pa., and C. H. Bergner and J. E. B. Cunningham, both of Harrisburg, Pa., for defendants.

WITMER, District Judge. This case is tried without jury by agreement of parties, as provided by Act April 22, 1874 (P. L. 109).

The plaintiff, Henry Mann, trading as H. Mann & Co., has brought this suit against the defendant, the Mt. Union Tanning & Extract Company, and H. Theodore Sorg, as trustee of Bothamley Chemical Color & Extract Company, Incorporated, bankrupt, to recover an alleged ballance due upon the purchase of certain logwood on a contract in writing consisting of certain letters and telegrams. The Bothamley Company, a dealer in logwood and extracts, wrote to Mann, an importer of logwood, under date of April 19, 1916, offering to place with him an order for 2,800 tons of logwood, to be delivered at a specified time and price. Mann replied the following day:

"We accept your order for 2,800 tons of logwood, to be delivered during May, June, July, and August 27, \$75 per ton, net cash ex dock, New York."

The letter goes on saying:

"Regarding the delivery of this wood, we beg to say that we have chartered the following boats, which cargoes we can apply to the above quantity: Schooner Fred A. Davenport, cargo 800 to 900 tons; Perry Setzer, load about 1,600 tons, arriving middle of June; Calhoun E. Ross, about 600 tons, should arrive the beginning of July; and Wiley, load 900 tons, should arrive the beginning of August."

The letter further states:

"Of course we may change the above items, as we no doubt will charter other schooners, which may suit you better for your requirements. As to immediate deliveries, we are sorry to say that the chances are not very bright. We will give you as much as we possibly can of our arrivals by steamer. The first large arrival will be the Davenport, and it is understood that the delivery of the wood will be made to the best of our ability."

The Mt. Union Company was a manufacturer of chemical extracts, with whom the Bothamley Company had arranged for the manufacture of the extract from the wood about being purchased, upon some agreement looking to the financing of the undertaking by the Bothamley Company, who was not financially well rated by Mann & Co. At the instance, therefore, of the Bothamley Company, the Mt. Union Company telegraphed Mann & Co., April 28th:

"We will be jointly responsible with Bothamley Chemical Co. for twenty-eight hundred tons logwood recently bought, shipment here."

—followed by letter written the next day, supplementing the telegram, saying again:

"We beg to advise that we will jointly obligate ourselves for the payment of the 2,800 tons logwood to be delivered in May, June, July, and August at \$75 per ton net cash, ex dock New York, which Bothamley Chemical Company have arranged with you to come up on the schooner, Fred A. Davenport, Perry Setzer, Calhoun E. Ross, and Wiley, which wood is to be shipped here."

[1, 2] The contract between the Bothamley Company and Mann & Co., is no doubt one of purchase, while that of the defendant Mt. Union Company constitutes one of guaranty of payment for such purchase, forming the subject-matter of the contract. It was so held by the Court of Appeals of this Circuit in *Olivier & Co. v. Mt. Union Tanning Co.*, 264 Fed. 601, wherein this subject received consideration. Though plaintiff made a strong attempt to place the writing under different light, with a view of having the same construed as a joint contract of purchase, he has not succeeded in convincing the court that it is in any respect different than that placed before the appellate court in the case mentioned.

[3] The dispute between the parties otherwise has to do mainly with the deliveries and shipments made pursuant to the contract, and payments and credits to be allowed on account of such. The contract of purchase provides that deliveries were to be made in May, June, July, and August, amounting to a minimum of 700 tons per month, at \$75 per ton net cash, ex dock New York, and the further agreement with the defendant Mt. Union Company was that shipment should be to the Mt. Union works at Mt. Union, Pa.

Regarding the latter, it is admitted that shipments were made during the month of June of wood from the schooner Davenport, amounting to 815 ¹⁵¹⁵/₂₂₄₀ tons, and 100 tons from yards of plaintiff, aggregating \$68,675.72, and that another shipment was made during the month of August from the schooner Baxter, amounting to 501 ⁴²⁰/₂₂₄₀ tons, aggregating \$37,622.54. It appears that certain shipments were made during the month of May from steamers Lajoc and Uraina, amounting to 936 tons, aggregating \$70,274.50. The Mt. Union Company insists that these shipments must be credited to the 2,800 tons contract, while the plaintiff contends that the same were on account of separate and independent contracts which he had with the Bothamley Company. The correspondence between Mann and Bothamley would possibly indicate as much, but the suit is between Mann and the Mt. Union Company, and it is important what the latter's understanding was regarding this matter.

The Mt. Union Company was in need of the wood it was assured; otherwise, it should not have made itself liable for the purchase made. It was entitled under the contract to receive shipments during the month of May, aggregating not less than 700 tons, and accepting the promise of Mann, contained in his letter above quoted, to Bothamley, which no doubt was part of the inducement causing the Mt. Union Company to guarantee payments of the purchase, to the effect that other schooners would be chartered which might better accommodate defendant's convenience, promising to give as much wood from other steamers coming in as possible, so as to help out on the contract; the defendant had a right to suppose that the deliveries made were on

account of the contract in suit, aside from Mr. Green's testimony to the effect that it was with this arrangement and understanding with Mann that his company accepted it and paid for it. Under all of the evidence in the case and bearing in mind the presumption that plaintiff complied with his undertaking to make delivery during the month of May, I find that such deliveries were made and accepted on account of the contract in suit.

[4] As to sales and shipments made to the United Dye Extract Company, at Long Island City, N. Y., the court has found that such sales and shipments, if any, were without the knowledge, consent, approval, or ratification of the Mt. Union Company; hence shipments made, as found, on account of the contract, aggregate 2,354³⁴⁰/₂₂₄₀ tons, leaving unshipped 445¹⁰⁰⁰/₂₂₄₀ tons. This balance, it was found, was delivered to Bothamley ex dock New York, but was not paid for, nor was it shipped to Mt. Union, owing to its refusal to receive the same and the embargo placed on further shipments. The wood was stored for the Bothamley Company; but, failing to make payment, the same was sold as provided by the lien law of the state of New York. Allowing for the wood what plaintiff realized on sale by public auction after due advertisement, and believing that such price represented the fair market value, after making allowance for storage and other expenses, defendant should be credited with \$11,500 in settlement of its liability on the contract. The defendant is also entitled to the several amounts admitted as paid—November 15, 1916, \$1,400, and December 8, 1916, the further sum of \$1,600—and the further credit of \$70,274.50, paid at various times for shipments delivered from steamers Lajoc and Uraina.

The court having found that the evidence is not sufficient to sustain the defendant's contention that extract in barrels was delivered on account of the contract to plaintiff, by the Bothamley Company or by defendant, the question remaining is whether defendant shall be charged with shipment from the steamer Fred A. Davenport in excess of \$33,750 paid by check or draft from Olivier & Co.

[5] It appears that, when the plaintiff made delivery, ex dock New York, on or about June 16, 1916, of the Davenport cargo, including some additional wood from his yard, aggregating 915¹⁵¹⁵/₂₂₄₀ tons, to Bothamley Company, and shipping same by Pennsylvania railroad to defendant's plant at Mt. Union, he turned over his bill of lading, obtained from the railroad company, to Bothamley Company, who in turn transferred the same, together with the shipment to Olivier & Co., to secure the money, \$33,750, advanced to Bothamley Company. The latter company paid this money to the plaintiff as part payment of the cargo and gave its notes for the balance. Now, if the plaintiff intended to hold the defendant liable on his contract, he should have sent the bill of lading directly to them at Mt. Union, or in any event informed them of Bothamley's transaction with him and Olivier & Co.

The contract of guaranty provided that the cash should be paid at dock, and, if the purchaser did not pay upon the arrival of the wood at dock, notice should have been promptly given to the Mt. Union Company to that effect. Had the company received such notice, it could

have taken prompt steps to compel the purchaser to pay for the logwood, or, paying for it itself, it could have protected itself against the purchaser and others without prejudice of its own rights; but the plaintiff, by accepting the notes of the Bothamley Company, payable at a future date, tied the hands of the guarantor, so that it could not proceed against the purchaser had it desired to do so. This in itself was in violation of the terms of the contract of guaranty, to the prejudice of the guarantor. If so, the plaintiff's conduct in the placing of a lien upon the shipment prior to delivery at Mt. Union was of greater importance and truly should absolve defendant. A long line of cases might be cited to the effect that variation of or departure from the terms of a contract, without the consent of a surety or guarantor, and to his injury, discharges him. *Mercer v. Coovert*, 6 Watts & S. (Pa.) 70; *Hibbs v. Rue*, 4 Pa. 348; *N. Am. Land Co., etc.*, 60 Pa. 247; *Green v. Boyd*, 13 Pa. Super. Ct. 651. And in some cases, where injury is not shown, the change in terms even is prima facie evidence of such injury.

It follows that the account will be stated thus; 2,800 tons logwood, at \$75, \$210,000, from which will be deducted the items \$11,500, \$3,000, \$70,274.50, and \$67,500, and a dividend, \$1,575.37, admittedly received on account, paid by the trustee in bankruptcy of Bothamley & Co., leaving a balance of \$56,150.13, for which the court finds in favor of the plaintiff and against the defendant with interest from August 30, 1916.

DUNTON v. HINES, Director General of Railroads.

(District Court, D. Maine. September 15, 1920.)

No. 577.

1. Evidence ⇨589—Testimony of plaintiff of some value, although unconscious after injury.

Although plaintiff in personal injury action was, for a long time after the injury, incapable of memory, his testimony is of some value.

2. Master and servant ⇨278(6)—Evidence held to warrant recovery under federal act for injury to brakeman from defective running board.

In action under the federal Employers' Liability Act (Comp. St. §§ 8657-8665) for injuries to a brakeman through violation of the Safety Appliance Act, evidence on issue whether he fell from a car on which the running board was defective, or from another car, held to support verdict for plaintiff.

3. New trial ⇨81—Damages cannot be claimed excessive on account of issue of contributory negligence, not requested to be submitted.

In brakeman's action for injuries, new trial because of excessive damages would not be granted, on the ground that the question of plaintiff's contributory negligence, as diminishing damages pro rata under the Employers' Liability Act (Comp. St. §§ 8657-8665), was not submitted to the jury, where defendant did not request such submission.

4. New trial ⇨162(3)—In case of passion or prejudice, court may order new trial on condition of remittitur.

Where it appears that sympathy, passion, or prejudice has affected the result, a federal court may order that the verdict be set aside and a new

trial granted, unless the plaintiff allows judgment to be entered for some lesser amount, for which, in the opinion of the court, the verdict may be sustained, and it then becomes the duty of the court to permit a verdict for the largest amount which the testimony will support.

5. Damages ⚡132 (9)—\$38,625, for loss of legs, reduced to \$30,000.

Where brakeman, 28 years old, with income of less than \$1,800, suffered loss of both legs, verdict for \$38,625 would be reduced to \$30,000.

At Law. Action by Charles O. Dunton against Walker D. Hines, Director General of Railroads. Verdict for plaintiff, and defendant moves for new trial. Motion overruled, on condition of remittitur.

Matthew McCarthy, of Rumford, Me., and William R. Pattangall, of Augusta, Me., for plaintiff.

Charles B. Carter, of Lewiston, Me., for defendant.

HALE, District Judge. This case is now before the court upon defendant's motion for a new trial, after a verdict for the plaintiff in the sum of \$38,625. The defendant asks the court to set aside the verdict:

First. Because the evidence discloses no liability on the part of the defendant; and

Second. Because the amount of the verdict is excessive. The action is brought under the federal Employers' Liability Act (Comp. St. §§ 8657-8665). The declaration sets forth that the plaintiff was a federal employé within the meaning of the act; that the defendant was in violation of the Safety Appliance Act, in that the running board on the roof of car No. M. C. 55129 was out of repair; and that, by reason of this lack of repair, the plaintiff suffered injury, causing great suffering and the amputation of both legs.

On February 7, 1919, the day of the injury, the plaintiff was employed as a brakeman by the United States Railroad Administration. He was then 28 years old. While in the exercise of his duties, in moving out four empty cars from a siding, and while upon the roof of one of the cars, he slipped on the running board, and pitched over upon the track, where he was run over, and suffered the loss of both legs. At the trial he contended that the car upon which he was hurt was the fourth, or rear, car in the train. The defendant contended that the car upon which the injury occurred was not the fourth car—the car having the defective running board—but the third car, which had no defect. The principal issue of fact was upon this point.

[1, 2] 1. The defendant now urges that the physical facts proven and shown in the record are uncontradicted by any competent testimony; that the faulty running board was on the fourth car from the engine; but that the blood, bone, and flesh from Dunton's body, where the train hit him, were found on the wheels and truck frame under the westerly end of the third car; that the train was moving in a westerly direction; that the testimony that Dunton fell from the forward end of the fourth car is inconsistent with these and other physical facts; that this leads to the irresistible conclusion that Dunton could not have fallen from the fourth car; that the proven physical facts are conclu-

sive against inconsistent and irreconcilable oral testimony; that such oral testimony, when confronted with these physical facts, must be regarded as incredible; and that therefore the jury had before it no competent evidence upon which to base its verdict.

The plaintiff testifies that he fell from the fourth car. Although he was, for a long time after the injury, incapable of memory, his testimony is of some value. He is corroborated by Quigley, who testifies that he saw him fall from the fourth car; that the alarm was given at the moment he fell; and that the car could not have proceeded more than half its length after the alarm was given. It appears from the testimony that the last time Dunton was seen on the ground he was standing near the end of the fourth car, just before the train was set in motion, and there is some evidence tending to show that the accident occurred so soon after he went up to the top of the train that he could not have had time to go the length of the car. There was further evidence tending to show that the plaintiff fell from the defective car, and not from the car which had no defect. There was also testimony to the effect that, after the injury, the third car was pushed up the track, over the rails where the plaintiff says he fell; and it is urged that whatever blood stains and clots were found on the third car would have readily got there by this movement of the car over the track. It is true that uncontradicted physical facts should have great weight with the jury; but I cannot say that the testimony offered by the plaintiff is incompetent, or that it should not have been regarded by the jury. It is clearly a case of conflicting evidence. The jury had the witnesses before them. I cannot conclude that they had no competent evidence upon which to base their verdict, or that it is a case where only one inference could fairly be drawn from the whole testimony. I cannot say, then, that the verdict was so clearly against the weight of evidence that I ought to set it aside.

[3] 2. Were the damages excessive? On this question the defendant urges, first, that the matter of contributory negligence should be considered. The learned counsel for the defendant says that, although the issue before the jury was largely, if not entirely, upon the question of liability, and the main controversy was whether the plaintiff fell from the third car or the fourth car, still, there is a question of contributory negligence in the case, for, if the jury found that the plaintiff fell from the fourth car, the evidence relating to the obviously defective condition of the running board of the fourth car, tends to show that the plaintiff was guilty of contributory negligence, and that, if he had been in the exercise of due care, he would have seen the condition of the running board. And the learned counsel invokes the section of the statute, which diminishes the damages pro rata with the contributory negligence. He contends that the damages should have been greatly reduced by the plaintiff's evident contributory negligence; and that this is true, even though the question were not in terms submitted to the jury. The record shows that this question was not submitted to the jury at all, and that the defendant did not request such submission. Upon the record, I am of the opinion that there is nothing in this view of the case which ought to induce me to disturb the verdict.

The important question remains: Were the jury unduly affected in their judgment by sympathy, passion, or prejudice, and thus induced to render a verdict for excessive damages?

No man could help being moved at the recital of the plaintiff's pain, and by the contemplation of the burden he must bear through life. It is too much to expect that the jury should not be affected by sympathy. But even such sympathy must not be what the law calls undue. It must not rise to the height of passion. It must not overthrow the judgment. Were the jury unduly affected, and so induced to render a larger verdict than can be sustained?

[4] In *Tomljonovich v. Victor American Fuel Co.* (D. C.) 227 Fed. 951, 952, this court held that in a case where it appears that sympathy, passion, or prejudice has affected the result, a federal court may order that the verdict be set aside and a new trial granted, unless the plaintiff allows judgment to be entered for some lesser amount, for which, in the opinion of the court, the verdict may be sustained, and that it then becomes the duty of the court to permit a verdict for the largest amount which the testimony will support. *Southern Ry. v. Bennett*, 233 U. S. 80, 34 Sup. Ct. 566, 58 L. Ed. 860; *Occidental Con. Min. Co. v. Comstock Tunnel Co.* (C. C.) 125 Fed. 244; *Yurkonis v. Delaware, L. & W. R. Co.* (D. C.) 213 Fed. 537, 538.

The court of Maine has said that there is no precise way by which the pecuniary compensation for pain can be estimated; that latitude in judgment must be allowed the tribunal which determines it; but that it is the duty of the court to say what should be regarded as the ultimate bounds, and to see that such bounds are not greatly overstepped. *Ramsdell v. Grady*, 97 Me. 322, 54 Atl. 763. In *O'Brien v. J. G. White & Co.*, 105 Me. 308, 316, 74 Atl. 721, 724, in speaking for the Maine court, Judge King held that, where the amount awarded would purchase for the plaintiff an annuity in excess of the plaintiff's total yearly earnings, the amount of the verdict should be held to be excessive. He added:

"We think the jury may have failed to appreciate that the amount to be awarded the plaintiff for the diminution in his future earnings should be a sum equal to the present worth of such diminution, and not its aggregate for his expectancy of life."

[5] In the case at bar the plaintiff, at the time of the injury, was a young man of 28, having an income of less than \$1,800. He was a man of excellent character, ability, and promise, and it is probable that he would in future have had a much larger earning capacity. But the amount of the verdict, if allowed to stand would, at the present value of money, yield him an income considerably greater than his income at the time of the injury. It is clear that I should take into consideration the depreciation of money at the present time, and the fact that it has a purchasing power much less than in former years. But, after giving due weight to all these considerations, I am forced to the conclusion that the jury were induced by undue sympathy to exceed the limit of reason in their award of damages. Although I warned them, if they came to the question of damages, they must proceed with caution, they

did award damages which, I think, must be held to be excessive. I am of the opinion that a verdict cannot be allowed to stand for more than \$30,000. Unless the plaintiff will remit all over that sum, a new trial will be granted because the damages awarded by the jury are excessive.

Accordingly the entry will be:

Motion overruled, if within 30 days after the filing of this opinion, the plaintiff remits all of the verdict in excess of \$30,000; otherwise, motion sustained, and new trial granted.

CORNELI v. MOORE, Internal Revenue Collector.

(District Court, E. D. Missouri, E. D. September 21, 1920.)

No. 5282.

1. **Intoxicating liquors** Ⓒ325—Before Eighteenth Amendment, whisky was "property."

Before the adoption of the Eighteenth Amendment, whisky was "property," and property rights therein were as full and complete as they were with reference to any other sort of personal property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

2. **Constitutional law** Ⓒ87—Statute restricting use and possession of property confiscates it.

A statute, which has the effect of restricting the use and possession of personal property owned by a citizen, confiscates such property within the purview of Const. Amend. 5.

3. **Injunction** Ⓒ22—Equity will not compel acceptance of tax on whisky which plaintiff cannot remove.

Even though the National Prohibition Act does not prohibit the acceptance of the internal revenue tax on whisky stored in bond from one who had no right under that act to remove the whisky from the warehouse, equity will not compel the acceptance of such tax, and the delivery of possession to the owner of the whisky.

4. **Intoxicating liquors** Ⓒ17—Prohibition of transportation of liquor valid under Eighteenth Amendment.

Volstead Act, tit. 2, § 3, forbidding the transportation of liquor for beverage purposes, is valid under Const. Amend. 18, which forbids the manufacture, sale, or transportation of such liquor for beverage purposes.

5. **Constitutional law** Ⓒ87—Intoxicating liquors Ⓒ13—Provisions of Eighteenth Amendment, contrary to Fifth Amendment, are controlling.

Though the Eighteenth Amendment to the Constitution did not abrogate the Fifth Amendment, its provisions are controlling, where they conflict with the provisions of the earlier amendment, so that the prohibition of the transportation of intoxicating liquor authorized by the later amendment is constitutional though it amounts to a confiscation of property under the Fifth Amendment.

6. **Intoxicating liquors** Ⓒ138—Liberal construction of Volstead Act prevents removal of whisky for personal consumption.

Under the provisions of Volstead Act, tit. 2, § 3, that the act shall be construed liberally to prevent the use of liquor for beverage purposes, it will not be construed to permit the removal of the whisky stored in warehouses for such purposes, unless such construction is too clear for reasonable dispute.

In Equity. Suit by Charles Corneli against George H. Moore, Collector of Internal Revenue. Motion of defendant to dismiss bill sustained.

Elliott W. Major and Glendy B. Arnold, both of St. Louis, Mo., for plaintiff.

Benj. L. White, Asst. U. S. Atty., of St. Louis, Mo., for defendant.

FARIS, District Judge. Complainant files his bill in equity, praying for a decree compelling defendant, as collector of the internal revenue for the First district of Missouri, to accept the internal revenue taxes on a certain barrel of whisky, owned by complainant, and now contained in a bonded warehouse of the United States, and to deliver this whisky to complainant. The whisky was bought by complainant in bond in the spring of 1917, and complainant avers he has ever since owned the same and now owns it. Complainant avers (and this, perforce the state of the pleadings, is admitted) that he desires to obtain this whisky and transport it to his residence for use by him in a way permitted by law; that is, for his own personal consumption as a beverage. To this end complainant has tendered to defendant in cash the amount of taxes due on this whisky and has demanded from defendant the possession thereof, which defendant has refused.

Defendant has filed his motion to dismiss complainant's bill on the ground that no facts are stated therein which entitle complainant to the relief for which he prays. As a part of these grounds for dismissal, I am met in limine with the contention that an action in equity will not lie, because complainant has an adequate remedy at law. This contention I put aside for the present, and I shall first discuss whether there exists a right in complainant, in either law or equity, to the relief he prays for. Should I reach a warranting conclusion as to complainant's right, I shall then consider his remedy.

Complainant insists: (a) That the whisky in question is property in the same sense that a house or a horse is property; that his property rights therein are therefore as full and complete with reference to whisky as they are with reference to any other sort of personal property; (b) that the refusal to allow him to use this whisky in a way not forbidden by law is tantamount to confiscation, for that the right of property connotes the right of possession, and the right of use in any manner which the law does not forbid; and (c) that any law which restricts the broad property right of complainant is void, because in conflict with the Fifth Amendment to the Constitution of the United States, for that it takes away, or confiscates, the property of defendant.

[1] Complainant's first proposition may be fully and candidly conceded. The courts everywhere, in dealing with property rights in whisky before the adoption and ratification of the Eighteenth Amendment, have uniformly so held. Citation of authorities would therefore be a waste of time.

[2] I also think it may be conceded that any statute which restricts the use and possession of personal property owned by the citizen has the effect to confiscate such property, within the purview of the Fifth Amendment, for that it deprives the owner of certain inherent rights

which are inalienable attributes of ownership. It follows that it does not aid the argument to urge that the rule does not apply because the property is not physically taken, or the ownership disturbed, but that the use and possession are merely restricted. In short, the owner may not in such use exercise his own volition, but is compelled to use the property in a way he does not desire to use it, or not use it at all. Without further discussion it may be conceded that a confiscation of complainant's personal property technically exists, when the matter is regarded solely from the viewpoint which was open to us before the adoption of the Eighteenth Amendment.

[3] The question is whether any constitutional right of complainant has been violated by this confiscation. If what is being done is being done under a statute, and if that statute is constitutional, it is clear the inquiry ends right here. Section 3 of title 2 of the act of October 28, 1919 (41 Stat. 305), commonly called the "Volstead Act," provides that—

"No person shall on or after the date when the Eighteenth Amendment of the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquors except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. Liquors for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided."

I think it is clear that the prohibition of the above statute against "transporting" intoxicating liquors would effectually prevent complainant from moving this whisky from the bonded warehouse to his residence for the purpose of there consuming it for beverage purposes. Neither does the act anywhere contain any provision authorizing transportation for such a purpose. But, on the contrary, transportation of such sort is made a criminal misdemeanor.

I need not consider whether the defendant is or is not compellable to take the tax on this liquor. If it were for argument's sake to be conceded that he is, this concession does not help complainant. For if complainant, having paid the tax, and having gotten the whisky into his constructive possession, yet could not transport it to his residence without violating, and thus becoming amenable to, the criminal provisions of the act, it is plain that equity ought not to afford relief. Certainly a court of equity ought not to become particeps criminis to an offense against the law. In short, equity will not aid defendant to do an act which will, when done, constitute a crime, and an act, therefore, which, when done, would be vain and useless.

Complainant ably urges the view that there is in the Volstead Act no express provision—no written letter of the law—forbidding the defendant from accepting the money due for taxes on his barrel of whisky and delivering the same to complainant. It seems fairly plain that complainant's contention is, in the spirit, if not the letter of the law, too broad. If defendant delivered possession of this whisky to complainant at the door of the warehouse, the section I quote above forbids

complainant to transport it from such place, or to actually possess it at such a place. Not being a permittee under the provisions of the act, complainant can actually possess liquor only in his own residence, or constructively only in a bonded United States warehouse. He cannot transport it, except from one bona fide residence to another. The effect of such a statute as this may be to confiscate the complainant's whisky, for that it limits and restricts his volition in the use thereof; but, if the statute is constitutional, the situation is one arising from majority rule, and is not one to be ameliorated by the courts.

[4] The provisions of section 3 of the Volstead Act which forbid the transportation of liquor are, I think, clearly permissible under the terms of the Eighteenth Amendment. This amendment forbids the manufacture, sale, or transportation of such liquors, when designed for beverage purposes, "except as authorized in this act." It does forbid, expressly, I think, such transportation as complainant desires to make here. Such provision is warranted by the Eighteenth Amendment.

[5] But it is contended that the Fifth Amendment has not been abrogated by the Eighteenth Amendment. Broadly speaking, this is, of course, true. The adoption of an amendment to the organic law, which does not expressly change or repeal a former provision, necessitates construction of the effect of such amendment upon the older provision. A constitutional amendment cannot be unconstitutional. If it is in conflict with an older provision, so that the two cannot be reconciled or construed together, clearly the older one must yield at the tangent of conflict to the newer law. Courts have found themselves compelled to adopt, for the construction of constitutional provisions, rules strikingly similar to the rules used in construing statutes. It may be a matter of regret that age-old provisions making for the liberty of action of the citizen have been encroached upon, and to a degree whittled away; but this is not a matter wherein the courts may relieve. It is a political question, and not a judicial one.

It follows that, if a newer constitutional amendment in point of time of adoption permits, as the Eighteenth Amendment obviously does, the passage of a law which forbids the transportation of whisky, a law which is well within the constitutional grant of power on this point is not unconstitutional, even though the effect of such a law may be to encroach upon the rights given by older provisions of the organic law, and theretofore deemed to be inalienable. I am of the opinion that the provision of section 3 of the Volstead Act, which forbids the transporting of liquor, prohibits as a matter of law the granting of the relief prayed for, and that such prohibition is constitutional.

[6] In reaching this conclusion I have held in mind, without considering, other provisions of this act, which I also quote *supra* from section 3. These provisions are that the act is to be construed liberally, so that the use of liquor for beverage purposes may be prevented. Considering the effect of holding, as complainant urges, largely as a matter of academic interest, since I reach the same view on strictly legal grounds, unaffected by the sentimental phase, it is clear that, if complainant's contention should be adopted, it is possible, by pur-

suing practical and obvious methods of procedure, to turn loose upon this country, for alleged consumption as a beverage by the owners, all of the 60,000,000 gallons of whisky said by the public press to be now stored in warehouses. In the light of the legislative command of liberal construction in favor of preventing the use of liquor as a beverage, such a result ought not to be permitted, except in a case where the law favoring such a view is too clear for reasonable dispute. I do not find the law to be thus clear in this case, and I conclude that the defendant's motion to dismiss complainant's bill ought to be sustained, on the ground that the bill states no facts warranting the granting of the relief prayed for. This view renders any discussion of the other point reserved unnecessary.

Let the motion to dismiss be sustained.

KIRWIN v. MEXICAN PETROLEUM CO.

(District Court, D. Rhode Island. July 24, 1920.)

No. 1382.

1. Navigable waters ⚡39(2)—Owner of bathing beach may maintain action for pollution of water.

The owner of land on the shore of public waters, having a sandy beach, and upon which he maintains facilities for public bathing, from which he derives a profit, *held* to suffer special injury from pollution of the water, which destroys the value of his land for such purpose, which will support an action for damages.

2. Nuisance ⚡76—Declaration for public nuisance need not allege negligence.

An allegation in a declaration that defendant in the conduct of its business has created a continuing public nuisance by which plaintiff has suffered special damage cannot be met by showing that it was necessarily incident to the business itself, or that it was unavoidable by the most careful management, and the declaration need not allege negligence.

At Law. Action by John W. Kirwin against the Mexican Petroleum Company. On demurrers to declaration. Demurrers overruled.

William R. Champlin, of Providence, R. I., for plaintiff.

Green, Hinckley & Allen, of Providence, R. I., for defendant.

BROWN, District Judge. This is an action of trespass on the case for damages resulting from the pollution of public waters and shores by oil deposits. The plaintiff, on land in the city of Cranston, bounded upon Providence river or Narragansett Bay, carries on the business of letting bath houses and bathing suits, and maintaining a bathing pavilion where a variety of articles is sold to the public.

The plaintiff's shore resort is known to the public as "Kirwin's Beach."

[1] It is alleged that the defendant corporation is engaged in the business of transporting, receiving, selling, storing, handling, distributing, manufacturing, and refining crude oil and other grades of petro-

leum oil, on premises in Providence, on the west bank of the Providence river, and in East Providence, on the east bank of the Providence river, maintaining tanks, pipes, and other apparatus, and operating tank steamers, vessels, and barges, etc., in the usual course of its business; that on January 1, 1916, and on other days, the defendant did discharge and suffer to escape from its plants, steamers, barges, etc., into the waters of the Providence river, large quantities of oil and kindred products, which were carried by the winds, currents and tides of the Providence river upon plaintiff's beach, fouling and polluting the beach and waters, and rendering the same wholly unfit for bathing, whereby the value of plaintiff's property and business is destroyed.

The principal question raised by demurrer, and which goes to all counts of the declaration, is thus stated by the defendant:

"Has the plaintiff alleged such special damage as will allow him to recover in this action, or is the damage sustained by him such as is common to the public, for which a private action will not lie?"

It is contended—

(1) That plaintiff's damage does not differ in kind from that sustained by other members of the public similarly situated.

(2) That the damages are too remote.

I am of the opinion that neither of these objections is sound.

Lands located on the shores of the Providence river and Narragansett Bay have a special value, owing to the riparian rights of access to the waters. This right of access is a private right, incidental to ownership of the upland. The general public does not have the right to cross or occupy private lands to gain access to the shores below the high-water mark, at which private ownership terminates.

The value of the right to erect buildings in aid of navigation and fisheries or for bathing in the public waters varies greatly according to the character of the shore. The right of direct access at a particular place to deep water close to the upland has its special value for docks and wharves.

The right of direct access to shallow water and sandy beaches for bathing purposes has also its special value. The rights to occupy bathing houses built on private lands, and to pass over private lands to public waters for bathing purposes, are private rights of the owner, which he may himself exercise, and which he may grant to others. These rights are entirely distinct from the rights of the public below high-water mark. While the owner cannot grant rights to bathe in public waters, he may grant rights of access thereto, and a use of his lands which may be regarded as a valuable use of a private right in aid of the exercise of a public right.

Pollution of water, which renders it unfit for bathing, destroys, not only the rights of the public below high-water mark, but the value of private rights of access to public waters and of buildings erected for use in aid of the exercise of such rights.

The plaintiff in the present case does not claim damages for the destruction of his right as a member of the public to bathe in public waters, nor for any injury which is common to himself and all other

members of the public. It is not alleged that the public bathes upon the plaintiff's premises, but that they obtain from him rights in his land and facilities for bathing, and that by the creation of a public nuisance the value of what the plaintiff had in his own right, and what the public were in the habit of paying for, has been diminished or destroyed.

That this is a natural consequence of the alleged pollution of water by the discharge of oil seems clear. Having in mind the large number of shore cottages at the waters of this state, and the great depreciation of values of the investments in real estate adjoining the shores, which may naturally result from such pollution of the waters by oil as destroys bathing on the shores, I am unable to believe that this should be regarded as *damnum absque injuria*. It cannot be doubted that the location of land on the water's edge and adjoining a sandy beach gives it a special value, which dealers in real estate and purchasers alike would recognize. The impairment of this special value is in no proper sense a violation of a public right, though it may be a direct consequence of a violation of public rights.

The damage which has been done does not cease at the water's edge; it affects the use of the upland for a purpose for which it is specially valuable.

The value to plaintiff's customers of the privilege of passing over plaintiff's land to clean water suitable for bathing is destroyed when the water or the adjacent public soil under water is made unsuitable for bathing, by the creation of a public nuisance. To unlawfully turn away customers from an established place of business is a well-settled ground of liability for damages. It is immaterial that the right of each customer to bathe in public waters may be violated. The plaintiff does not sue for a violation of their rights below high-water mark, but for the destruction of the value of his rights above high-water mark.

The question of the right of private action for special damages resulting from a violation of a public right was before me many years ago in *Piscataqua Navigation Co. et al. v. N. Y., N. H. & H. R. Co.* (D. C.) 89 Fed. 363 (see on appeal 108 Fed. 92, 47 C. C. A. 225). This case has been commented upon by Judge Jeremiah Smith in an exhaustive discussion of the subject in volume 15, Nos. 1, 2, *Columbia Law Review*, January and February, 1915, and seems to state the rule which is best supported by the authorities and which accords with the views of the Supreme Court of Rhode Island, as stated in *Payne & Butler v. Providence Gas Co.*, 31 R. I. 295, 77 Atl. 145, Ann. Cas. 1912B, 65. Although the defendant, by the creation of a public nuisance may have violated the theoretical right of every citizen, and though it may have inflicted upon several others substantial damages and actual loss similar to that alleged by the plaintiff, this is a defense without merit.

[2] A second ground of demurrer goes only to the first and second counts of the declaration. The defendant states that no negligence upon the part of the defendant is set forth in either of these counts, and contends that negligence must be alleged and proved to warrant a recovery. This does not apply to the other counts, which allege negligence.

It may be conceded that as the defendant is engaged in a lawful business its liability for the escape of oil is not to be determined by the strict rule applicable to one who fails to prevent the escape of a dog "well knowing that the said dog was used and accustomed to attack and bite mankind." 2 Chitty on Pleading, 596, 597; Jennings v. Davis, 187 Fed. 703, 708, 109 C. C. A. 451; Bigelow's Leading Cases on Torts, p. 478 et seq. Assuming that the defendant's duty to prevent the escape of oil is not absolute, and that an isolated and inevitable accident, or act of God, might excuse it from liability, it does not follow that it is not liable for a nuisance created without negligence in the care of its appliances, or in the mode of conducting its business; nor that the plaintiff must allege and prove that the creation of the public nuisance was due to special causes, preventable by the exercise of due precaution in the care of its property and the operation of its appliances. A nuisance may be created by the conduct of a business with all the care and caution which is possible, and with appliances in perfect order and most carefully operated. The existence of a nuisance may be due to the nature of the business, and its unavoidable effects on others, as well as to negligence in the maintenance of the plant or the conduct of its operations.

Should it appear that the defendant had been guilty of no negligence in respect to the condition or operation of its appliances, and that the plaintiff could not prove the allegations of its other counts which specify negligence, this would not relieve the defendant from liability upon the facts alleged in the first and second counts.

The allegation that the defendant, in the conduct of its business, had created a continuing public nuisance of the kind described, by which plaintiff suffered special damage, cannot be met by showing that it was necessarily incident to the business itself, or that it was unavoidable by the most careful management; nor can it be met by showing that it was avoidable by due care on the part of the defendant. If it was due to inevitable accident, that is matter of defense, which need not be negatived in the declaration.

It is the general rule that negligence is not an element in an action for a nuisance, and need not be alleged. "Actions for nuisance, properly speaking, stand irrespective of negligence." Bigelow's Leading Cases on Torts, p. 473; 14 Enc. of Pl. & Prac. 1114. See, also, *Blomen v. N. Barstow Co.*, 35 R. I. 198, 85 Atl. 924, 44 L. R. A. (N. S.) 236.

It is further objected that in counts other than the first and second the defendant's negligence has not been set forth with sufficient particularity. The details of the construction and condition of the defendant's plant and the mode of operation are within the defendant's knowledge, and the allegations seem sufficient to enable the defendant to prepare its defense.

Demurrers overruled.

THE HAMPDEN.**THE ANVERSOISE.**

(District Court, S. D. Georgia, E. D. July 16, 1920.)

Collision 94—Fault of overtaking steamship.

A collision between two steamships, entering Savannah river from the sea at approximately the same time, held due solely to the fault of one which passed the sea buoy a little later than the other, which was in the channel, and converged on the channel in an attempt to pass ahead, and in doing so came so close that she brought about the collision, either through keeping her course or through suction.

In Admiralty. Suit by Eugene Van Quekelberg, master, and the Société Anonyme Anversoise de Navigation, owner, of the steamship Anversoise, against the steamship Hampden, the Coastwise Transportation Company, claimant, with cross-libel. Decree for respondent.

O'Byrne, Hartridge & Wright, of Savannah, Ga., and Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for the Hampden.

Anderson, Cann, Cann & Walsh, of Savannah, Ga., and Barry, Wainwright, Thacher & Symmers, of New York City, for the Anversoise.

BEVERLY D. EVANS, District Judge. Early in the morning of February 4, 1920, the steamships Anversoise and Hampden, bound for the port of Savannah, anchored beyond the sea buoy, awaiting their pilots. Before the pilot boat came without the bar, the Hampden had pulled her anchor and was under way. When the pilot boat came near the sea buoy, the Anversoise was at anchor, with her bow eastward to the ocean. Her position was nearer in, and, according to the pilotage rules, the pilot boat, which had drawn within 50 to 100 feet of her, dropped her a pilot, who was rowed on a skiff to the Anversoise and immediately boarded her. The skiff returned to the pilot boat and took on another pilot, who was put on the Hampden, as she was slowly moving or drifting towards the sea buoy, with anchor up. Both vessels proceeded towards Savannah, and came into collision while in the channel near buoy No. 7; the bow of the Anversoise striking the stern of the Hampden.

Briefly stated, the theory of the Anversoise is that she was the first ship to pass the sea buoy, and after passing it she headed to pass between buoys C-1 and C-3, passing C-1 on her starboard side, about 100 feet away; the Hampden at that time being on the starboard side of the Anversoise, with bow not far from the stern of the Anversoise. The speed of the Hampden was faster than that of the Anversoise, and by the time buoy 6 was reached the Hampden had drawn up almost abeam the Anversoise, when the pilot of the latter vessel, realizing his vessel could not keep ahead of the Hampden, slowed his engines and told the Hampden's pilot to go ahead. The engines were put at half speed, then were stopped, and then with helm hard astarboard the engines were put full speed again. The Anversoise was perceived to be

under the influence of the suction of the Hampden, and with a view to avoid the consequences of the suction the engines of the Anversoise were backed. A collision resulted, by the bluff of the Anversoise's star-board bow striking the Hampden on the port quarter, about 150 or 200 feet forward of the stern.

On the other hand, the Hampden's theory is that she passed the sea buoy before the Anversoise did, and immediately took the middle channel course up the river, which she continuously held until the collision occurred; that the Anversoise was southward and outside the channel until she reached buoy 3; that when the Anversoise entered the channel at that point she was more than two points abaft the beam of the Hampden; that she gained on the Hampden until her stern was about abreast of the Hampden's bridge, when the navigators of the Anversoise, abandoning their effort to pass the Hampden, gave the orders which caused the Anversoise to sheer, and to strike with bow the stern of the Hampden.

As will be seen from the statement of the respective contentions, each ship claimed to be the overtaken vessel at the time of the collision. On this point the evidence is in distressing conflict. In the main, the ship crews support the contention of their respective vessels.

The Anversoise was 365 feet long, was partly loaded, and drew 15 feet forward and 19 feet aft. The Hampden was 397 feet overall, and was fully loaded, and drew 27 feet forward and 26 feet aft. At the time the pilots were taken aboard, it was about an hour and a half past high water; the tide having fallen about 8 inches. The master of the Hampden was a master mariner, holding a master's license for all oceans and a pilot license for the Savannah river. This probably accounts for the readiness of the Hampden for immediate navigation by the pilot. The Anversoise's previous speed for 24 hours had been 8.8 knots. The Hampden's speed was a little better than 10 knots. The Hampden took her course on Tybee range, which marks the center of the channel, and the Anversoise, after passing the sea buoy, headed for buoy 3, which according to her pilot "was a short course in from where I lay."

The pilot of the Anversoise, strenuously insisting that his vessel passed the sea buoy before the Hampden did, testified that when he boarded the Anversoise he noticed the Hampden on his port quarter, headed into the channel entrance, four or five ship lengths from the sea buoy, slowly drifting, when her pilot went aboard; that he had just given the order full speed ahead for the Anversoise, and when the Hampden pilot went aboard his ship the Anversoise was still headed out to sea in a southeasterly direction. The Hampden's pilot, as well as others on the Hampden, testified that immediately upon the pilot's coming on board the Hampden an order was given for full speed ahead. At that time the Hampden was a couple of lengths from the sea buoy. According to the Hampden's pilot, the Anversoise had not made her turn towards Tybee until his vessel was very nearly upon the sea buoy. Pilot Fleetwood, on the pilot boat, testified that when the pilot went on board the Hampden that ship was two or three lengths from the sea buoy. From this data, as well as that gleaned from the other witnesses,

I conclude that at the time the Hampden received her pilot that vessel was not further than three ship lengths away from the sea buoy (probably nearer), headed in to Tybee, while the Anversoise was about a ship length away from the sea buoy, in the act of making her turn, still headed out to sea in a southeasterly direction. The Anversoise left her anchorage to the east of the sea buoy, and turned around under a port helm, and in making this turn her distance from the sea buoy was increased. When all the circumstances are considered, I think the probabilities are with the testimony of the captain, chief officer, third mate, and pilot of the Hampden, that this vessel was ahead of the Anversoise when the latter steamer passed the sea buoy headed for the channel.

Contributing to the probability that such is true is the course selected by the pilot of the Anversoise, when he headed to buoy 3, instead of to Tybee range. As the Anversoise was the lighter draft ship, and, according to her pilot, could stay out of the channel before reaching buoy 3 with impunity, and as the course from where his vessel lay to buoy 3 was regarded by him as "a short course," it is not unreasonable to draw a conclusion that the pilot of the Anversoise entertained the opinion that in order to obtain primacy in the channel it was necessary to take a short course. On cross-examination the Anversoise's pilot testified that the minute the Hampden got to the sea buoy he knew that she was in the channel, that the Hampden was on his starboard side, and that if it had been night he supposed that she could have seen the green side light of the Anversoise. If this be true, then the Hampden could not have been the overtaking vessel when she was leaving the sea buoy. Inland Rules, art. 24.

It appeared that the pilot commissioners of Savannah instituted an investigation as to the responsibility for the collision. The Anversoise's pilot was asked whether he made any claim in that investigation that the Hampden was the overtaking vessel, and his reply was that he did not recollect whether that question was put to him by the commissioners. It would seem that this was such a vital matter in the inquiry that, if the Hampden had been the overtaking vessel, the pilot of the Anversoise would have asserted it on his own initiative.

It is very cogently argued by the Anversoise's proctor that, if the Hampden first entered the channel, it would have been impossible for the Anversoise to have overtaken her by reason of her slower speed. It is true that the Hampden slightly exceeded the Anversoise in speed in the open water, but it is a well-recognized fact that a heavily laden vessel in a narrow channel, drawing so much water that her keel is near the bottom, cannot make the speed which she could otherwise make, when not handicapped by this environment. That these vessels, in the circumstances under which they were steaming up the river, were pretty evenly matched in speed, is admitted by the pilot of the Anversoise. He testified that he kept his vessel well to the south of the channel until he reached buoy 3, when he came into the south side of the channel, with the buoy close to his port side, with the Hampden on his starboard side, and then it became apparent that "the ships were so evenly matched" that he slowed down and gave the order for half

speed. So I do not think that the speed capacity of the vessels in open water is necessarily controlling.

According to the Anversoise's pilot, when his ship passed buoy 1, the Hampden was on his starboard side, and he came closer to the Hampden because she was heading in for Tybee, while he was heading for the buoy, and when he entered the channel at buoy 3 the Hampden was still on his starboard side. Just above buoy 3 he saw that the ships were so evenly matched that he gave the order to slow down, so as to let the Hampden pass. At that time he observed the figure 6 on the stern of the Hampden rise above the water; the stern of the Hampden being just abaft the bridge of the Anversoise, where he was standing, and the Hampden's bow being in front of his vessel. The stern marks showing the vessel's draft were on the Hampden's stern post. The photograph of the Hampden shows that the contour of the vessel was such as to prevent any one's seeing the mark on the stern post unless very nearly opposite it, so that the bridge of the Anversoise must have been almost abreast the stern of the Hampden when the Anversoise entered the channel.

This conclusion is challenged by the Anversoise's proctor as being opposed to other facts, such as the conversation between the pilots on the two ships. The pilot of the Anversoise testified that coming from the sea buoy, until he reached buoy 3, he was leading the Hampden, and when he got to buoy 3 he said to the pilot of the Hampden he had slowed down so that he might pass. The Hampden's pilot was forward of him, and he spoke to him at an angle. The pilot of the Hampden testified that the stem of the Anversoise was abaft the bridge of the Hampden when the pilot of the Anversoise hailed him, and it was necessary for him to turn round to make answer. He was in the lead, and had been all the time, steering his vessel without change in course or speed. The pilots did not differ materially in the substance of the conversation. Other witnesses to this conversation were the captain and chief officer of the Hampden, who said that the pilot of the Anversoise said to the Hampden's pilot, "Go ahead; I am not going to try to pass you."

The query is put: If the Anversoise had been the overtaking vessel, why the statement that the Anversoise had slowed down to let the Hampden pass? If the Anversoise had not been the overtaking vessel, there would have been no occasion to have slowed down, because, if the Hampden was the faster vessel, by keeping her speed and course she would have kept ahead. The conversation, in connection with the attendant circumstances, rather indicates that the Anversoise was attempting to pass the Hampden, and, realizing that the vessels were too evenly matched in speed to do this, the Anversoise pilot changed his mind and decided to drop astern.

The discussion thus far brings me to a decision of the probable cause of the collision. Without attempting to marshal all the minutiae of details in the evidence, from what has been said, as well as from other testimony appearing in the record, I have reached the conclusion that the Hampden was in the channel, maintaining her course and speed when the Anversoise came in at or near buoy 3. The Hampden was

holding her course and speed, steering straight up the channel, without sheering. The Anversoise converged on the Hampden's course, and, when the Anversoise came near the Hampden, the Anversoise slowed her engines to half speed, then stopped them, then started them, and then reversed them; these several changes occurring within from 10 to 12 minutes. Then the Anversoise's bow swung to the starboard and struck the Hampden's stern.

Whether this result be attributable to the movement of the engines of the Anversoise, or to the suction of the Hampden, the fault of the collision is attributable to the Anversoise, and not to the Hampden.

THE BACCHUS.

THE BRAEMAR.

(District Court, E. D. Virginia. July 19, 1920.)

No. 2305.

Collision 72 (1)—Mutual faults of anchored vessels.

A collision at night between a steamship and bark anchored in Elizabeth river held due to faults of both vessels; the bark being primarily in fault for allowing her anchor to drag, and the steamship for failing to take measures to prevent the collision, when the danger became apparent, some three hours before it occurred.


In Admiralty. Suit for collision by one Van de Moer, Master of the steamship Bacchus, against the Norwegian bark Braemar, Ark-ties Braemar (K. Knudson) owner and claimant, with cross-libel. Decree dividing damages.

Hughes, Little & Seawell, of Norfolk, Va., for the Bacchus.

Hughes, Vandeventer & Eggleston, of Norfolk, Va., for the Braemar.

WADDILL, District Judge. The collision, the subject of this litigation, occurred in the waters of the Elizabeth river, in Virginia, about 6 o'clock on the morning of March 13, 1918; the vessels at the time being anchored in the regular anchorage ground to the westward and about a mile and a quarter off Sewell's Point. The Braemar came to anchor on the 8th of March, and the Bacchus on the evening preceding the collision. The Bacchus is a Dutch steel steamship, about 300 feet long, 40 feet beam, and the Braemar a Norwegian square-rigged bark, of steel construction, 300 feet long and 36 feet beam. Both vessels were loaded with coal, and each was properly manned and equipped. In the collision, the bow of the bark came in contact with the starboard quarter of the steamship, causing damage to both vessels.

Each ship insists that she was free from fault, and that the other dragged her anchor, bringing about the collision. It is exceedingly difficult to determine from the testimony precisely how the collision did occur, and what caused the same, further than that the anchor of one or the other vessel actually dragged. The conflict is sharply drawn,

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tending strongly to support the ship in whose behalf it was taken. The Bacchus, on coming to anchor the night before the collision, apparently allowed ample berth room to the bark then at anchor, and both vessels had out as much chain as appeared to be sufficient in the weather prevailing.

The testimony is undisputed that the vessels apparently moved from their positions as early as 1:30 that night, and continued to approach each other, swinging with the ebb tide, until at 4 o'clock they were within a vessel's length apart, and at about 6:30 a. m. they came together under the influence of the tide and a slight squall of wind, blowing from the southwest. The conflict in the testimony is acute on every important question, even going to the positive difference as to which ship anchored above the other in the stream, save that it is not in dispute that as early as 1:30 on the morning of the collision the vessels were getting in closer proximity to each other, and that for more than two hours prior thereto the probability of collision was patent.

The court, though with some doubt, adopts the view of the Bacchus, that the bark dragged its anchor, causing the collision. In reaching this conclusion, it is influenced by the fact that the construction of the bark, particularly with its square rig and high masts, was such that it was more likely to drag under the influence of wind and tide than the Bacchus. While her anchor chain of 45 fathoms would ordinarily have proven sufficient, with the vessel loaded, to have held her where she was anchored, it failed to do so on this occasion, and she slowly dragged until the collision with the Bacchus.

This conclusion places the fault primarily upon the Braemar, but it does not follow necessarily that she ought to bear the entire loss resulting from the collision, assuming that the Bacchus may have done or omitted to do something which may also have entered into bringing about the accident. This, the court believes, under the facts and circumstances of this case, she did, and taking into account the smooth waters in which the vessels were anchored, and the then condition of the weather, there was no good reason why, during the long period of five hours that the vessels were known to be getting in closer proximity to each other, and for about three hours when they were in a ship's length of each other, the Bacchus should not have taken some step to aid in extricating herself from possible danger of collision with the sailing vessel, which was less able to control its movements than the steamship. Had the Bacchus had steam up, it would have been a simple matter to have eased up on her anchor, and moved forward or aft. The testimony is that it would only have taken some 20 minutes for her to have gotten up steam. Spencer on Marine Collisions, 201; *The Ciudad de Reus*, 185 Fed. 391, 107 C. C. A. 447.

The court is somewhat influenced in reaching its decision by the failure of the Bacchus to call the state pilot who located her anchorage place the evening prior to the collision. The question of the exact location of the vessels in the stream was a most material one, and the pilot, a person experienced in matters of navigation, and particularly in the waters in question, would have been able to tell almost with certainty, from the shore bearings, whether the Bacchus had dragged

anchor, as claimed by the Braemar, or remained where he had anchored her. The Georgetown (D. C.) 135 Fed. 854; The Irishman (D. C.) 259 Fed. 301.

Counsel for the Bacchus cite and rely upon the case of the Boxleaf, 265 Fed. 803, decided by this court on the 24th day of May, 1919, to sustain their contention that the steamer was not called upon to take any step to avoid the collision. A careful consideration of that case will show that the facts were so different from those here that it does not materially militate against anything herein said.

The court's conclusion upon the whole case is that the collision was brought about as a result of the joint fault of the two vessels, and that the damages resulting therefrom should be divided between them.

UNITED STATES v. HYDES.

(District Court, W. D. Washington, N. D. June 25, 1920.)

No. 5171.

Intoxicating liquors ⚡250—Procedure for forfeiture of vehicle used in transportation must be strictly followed.

Under National Prohibition Act, § 26, providing that, on seizure of liquor being illegally transported, the officer shall take possession of the vehicle and arrest any person in charge, and that on his conviction, unless good cause is shown, the court shall order a sale of the property seized, the procedure prescribed is jurisdictional, and the arrest of a defendant for a previous illegal transportation of liquor does not authorize the seizure without warrant, and forfeiture, of an automobile used in such transportation.

Criminal prosecution by the United States against A. Hydes. On motion for forfeiture of automobile. Denied.

Robert C. Saunders, U. S. Atty., and R. E. Capers, Asst. U. S. Atty., both of Seattle, Wash.

John F. Dore, of Seattle, Wash., for defendant.

NETERER, District Judge. The defendant was convicted of transporting intoxicating liquor in violation of the National Prohibition Act (41 Stat. 305), several gallons of alcohol. At the time of transportation the liquor was seized by an officer. The defendant was not arrested. About 10 days thereafter the defendant was arrested on a warrant duly issued, and the automobile in which the liquor was transported was seized without process, and forfeiture is demanded.

The right of the government to forfeit the automobile is challenged by the owner upon the ground that it was seized without warrant of law, in that it was not taken while in the act of doing the forbidden thing.

Section 26 of title 2 of the National Prohibition Act, under which the government seeks to forfeit the automobile, so far as pertinent, reads:

"When * * * any officer of the law shall discover any person * * * transporting in violation of the law, intoxicating liquor in any * * *

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automobile * * * It shall be his duty to seize * * * all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported * * * shall be seized by an officer, he shall take possession of the vehicle * * * and shall arrest any person in charge thereof. * * * The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause * * * be shown * * * a sale * * * of the property seized. * * *

The forfeiture demanded is a proceeding in rem under the procedure provided by the National Prohibition Act, and such procedure must be complied with in order to divest the owner of his title. The procedure provided is not merely directory and cumulative, but is jurisdictional. This statute gives a new power, a power to divest title from the owner of property, and the statute provides means of enforcing such power, which is controlling. *Franklin Glass Co. v. White*, 14 Mass. 288. Under various acts of Congress, property may be seized. Each act has a procedure applicable to its provision. Under Act March 2, 1799, 1 Stat. 678, 3 Fed. Stat. Annot. 95, the right to libel was absolute, and not dependent upon statutory conditions and restrictions; and the return of a car used in violation of Act June 22, 1874, § 17 (Comp. St. § 10132), could not be decreed prior to a declaration of forfeiture. *U. S. v. One Certain Locomobile (D. C.)* 242 Fed. 998. Act June 15, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 7678f), gives the owner the right to petition a restoration any time before condemnation proceedings have been instituted. Under the acts, *supra*, the disposition of the property is decreed upon trial after seizure on process duly issued.

By the provisions of section 26, *supra*, the vehicle after seizure may be instantly returned to the owner, upon execution by him of a bond to produce the property at the criminal trial, and disposition must be decreed upon the trial of the criminal case. Forfeiture by original seizure depends upon the statute. Congress may declare the forfeiture absolute upon seizure, or make the forfeiture depend upon conditions. *U. S. v. Stowell*, 133 U. S. 11, 10 Sup. Ct. 244, 33 L. Ed. 555. The Congress may provide for the seizure of the vehicle at any time, for having offended, but before any forfeiture can be decreed, the jurisdictional facts as outlined by the statute must be present, and the statutory provision must be in harmony with the taking or detention. *U. S. v. Two Hundred and Sixty-Seven Gold Pieces and One McLaughlin Automobile (D. C.)* 255 Fed. 217.

Section 26, *supra*, expressly providing that the vehicle shall be taken while in the act of illegal transportation, and the vehicle in issue not being so taken, the subsequent taking without process was without warrant of law. An order decreeing the return of the vehicle and exonerating the owner's bond may be presented.

UNITED STATES v. GRAHAM et al.

(District Court, W. D. Washington, N. D. June 25, 1920.)

Criminal prosecution by the United States against Gordon Graham and others. On motion for forfeiture of boat. Denied.

Robert C. Saunders, U. S. Atty., and R. E. Capers, Asst. U. S. Atty., both of Seattle, Wash.

Adam Beeler and J. J. Sullivan, both of Seattle, Wash., for defendants.

NETERER, District Judge. The defendant was convicted of transporting intoxicating liquor in violation of the National Prohibition Act (41 Stat. 305). The liquor was transported in the June G, a small water craft. The boat was not arrested or taken possession of while in the act of transportation, but was subsequently seized without process, and forfeiture is demanded by the government. The right to forfeit is challenged by the owner.

The issue here is as that decided in *U. S. v. A. Hydes* (D. C.) 267 Fed. 470, this day filed, and, for the reasons therein, the motion to forfeit will be denied, and an order decreeing a return of the water craft may be presented.

KIRKLAND v. ENSIGN-BICKFORD CO.

(District Court, D. Connecticut. September 2, 1920.)

No. 1933.

1. Release ⚡29(1)—All joint tort-feasors released by release of one.

The release of one joint tort-feasor, being valid, operates as a release of the others.

2. Torts ⚡22—Who are "joint tort-feasors."

Where the negligence of two or more persons concurs in producing a single indivisible injury, such persons are "joint tort-feasors," though there was no common design or concert of action.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Joint Tort-Feasors.]

3. Release ⚡29(3)—Injured miner's release of employer releases manufacturer of defective fuse.

Where a miner, injured when a fuse manufactured by defendant burned its entire length instantly and set off a blast before he had an opportunity to seek a position of safety, released his employer, which furnished the fuse, such release will be deemed as a matter of law to release the defendant manufacturer of the fuse, on the theory that it and the employer were joint tort-feasors, notwithstanding the miner in his complaint against defendant alleged that the accident was caused solely by its negligence, for under the circumstances he cannot deny the liability of his employer, which is presumed; hence defense setting up the release is good, notwithstanding the averments of sole negligence.

4. Release ⚡58(1)—Whether defendant and another were joint tort-feasors question for the court.

In an action by a miner, injured when a fuse burned instantly, where the defendant manufacturer asserted that the miner's release of his employer was a release of it, that question will be determined by the court as a matter of law, notwithstanding the averment of the complaint that the injury was solely the result of defendant's negligence, and the court will not submit to the jury the question whether defendant and the employer were joint tort-feasors.

At Law. Action by W. L. Kirkland against the Ensign-Bickford Company. On demurrer to the second defense. Demurrer overruled.

Edward W. Broder, of Hartford, Conn., for plaintiff.

Gross, Gross & Hyde, of Hartford, Conn., for defendant.

THOMAS, District Judge. On May 5, 1914, the plaintiff was a miner in the employ of the Tennessee Copper Company, a corporation engaged in mining and smelting copper ores in the state of Tennessee. The defendant is a Connecticut corporation, and manufactures coils of fuse, commonly known as "safety fuse," and upon various occasions sold such fuse to the Tennessee company, to be used in its blasting operations.

The plaintiff had been in the employ of the mining company for some time prior to May 5, 1914, and it was part of his duty to bore in the stopes or walls of mines certain holes and load them with blasting material. In order to discharge this blasting material, the plaintiff cut strips from the coil of "safety fuse" furnished him by his employer, which was made by the Connecticut company and sold to the Tennessee company. These strips were attached by the plaintiff to the charge of blasting material in each of said holes. It was then the duty of the plaintiff to light each fuse and retreat to a place of safety. When properly manufactured, the fuse was intended to burn at the rate of two feet to one minute, and when cut to a sufficient length would allow the person lighting the same to retire to a place of safety. On the day in question the plaintiff, after properly preparing the charges with the fuse properly attached, lighted the ends of each fuse, and all of them burned slowly and gradually, except the last one, which flashed, burned its entire length instantly, and exploded before the plaintiff had a chance to reach a place of safety.

The amendment to the complaint discloses the grounds of negligence on the part of the defendant manufacturer of the fuse in alleging that it knew, or ought to have known, that it was a dangerous substance to persons in whose hands it might come, one of whom was the plaintiff, unless properly manufactured, and that the defendant was negligent in making it in a certain way, and that the defects were unknown to the plaintiff, and that he was unable to discover them, with the result that the fuse caused the powder to explode prematurely. In paragraph 11 of the complaint it is alleged that the plaintiff's injuries and the damages sustained were due solely to the negligence of the defendant.

As a result of the explosion the plaintiff was severely injured, and seeks in this suit to recover of this defendant damages for such injuries. In its answer the defendant enters in its first defense, practically a general denial. In its second defense it alleges that—

"On or about the 30th day of July, 1914, the plaintiff, W. L. Kirkland, for a valuable consideration, which was accepted in full settlement and satisfaction, of all claims and demands hereinafter set forth, executed and delivered to the said Tennessee Copper Company a receipt and release of any and all actions, causes of actions, claims, and demands for or by reason of any damage, loss, or injury which theretofore had been or which might thereafter be sustained by him in consequence of personal injuries alleged to

have been received by him while in the employ of said Tennessee Copper Company on the said 5th day of May, 1914, as alleged in the complaint in this action; the plaintiff claiming that said alleged defective fuse had been furnished him by said Tennessee Copper Company for use, and was being used, in the prosecution of its work under its direction."

The release relied upon is as follows:

"Accident Report File No. 5289.

"Receipt and Release.

"In consideration of the sum of two hundred sixty-two (\$262.50) and 50/100 dollars, to me in hand paid by Tennessee Copper Company, I do hereby release and forever discharge said Tennessee Copper Company from any and all actions, causes of action, claims, and demands for or by reason of any damage, loss, or injury which heretofore has been or which hereafter may be sustained by me, W. L. Kirkland, in consequence of personal injuries received by me, W. L. Kirkland, while in the employ of the said Tennessee Copper Company, to wit, at or about 4 p. m. on the 5th day of May, 1914, while at work in 3N1t backstope, Burra mine, as drill runner, I had charged up my holes and had all but one or two fired, when one went off, resulting in my receiving compound fracture of left index finger, numerous deep puncture wounds of arms, thighs, chest, groins, and face. It being further agreed and understood that the payment of said sum of two hundred and sixty-two and 50/100 dollars is not to be construed as an admission on the part of said Tennessee Copper Company of any liability whatever in consequence of said accident, but said sum is accepted in full settlement and satisfaction of all said claims and demands of said W. L. Kirkland by reason of said accident. I further represent and covenant that at the time of receiving said payment and signing and sealing this release I am of lawful age and legally competent to execute it, and that before signing and sealing it I have fully informed myself of its contents, and executed it with full knowledge thereof, and of my own free will and accord.

"In witness whereof, I have hereunto set my hand and seal this thirtieth (30th) day of July, nineteen hundred and fourteen.

"W. L. Kirkland."

Then follows the witnesses names and the notarial acknowledgment. To the second defense the plaintiff demurs because:

"First. It does not appear that the defendant is a party to the release, and
"Second. It appears from the plaintiff's complaint that the injuries complained of were due solely to the negligence of the defendant, its servants and agents."

So that the question now before the court is as to the sufficiency of the second defense. The issue thus raised is whether or not the release given to the Tennessee Copper Company, the plaintiff's employer, who had furnished him the fuse for use in its business and under its direction in the course of his employment, for a sum of money acknowledged to have been received in full settlement and satisfaction of all claims and demands arising out of the injury, does not bar action against all other persons whose alleged negligence was the proximate cause of the accident in question.

[1] It is conceded, as I understand it, that the release of one joint tort-feasor operates as a release of the other or others. It requires the citation of no authority to support the claim of law that a full, absolute, and unqualified release of one or more of several joint tort-feasors, upon a consideration free from fraud or mistake or incapacity, given in full settlement and satisfaction of all claims for the injuries

complained of, is a release of each and every one of such joint tort-feasors.

The plaintiff contends, however, that the Connecticut company, this defendant, is not a party to the release, and that as the complaint does not allege any joint negligence or joint liability, but alleges that the injuries complained of were due solely to the negligence of the defendant, the rule that the release of one joint tort-feasor releases all does not apply, and relies upon the rule of law that a release given in favor of a person who is not liable will not operate to release the person who is liable, and who has been sued or whose negligence was the sole cause of the injury. In support of this contention a number of cases are cited, and in all such cases, where it is held that a release does not operate to discharge the defendant sued from liability, an examination of them will show that the courts held that the defendant sued was not a joint tort-feasor, and the acts of negligence complained of which rendered the defendant sued liable to the plaintiff were separate and distinct acts, and the pleadings and proofs showed an independent and separate act or acts of negligence in no way connected with or concurring with the negligent act sued upon.

[2-4] The plaintiff's contention raises this question: Can a plaintiff escape the application of the rule that the release of one joint tort-feasor releases all, by merely alleging that the "damages sustained were due solely to the negligence of the defendant," if it appears from the allegations of the complaint that the plaintiff may be well within the rule of the cases which hold that one who receives consideration for a release and discharge of a claim is precluded from denying that such claim was well founded, and that there was, as here, a probable or possible liability against the person in whose favor the release was given? Ought not the facts alleged make it appear that the defendant sued was not a joint tort-feasor?

It occurs to me that to sustain the plaintiff's contention in this case would present a novel situation. Would not the court be obliged to submit to the jury at the trial, the question as to whether the Tennessee company was liable or not, and instruct the jury that if they found such company liable to render a verdict for this defendant? And if it found the Tennessee company not liable, and that this defendant's acts of negligence were the sole cause of the accident, to render a verdict against this defendant under the rule that in such case they were not joint tort-feasors, and the release secured by one did not release the other, and that the jury would first have to find that they were joint wrongdoers before they could render a verdict in favor of this defendant.

Ought not the court, as matter of law, pass on the question of whether, under the allegations of the complaint, the Tennessee company, and the Connecticut company were joint tort-feasors and neither leave the question to the jury, nor let the pleader evade the application of the rule by stating the conclusion that the injuries complained of were caused solely by the negligence of the defendant sued, and follow the rule laid down in *Cooley on Torts*, p. 247, that—"where the negligences of two or more persons concur in producing a single, indivisible

injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert action"? Does not the rule stated by the court in *C., C. & St. L. Ry. Co. v. Hilligoss*, 171 Ind. 417, 425, 86 N. E. 485-488, (131 Am. St. Rep. 258) apply? In this case the court said:

"One who compromises a claim does not necessarily admit that the claim was well founded, but the one who receives the consideration is precluded from denying that it was. So it may be said that, when a pretended claim for a tort has been settled by treaty, and satisfaction rendered the claimant by one so connected with the trespass as to be reasonably subject to an action and possible liability as a joint tort-feasor, the satisfaction rendered will release all who may be liable, whether the one released was liable or not. In such a case it is not necessary that it should appear that the party making the settlement was in fact liable. It will be deemed sufficient if there is an appearance of liability; that is, something in the nature of a claim on the one hand, and a possible liability under the rules of the law on the other."

The allegations of the complaint bring the plaintiff well within the rule there laid down. The plaintiff here was an employ  of the Tennessee company using an instrumentality of his trade, which the plaintiff himself characterizes as a "dangerous and hazardous substance to persons into whose hands it might come," and that it was furnished by his employer, from whom he received a complete satisfaction by reason of the injuries received while in the employ of the Tennessee company. Can it be said, fairly, that there was no "possible" ground of action against the Tennessee company, when it is alleged that the plaintiff was injured by the premature explosion of powder, because the fuse made by this defendant, sold by it to the Tennessee company, and furnished by said company to the plaintiff was the cause of the injury? Nor does the allegation of the complaint that the accident was caused solely by the negligence of the defendant cure the defect. In my opinion it clearly brings the plaintiff within the rule that the Tennessee company and the Connecticut company were joint tort-feasors, because it affirmatively appears that the same dangerous instrumentality was set in motion by the Connecticut company, who made the fuse, and by the Tennessee company, who furnished the same to the plaintiff, for use. The liability against the employer must have been based either on negligence in giving it to the plaintiff or lack of care in selecting it. This is implied from the fact that plaintiff settled with his employer.

In *Carstesen v. Town of Stratford*, 67 Conn. 428, 35 Atl. 276, Judge Torrance said:

"In general, the negligence of third parties, concurring with that of the defendant to produce an injury, is no defense; it could at most only render the third party liable to be sued also as a joint wrongdoer."

Applying this doctrine to the facts in the case at bar, the manufacturer of the fuse, if negligent in the making, is jointly liable with the employer, who presumptively was negligent in supplying the fuse to the plaintiff. I say "presumptively" because plaintiff made claim against and received satisfaction from his employer. It does not lie in his mouth now to say that he claimed no liability against his

employer. In *Ayer v. Ashmead*, 31 Conn. 453, 83 Am. Dec. 156, the court said:

"It is true, undoubtedly, that for a joint trespass they may all be sued jointly, or separate suits may be brought against each, because trespasses committed by several, while they are in fact the joint acts of all, are also the separate acts of each individually, each being liable in law for whatever was done by all or any of them; and if suits are separately brought against each they may all be pursued to final judgment, and the plaintiff may elect which of the separate judgments he will enforce and collect. But, having received the damages recovered against any one, and his costs against all, he must be content with that, as otherwise he would receive more than one satisfaction for his injury."


From all authorities it is clear that the plaintiff's demurrer must be overruled. An examination of the cases cited and relied upon by the plaintiff shows that in each case there was a separate liability. This appears from the facts or from the allegations in the complaint. I cannot hold that a plaintiff may escape the rule as to joint liability which is the test in all such cases, by pleading that the injuries received and complained of were caused solely by the negligence of the defendant sued. Such would have to be the ruling, if the plaintiff's demurrer is sustained. It is unnecessary to discuss all authorities cited and urged upon the court, for the principle of law is the same in each case.

The demurrer is overruled. Decree accordingly.

BOARD OF SUP'RS OF BUENA VISTA COUNTY, IOWA, v. TITLE GUARANTY & SURETY CO. OF SCRANTON, PA., et al.


(District Court, N. D. Iowa, W. D. September 14, 1920.)

No. 281.

- 1. Removal of causes** —No diversity of citizenship between board of supervisors and drainage district, in Iowa, and Pennsylvania "corporation"; "citizen."

The board of supervisors of an Iowa county and a drainage district within such county are not "corporations" or "citizens," within the statute relating to removal of causes, when suing a Pennsylvania corporation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Citizen; Corporation.]

- 2. Removal of causes** —Amendment of petition for removal not allowed, where facts do not authorize removal.

Judicial Code, § 274c (Comp. St. § 1251c), permitting amendment of petition for removal on motion for remand, applies only when existing facts authorize removal.

At Law. Action by the Board of Supervisors of Buena Vista County, Iowa, acting for and in behalf of Drainage District No. 34, in said county, against the Title Guaranty & Surety Company of Scranton, Pa., and another. On motion to remand to the state court. Motion sustained, and cause remanded.

Guy E. Mack, of Storm Lake, Iowa, and Kelleher, Hanson & Mitchell, of Ft. Dodge, Iowa, for plaintiff.

A. L. Whitney, of Storm Lake, Iowa, and Jepson & Struble, of Sioux City, Iowa, for defendant Title Guaranty & Surety Co.

REED, District Judge. This action was commenced in the district court of Iowa in and for Buena Vista county by the board of supervisors of said county, for and on behalf of the drainage district in said county known as drainage district No. 34, against the Title Guaranty & Surety Company, a corporation duly organized under the laws of Pennsylvania, doing business in the state of Iowa, to recover from said defendant Title Guaranty & Surety Company upon a surety contract executed by it guaranteeing the performance of a contract executed by a contracting firm known as Forrestal & Feyen, engaged in the construction of drainage ditches in said county. The action was commenced by the plaintiff as such board of supervisors against said defendant Title Guaranty & Surety Company, by the service of an original notice or summons upon it about September, 1919, which notice required the defendant to appear and answer the plaintiff's petition on or before noon of the second day of the September, 1919, term of said court, as authorized by the Iowa statute, which was appointed to begin on September 22, 1919, in which plaintiff demands judgment against the defendant for \$125,000 and costs.

For the purpose of the determination of this motion to remand, it must suffice to say that said contracting firm of Forrestal & Feyen entered into a contract with said drainage district No. 34 to construct and complete a drain or ditch as required by the statute of Iowa then in force, and as required by said statute said firm was to execute a bond or surety for the completion of such drain or ditch, and for that purpose the Title Guaranty & Surety Company executed a bond in the sum required to insure the full and complete performance of said contract, and upon the execution of such surety bond the contract was awarded to said firm, who entered upon the work of constructing said ditch, but ultimately failed to complete its said contract, and the drainage district was damaged by such failure, and steps were taken for the recovery of such damage by the board of supervisors of said Buena Vista county, for and in behalf of said drainage district, and suit was brought, as before stated, by the board of supervisors of said Buena Vista county against the Title Guaranty & Surety Company (and another, as joint surety upon the bond of said contractors, who is not a party to this action).

After the petition was filed in the state court against the surety upon said bond, a petition was filed by the Title Guaranty & Surety Company alone for the removal of said cause to this court, upon the alleged ground of diverse citizenship of the parties to this action, in that the Title Guaranty & Surety Company was a corporation organized under the laws of Pennsylvania, and that the plaintiff board of supervisors was an association of some kind created or organized under the laws of the state of Iowa, but in what capacity it was so acting is not alleged, either in the petition filed by the plaintiff, or in the petition for

removal as filed by the defendant Title Guaranty & Surety Company, and nowhere appears in the record in said cause.

The petition for removal was filed by the defendant Title Guaranty & Surety Company in said state court on September 22, 1919, and is as follows:

In the District Court of Iowa in and for Buena Vista County.

Board of Supervisors of Buena Vista County, Iowa, Acting for and in Behalf of Drainage District No. 34, Buena Vista County, Iowa, Plaintiff, v. Title Guaranty & Surety Company of Scranton, Pa., and First National Bank of St. Paul, Minn., defendants.

September Term 1919.

Petition to Remove this Cause to the United States District Court.

To the Honorable Court:

Your petitioner, the Title Guaranty & Surety Company of Scranton, Pa., respectfully shows that when the plaintiff's alleged cause of action accrued this petitioner was a corporation organized under the laws of the state of Pennsylvania, with its principal place of business at Scranton, Pa.; that said suit is of a civil nature, and is brought against your petitioner to recover \$125,000 damages on account of a certain contract in writing between your petitioner and said plaintiff, and your petitioner is actually interested in said controversy; that said action is a controversy wholly between citizens of different states in which the matter in dispute, exclusive of interest and costs, exceeds the sum of \$100,000. * * *

Your petitioner further avers that said district court of Buena Vista county, Iowa, is a court of the state of Iowa, that this suit is now pending in said court, and that this petition is filed in said court at the time, or before, your petitioner is required by law of said state, or the rule of said state court in which this suit is brought, to answer or plead to the petition or complaint of said plaintiffs.

The petitioner offers with its petition for removal a bond, with good and sufficient sureties, as required by law for its entering in the District Court of the United States for the Northern District of Iowa.

The petitioner further states that prior to the filing of this petition and bond for the removal of said cause written notice of its intention to file the same was given to the plaintiff as required by law, a true copy of which, with proof of the service of the same, is attached hereto.

Your petitioner prays that this court proceed no further herein, except to make an order of removal, and to accept the said surety bond, and to cause the record herein to be removed into the District Court of the United States for the Northern District of Iowa, Western Division.

[Signed] Title Guaranty & Surety Company,

By A. L. Whitney, Attorney.

This petition is duly verified.

On October 8, 1919, the plaintiff filed in said state court exceptions to the removal of said cause from said state court, which exceptions in substance were that the grounds alleged in the petition for removal were insufficient to show that the cause was one of which this court had jurisdiction, and that the cause was not, therefore, a removable one. The state court overruled such exceptions and granted a removal, and the record has been filed and the cause docketed in this court, and the plaintiff has filed a motion to remand the cause, which motion is as follows:

In the District Court of the United States for the Northern District of Iowa,
Western Division.

[Title.] Motion to Remand to the State Court.

Now come the plaintiffs, the board of supervisors of Buena Vista county, Iowa, and drainage district No. 34 of Buena Vista county, Iowa, and move the court to remand this cause to the district court of the state of Iowa in and for Buena Vista county, from which court it was attempted to be removed to this court, for the reasons and upon the grounds hereinafter set forth.

(1) The record in said cause does not present a case removable from the state court to this court, under the statutes governing such cases.

(2) The record in said cause does not present a separable controversy, in contemplation of the act of Congress authorizing the removal of causes.

(3) The requisite diversity of citizenship required as a condition precedent to the jurisdiction of this court of a controversy of the character presented by the record in this cause does not exist.

(4) The petition for removal fails to show a compliance with the acts of Congress for the removal of suits from state courts to the United States District Court.

(5) Only one of two joint defendants files or purports to ask for a removal of said cause.

(6) The petition for removal and the record in said cause both fail to show or present a case showing diversity of citizenship at the time of the commencement of the action.

(7) Under the statutes of the state of Iowa, the board of supervisors of Buena Vista county, Iowa, is not a corporation, and hence citizenship cannot be predicated on said board.

(8) Under the provisions of section 1989a10 of the Iowa Code Supplement for 1913, it appears, as shown by the record, that the action is prosecuted, not in behalf of a corporation, and not in behalf of a legal entity, but in behalf of a drainage district organized under the laws of the state of Iowa, which said drainage district has no existence independently of the property owners whose property is situated in said district. Therefore the requisite diversity of citizenship for the removal of said cause must be shown to exist between all property owners, incumbrancers, and others having interests in the said drainage district and each of the defendants, at the time of the commencement of the suit, and no such claim or showing is made by the record.

(9) Corporate capacity or citizenship cannot be predicated of the board of supervisors of Buena Vista county, Iowa; nor can corporate capacity or citizenship be predicated of drainage district No. 34 of said county.

(10) Under section 1989a10, both the board of supervisors and drainage district must be looked to and considered for the purpose of determining who are parties plaintiff.

(11) The board of supervisors having no interest for or on behalf of Buena Vista county, and the property of Buena Vista county not being liable or subject to be taken in respect of any judgment in an action of this kind, such county is not the real, or any party in interest, and the board of supervisors is therefore acting only nominally as plaintiff, and is without any financial interest, either for the board or for the county; hence property owners, incumbrancers, and those having interests within the drainage district are the sole, actual, real, and only parties whose citizenship must be shown by the record as of the time of the commencement of the action as a condition precedent to jurisdiction in the courts of the United States; and the record not showing such citizenship, said cause is not removable.

(12) The statement of the petition for removal, that there is a controversy wholly between citizens of different states, is a mere unauthorized conclusion of law, drawn by the petitioner from other averments, and is wholly insufficient to show citizenship; such conclusion is, furthermore, stated with respect to the date of filing said petition for removal, and not of the commencement of the action and hence is for that reason insufficient.

(13) There is no sufficient showing of a separable controversy to warrant a removal upon the ground of separable controversy. The pretended notice of the petition and bond for removal is insufficient, because (a) it is not a notice to the plaintiffs or their attorneys, and is not directed to the plaintiffs, but is directed to the defendant; (b) it is not a notice of a petition or bond, and no copies of any petition or bond, or other statement of the contents thereof, is annexed to said notice.

(14) For other reasons apparent upon the face of the record.

Wherefore the plaintiffs pray that this cause may be remanded to the district court of Iowa in and for Buena Vista county, to be there proceeded with according to the practice governing such cases.

[Signed] Guy E. Mack and
Kelleher, Hanson & Mitchell,
Attorneys for Plaintiffs.

[1] Neither the petition for removal nor the record in the cause shows any grounds for the removal of this cause from the state court to this court, or that this court has any jurisdiction of this controversy, and the exceptions in the state court to the petition for removal are well taken, and should have been sustained.

The petition for removal sufficiently shows that the Title Guaranty & Surety Company is a corporation organized under the laws of Pennsylvania and a citizen of that state for the purpose of removal; but there is no allegation or showing that the plaintiff board of supervisors of Buena Vista county, or drainage district No. 34 of that county, is a citizen or corporation of any other state than Pennsylvania, and there is no diversity of citizenship between any of the parties to this action, and this court has no jurisdiction of this controversy. *Thomas v. Ohio State University*, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. 160; *Great Southern Fireproof Hotel Co. v. Johnson*, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842; *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; *Grace v. American Central Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; *McLaughlin Bros. v. Hallowell*, 228 U. S. 278, 33 Sup. Ct. 465, 57 L. Ed. 835.

In *Adams & Co. v. May* (C. C.) 27 Fed. 907, Judge Love, formerly of this court, said:

"The petition [for removal] in this case states, in substance, that Adams & Co., the plaintiffs, are citizens of Pennsylvania. But who are Adams & Co.? Citizenship cannot be predicated of a firm *eo nomine*. * * * The individual names of the partners must be set out, and citizenship alleged of each and every of them. The state statute authorizing suits to be brought in the partnership name is inapplicable here. No doubt a cause commenced in a state court in the firm name, without giving the individual names, may be removed to this court; but the petition for removal should state the individual names and citizenship of the members of the firm, and show that no one of them is a citizen of the same state with an adversary party in the controversy. At all events, this diversity of citizenship should appear in some part of the record, when the case comes here from the state court. This nowhere appears in the present record."

In *Clary v. Woodbury County*, 135 Iowa, 488, 113 N. W. 330, the question arose as to whether or not a "drainage district" under the Iowa statute was an essential party to a proceedings under the statute to recover by an owner of property damages for the establishment of a drainage district, and the court said of this question:

"A drainage district under the statute is not a person or a corporation. It is nothing more than a definite body or district of land, constituting an improvement district. That it has no legal entity is manifest from the various sections of chapter 68, which place the entire matter under the control and supervision of the board of supervisors."

The court further said at page 493, of 135 Iowa (113 N. W. 332):

"The board of supervisors of any county shall have jurisdiction, power and authority at any regular, special or adjourned session, to establish a drainage district or districts, and to locate and establish levees, and cause to be constructed as hereinafter provided any levee, ditch, drain or water course," etc.

And in *Canal Construction Co. v. Woodbury County*, 146 Iowa, 526, 121 N. W. 556, the Supreme Court of Iowa further says:

"In attempting to determine the statute of Woodbury county in the proceedings in the district court, it is to be remembered that neither the board of supervisors nor the county auditor is the county. The county as a quasi corporation can act only through its officers; but it is not liable for or bound by their acts, save as they have authority to bind it. * * * In so acting it does not in any way represent the county. The county, as a corporation, has nothing more to do with its action than it has to do with the action of a justice of the peace, exercising as he does a limited jurisdiction, or the district court for the county, exercising a general jurisdiction. The county is not responsible for the judicial acts of its board of supervisors, nor is it interested in them. It may be rendered liable if the action of the board in the matter is one concerning the county, as to which the board is authorized to adjudicate its liability; otherwise, it is in no sense a party to the proceedings."


Section 1989a10 et seq. of the Code Supplement of Iowa, 1913, show the statute authority for constructing drainage ditches in the various counties of that state, and the power and jurisdiction of boards of supervisors in connection therewith.

[2] Counsel have suggested that the petition for removal and the record in the cause might be amended to show the requisite diversity of citizenship of the parties, to sustain the jurisdiction of this court. Chapter 90, 38 Stat. p. 956 (Judicial Code, § 274c [Comp. St. § 1251c]) permits such an amendment only when the existing facts so authorize; but no request for such an amendment has been made, and the existing facts do not warrant such an amendment. *Kinney v. Columbia Savings & Loan Association*, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103. ¶ In view of these authorities, no facts are alleged showing that this court has jurisdiction of this controversy, and the motion to remand must be and is sustained, and the cause remanded to the state court.

BATCHELDER v. S. C. QUIMBY LAND CO. et al.

(District Court, N. D. Iowa, Cedar Rapids Division. July 27, 1920.)

No. 120.

Removal of causes  49 (1)—Cause not removable, where joint defendant is resident of district.

A cause *held* not removable, where plaintiff's petition alleged that he was a resident, but not that he was a citizen, of the district of suit, where it did not appear that the petition and bond for removal were filed within the time required by Judicial Code, § 29 (Comp. St. § 1011), and where it was shown that one of the two defendants, jointly charged, was a resident of the county of suit, where he conducted a business for himself and his codefendant, and where he was served.

At Law. Action by C. E. Batchelder against the S. C. Quimby Land Company and Clayton Dumont. On motion to remand to state court. Granted.

Tobin, Tobin & Tobin, of Vinton, Iowa, and Johnson, Donnelly & Swab, of Cedar Rapids, Iowa, for plaintiff.

W. F. Zumbrunn and E. E. Bowers, both of Kansas City, Mo., for defendants.

REED, District Judge. This action was commenced in the district court of Iowa, in and for Linn county, on October 3, 1919, by the plaintiff causing to be served an original notice or summons upon the defendants, as authorized by the statutes of Iowa. The plaintiff alleges in his petition that when he commenced the action, and for many years prior thereto, he had been a resident of Springville, in said Linn county, Iowa, and that he was induced to purchase from the defendant S. C. Quimby Land Company, a corporation engaged in selling and trading land, with its headquarters in Linn county, Iowa, in charge of the defendant Clayton Dumont, some 208 acres of land in the state of Texas, for which he paid to defendants the sum of \$60,000, and because of fraudulent representations of the defendants he was damaged in the sum of \$40,000, for which he asks judgment against the defendants. The notice of such suit or summons was served upon the defendants in said Linn county, Iowa, where the petition alleges that the S. C. Quimby Land Company was doing business and maintained an office, in charge of the defendant Clayton Dumont as its agent, and that he was also interested financially in said transaction.

The petition is duly verified by the plaintiff, Batchelder, and the notice or summons so served upon the defendants reads as follows:

"You and each of you are hereby notified that there will be on file in the office of the clerk of the district court aforesaid, on or before the 23d day of October, 1919, the petition of the plaintiff, claiming of you and each of you the sum of forty thousand dollars (\$40,000.00), on account of fraud and misrepresentations in the sale to him of two hundred eight (208) acres of land in Hidalgo county, Texas. * * * Now, unless you appear thereto and defend before noon of the second day of the next regular November, 1919, term of the district court aforesaid, which will begin on the 3d day of

November, 1919, and be held in the courthouse at Marion, Linn county, Iowa, default will be entered against you and judgment rendered and entered as prayed. (Signed by attorneys for plaintiff.)"

Upon which notice the sheriff's return of service is indorsed as follows:

"The attached notice came into my hands for service on the 3d day of October, 1919, and I hereby certify that on the same date I personally served the same on the within-named Clayton Dumont by reading the same to him and personally delivered to him a true copy thereof. All done in Rapids township, Linn county, Iowa.

"John Taylor, Sheriff of Linn County, Iowa,
"By E. G. Thompson, Deputy Sheriff."

Afterwards the defendants filed in said state court a petition for the removal of said cause to this court, as follows:

"In the District Court of Linn County, Iowa.

"C. E. Batchelder, Plaintiff, v. Quimby Investment Company and Clayton Dumont.

"Petition to Remove This Cause to the United States District Court.

"Come now the defendants, Quimby Investment Company and Clayton Dumont, your petitioners, and respectfully show that they are the defendants in the above-entitled cause, and that the matter in dispute in said cause exceeds, exclusive of interest and costs, the sum, amount, or value of three thousand dollars (\$3,000.00).

"Your petitioners show that this is a suit of a civil nature being an action brought by the plaintiff against your petitioners in which the plaintiff in said cause charges that he, the said plaintiff, had theretofore purchased of defendant S. C. Quimby Land Company, certain land in Hidalgo county, Texas, which land was purchased by reason of the false and fraudulent misrepresentations in connection with the sale thereof, and that by virtue of said misrepresentations the plaintiff sustained damages of forty thousand dollars (\$40,000.00), being the difference between the value of the land purchased and its actual value, and it is for forty thousand (\$40,000.00) dollars damage this suit is prosecuted.

"Your petitioners therefore pray this honorable court to proceed no further herein, except to make an order of removal as required by law, and to accept said surety and bond, and to cause the record herein to be removed into said District Court of the United States within and for the Cedar Rapids Division of the Northern District of the state of Iowa, according to the statute in such cases made and provided.

"Your petitioner Quimby Investment Company shows that it was sued herein as the S. C. Quimby Land Company, that the correct name of this defendant is the Quimby Investment Company, and that the name of S. C. Quimby Land Company is used as a trade-name, and that in truth and fact the correct corporate name of the said defendant is the Quimby Investment Company, in that the Quimby Investment Company does business in and through its trade-name of S. C. Quimby Land Company.

"Your petitioners show that this is a suit involving a controversy wholly between citizens of different states, to wit, in this: That the plaintiff was at the time and commencement of this suit, and ever since has been, and still is, a resident and citizen of and residing within the Cedar Rapids Division of the United States District Court for the Northern District of Iowa, and that the defendant Quimby Investment Company is a corporation duly chartered, licensed, and existing under and by virtue of the laws of the state of Kansas, and is and was at the date of the institution of this suit a citizen and resident of and residing within the state of Kansas, and that your petitioner Clayton Dumont is and was at the date of the institution of this suit a resident and citizen of and residing within the state of Texas.

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"And your petitioners offer herein a bond, with good and sufficient surety, in the penal sum of five hundred dollars (\$500.00), conditioned for their entry in the District Court of the United States for the Cedar Rapids Division of the Northern District of Iowa, within thirty days from the date of the filing of this petition and the said bond for removal, a copy of the record in this suit, and for the payment of all costs which may be awarded by said District Court of the United States, if said District Court of the United States should hold that this cause was wrongfully or improperly removed thereto. And your petitioners respectfully pray.

"[Signed] W. F. Zumbrunn and E. E. Bowers,
"Attorneys for Petitioners."

Attached to which petition is an affidavit as follows:

"State of Missouri, County of Jackson—ss.:

"W. F. Zumbrunn, of lawful age, being duly sworn, on his oath says that he is the agent of the defendants herein, that he has read the foregoing petition for removal, and well knows the contents thereof, and that the statements and allegations therein made and contained are true.

"[Signed] W. F. Zumbrunn."

(Subscribed and sworn to by the said Zumbrunn before a notary public on October 27, 1919.)

When said petition for removal was filed in the district court of Iowa does not appear. Among the files of this court is the following notice:

"In the District Court of Linn County, Iowa.

"C. E. Batchelder, Plaintiff, v. Quimby Investment Company and Clayton Dumont, Defendants.

"Notice.

"To the Above-Named Plaintiff, or His Attorneys of Record, Johnson, Donnelly & Swab:

"You are hereby notified that on or before the 3d day of November, 1919, on behalf of the defendants, a petition praying for the removal of this cause from the state to the federal court, which petition will be accompanied by proper bond, copies of which are attached hereto, will be filed in the above-entitled cause. And on the 3d day of November, 1919, said petition will be called up for hearing and disposition, at which time and place you may be present, if you so elect.

"[Signed] W. F. Zumbrunn,

"Attorney for Defendants."

Attached to the foregoing is a certificate as follows:

"State of Iowa, County of Linn—ss.:

"John Taylor, of lawful age, being first duly sworn, upon oath says that he did on the 22d day of October, 1919, serve a copy of the foregoing notice upon C. E. Batchelder, the plaintiff herein.

"[Signed] John Taylor, Sheriff."

Said certificate is subscribed and sworn to before a notary public on October 22, 1919. On February 21, 1920, the plaintiff, C. E. Batchelder, filed a motion to remand said cause to the district court of Iowa in and for Linn county, from which it was removed, as follows:

"C. E. Batchelder, Plaintiff, v. S. C. Quimby Land Company, Clayton Dumont, Defendants.

"Motion to Remand Case to District Court of Linn County, Iowa.

"Comes now the plaintiff, and moves the court to remand the above-entitled cause to the district court in and for the county of Linn and state of Iowa, on the ground that this court is without jurisdiction to hear and determine

the cause, and is without jurisdiction of either the parties to or the subject-matter of this suit for the reasons follows:

"That at the time of beginning this suit in the district court of Linn county, Iowa, for a long time prior and for a long time subsequent thereto, both the plaintiff and the defendant Clayton Dumont were residents of said Linn county, Iowa.

"That in support of the foregoing motion the plaintiff hereby refers to the affidavits hereto attached and made a part hereof, marked Exhibits A, B, C, etc.

[Signed] Johnson, Donnelly & Swab,

"Attorneys for Plaintiff."

Among the files is the following order:

"In the District Court of Linn County, Iowa.

"C. E. Batchelder, Plaintiff, v. Quimby Investment Company and Clayton Dumont, Defendants.

"Order.

"And now, on this 5th day of November, 1919, defendants having presented their petition for removal, accompanied by proper bond, and the court finding that due and proper service of notice has been had upon counsel for the plaintiff; that petition and bond would be on this day presented for consideration: The Court finds that notice of the filing of petition and bond was given prior to the actual filing of the petition and bond for removal. It is therefore by the court ordered that defendants' petition for removal be and the same is hereby granted, and this cause transferred to the United States District Court for the Cedar Rapids Division of the Northern District of Iowa, sitting at Cedar Rapids; and it is further ordered that bond in the sum of five hundred dollars (\$500) tendered herewith be and the same is hereby approved.

F. F. Dawler, Judge."

Attached to the files is a certificate of the clerk of said district court of Iowa in and for Linn county, which is as follows:

"State of Iowa, Linn County—ss.:

"I, P. O. Clark, clerk of the district court of Iowa in and for Linn county, which court is a court of record and having a seal, and exercising common-law, equity, criminal, and probate jurisdiction, hereby certify that I am the custodian of the seal of said court, custodian of the files and records filed and kept therein, and I further certify that the foregoing is a true copy of the petition at law, original notice and officer's return of service, showing personal service on the S. C. Quimby Land Co., through their agent, Clayton Dumont, and personal service on Clayton Dumont, petition to remove this cause to the United States District Court, notice of filing of petition for removal to United States District Court and return of service thereon, record of the court's entry ordering this cause removed to the United States District Court and enrolled order for the same, and removal bond, all in cause No. 27522, same being entitled C. E. Batchelder v. Quimby Land Company and Clayton Dumont, as fully as the same remains of record or on file in my office.

"Witness my hand and seal of said court hereto affixed at my office in Marion, in said county and state, on this 17th day of November, 1919.

"[Seal.]

[Signed] P. O. Clark, Clerk of Said Court."

The foregoing copies in the above-entitled cause in the district court of Iowa in and for Linn county, Iowa, were filed in the office of the clerk of this court on November 22, 1919. The question thus presented for determination is: May the defendants remove this cause from the state court of Linn county, Iowa, to this court? This depends upon the question of whether or not the petition for removal or the record in the state court shows that this is a controversy between citizens of different states. The plaintiff's petition shows upon its face

that the plaintiff is a resident only of Linn county, Iowa, in which he originally brought this suit.

Section 29 of the Judicial Code (Comp. St. § 1011) provides as follows:

"Whenever any party entitled to remove any suit mentioned in the last preceding section * * * may desire to remove such suit from a state court to the District Court of the United States, he may take and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the District Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such District Court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto. * * * It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

Under this section a party having the right to remove a cause from a state to a federal court must file the required petition and bond therefor in the state court at the time or any time before the defendant is required by the laws of the state, or the rule of the state court, to answer or plead to the petition or complaint of the plaintiff.

The Code of Iowa (1897) provides:

"Sec. 3550. The defendant shall, in an action commenced in a court of record, demur or answer to the original petition, or assail the same by motion, before noon of the second day of the term."

After referring to the Removal Act of 1875 (18 Stat. 470), as corrected by the act of 1888 (25 Stat. 433), the Supreme Court of the United States in *Ex parte Wisner*, 203 U. S. 449, at page 457, 27 Sup. Ct. 150, at page 152 (51 L. Ed. 264), said:

"It is settled that no suit is removable under section 2 unless it be one that plaintiff could have brought originally in the [District] Court of the United States."

See, also, *Smith v. Lyon*, 133 U. S. 315, 320, 10 Sup. Ct. 303, 33 L. Ed. 635; *In re Winn*, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873; *Kansas City Railroad v. Daugherty*, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963; *Waverly Stone & G. Co. v. Waverly, C. F. & N. Ry. Co.* (D. C.) 239 Fed. 561; *Fife et al. v. Whittell* (C. C.) 102 Fed. 537; *Ex parte Harding*, 219 U. S. 363, at page 367, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392; *In re Pennsylvania Co.*, 137 U. S. 451, 453, 11 Sup. Ct. 141, 34 L. Ed. 738; *Roberts v. Pacific, etc., Ry.*, 121 Fed. 785, 58 C. C. A. 61; *Puget Sound Metal Works v. Great Northern Ry.* (D. C.) 195 Fed. 350.

Of what state the plaintiff is a citizen is nowhere alleged in the plaintiff's petition, only that he is a resident of Linn county, Iowa, and, in the absence of a showing of what state he was a citizen, he would not be enabled to bring this suit in the United States District Court for the Northern District of Iowa. The petition for removal alleges that plaintiff is, and was when the suit was commenced, a citizen of Iowa; but it is only the nonresident defendant who is authorized to remove the cause from the state court to the federal court. The petition for removal alleges that the defendant land company is not correctly named in the original petition, that the land company is a corporation of Kansas, that its correct name is the *Quimby Investment Company*, and that the defendant Dumont, who is jointly sued with the land company, is a citizen of Texas. Omitting any question of the form of the petition for removal, it alleges that defendant Clayton Dumont is a citizen of Texas, and omitting, further, the question as to the time the petition for removal was filed in the state court, the petition for removal, in the absence of any objections in the state court to the form thereof, might authorize the state court to order the removal; but it is incumbent upon the defendant, not only to file a petition in correct form and in proper time, but he must establish the citizenship of the defendant as well as allege it.

In *Kansas City Railroad v. Daugherty*, above, it is said by the Supreme Court (138 U. S. at page 303, 11 Sup. Ct. at page 307 [34 L. Ed. 963]):

"It is apparent that if the service of process upon the defendant was sufficient, a plea was required, from it at the September term, 1888, and that its application for removal came too late, for section 3 of the Act of Congress of March 3, 1887, as corrected by the Act of August 13, 1888, provides that the party desiring to remove must file his petition 'at the time, or any time before the defendant is required by the laws of the State or the rule of the state court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff.' 24 Stat. c. 373, p. 554; 25 Stat. c. 866, p. 435. The statute is imperative that the application to remove must be made when the plea is due, and because a plaintiff in error does not take advantage of his right to take judgment by default, it cannot be properly held that he thereby extends the time for removal."

In *Fife v. Whittell*, above, the court said (102 Fed. at page 539):

"Where the question of jurisdiction of the United States Circuit [now District] Court is presented, we are confronted at once with the presumption that the cause is without the jurisdiction of the court, unless the contrary affirmatively appears [citing a number of cases]. * * * It is also an established rule that parties seeking to remove causes to the United States Circuit [now District] Court are bound to comply strictly with every provision required by the act. One of the provisions of the removal act is that, where a cause of action between citizens of different states pending in the state court involves an amount within the jurisdiction of the United States Circuit [now District] Court, it may be removed to that court by the defendant or defendants therein, 'being nonresidents of the state.' This restriction to the right of removal, based upon the residence of the defendants, is clearly jurisdictional, and, if it does not appear in the record in the state court, it must be clearly shown in the petition for removal as a right which the defendant has and claims, or it will be presumed not to exist. The fact that it may be inferred argumentatively from any averment in the petition as to other facts is not sufficient. In *Amory v. Amory*, 95 U. S. 186, 24 L. Ed. 428, the

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defendants alleged that the suit was instituted by the plaintiffs as executors, and under letters of administration issued to them in New York, and that the plaintiffs, as such executors, were citizens of the state of New York. The averment was held insufficient, the court refusing to infer that the plaintiffs were personally citizens of New York. The court said: 'From the language here employed, the court may properly infer that, as persons, the plaintiffs in error were not citizens of New Jersey, as was the defendant.' In other words, the court would infer or presume against jurisdiction, but not in its favor.'

The plaintiff alleges in his motion to remand, and also alleges in his original petition, that the *Quimby Land Company* maintained an office and agency at Linn county, Iowa, in which it was doing a land business; that the defendant Clayton Dumont was not only the agent of the defendant land company, but that he himself was personally interested in the transaction out of which the plaintiff's action arose; and the plaintiff by a number of affidavits attached to his motion to remand shows that the defendant Clayton Dumont was not only doing business in Linn county, but that he was a resident of that county, and moved there for the purpose of educating one of his children; and the defendant Dumont himself testifies that he was reared in Jones county, Iowa, which is in the Northern district of Iowa, adjacent to Linn county; that he moved some years ago to the town of Hildalgo, Texas, purchased and established a home there, which he disposed of some years before the commencement of this suit, and has never returned to that state, but has only passed through it once or twice in the conduct of his business in Linn county, Iowa. He also testifies that he was conducting this land business in another county of Iowa, either at Davenport or some other place in Iowa, and it is apparent that he was transacting business in behalf of himself, and in behalf of the land company, whatever may be its correct corporate name, in Linn county, Iowa, and was rightly sued in the state court.

In this case there is nothing to show when the petition for removal was filed by the defendants in the state court. All that appears here is that it was ruled upon by the judge of the state court on the 5th day of November, 1919, which was after the second day of November, 1919, term of that court. The November term of the district court in and for Linn county, Iowa, began on November 3, 1919, the second day of said term being November 4th, on which day the defendants were required to plead or answer the petition of the plaintiff filed in that court.

The petition for removal is verified by one who signs it as attorney for the defendant, who states that he is the agent of the defendants; but in what capacity he is their agent is not shown, other than he signs the petition as attorney for defendants. It is quite doubtful if this verification is a sufficient verification of the petition for removal.

We are constrained to find and hold that this suit was improperly removed to this court, and the motion to remand the same to the state court must therefore be and is granted.

It is ordered accordingly.

WESTINGHOUSE ELECTRIC & MFG. CO. v. RICHMOND LIGHT & R. CO.**In re KUHN.**

(District Court, E. D. New York. July 13, 1920.)

- 1. Injunction** ⚡84—**Passage of resolution declaring forfeiture of franchise held by receivers cannot be enjoined.**

The court which appointed receivers for a street railroad corporation cannot enjoin the passage by the board of estimate of the city of a resolution declaring a forfeiture of the franchise held by the receivers.

- 2. Receivers** ⚡73—**Court can restrain interference by officers acting under municipal resolution forfeiting franchise.**

The court which appointed receivers for a street railroad corporation can enjoin municipal officers acting under the authority of a resolution declaring a forfeiture of the franchise held by the receiver from interfering with the operation of the property by the receiver.

In Equity. Suit by the Westinghouse Electric & Manufacturing Company against the Richmond Light & Railroad Company. On petition by John J. Kuhn, temporary receiver of the defendant, for an injunction. Injunction granted in part.

See, also, 267 Fed. 493.

I. R. Oeland, of New York City, for plaintiff.

John P. O'Brien, Corp. Counsel, of New York City (Vincent Victory, of New York City, of counsel), for defendant.

CHATFIELD, District Judge. The board of estimate of the city of New York has given notice of a hearing for the purpose of forfeiting certain franchises of the defendant corporation, under which the receiver is now operating various parts of the street railroad in Richmond county, in this district. The receiver has applied for an injunction against the board of estimate for the purpose of preventing such forfeiture during the pendency of this litigation, and has obtained a temporary restraining order against such action pending the determination of the application for the injunction. The city of New York has entered a preliminary objection to the exercise of jurisdiction by this court, both in continuing the restraining order and in granting any such injunction, and has also filed an answer under which a hearing could be had on the merits of the injunction, if the objection to jurisdiction be overruled.

The preliminary objection to jurisdiction is based upon the proposition that a court of equity has no right to restrain a municipal government from the exercise of such legislative or governmental authority as has been granted by the legislative act of the state to that municipal government, and which is in effect a continuation of the exercise of the legislative power of the state. A similar question was presented in the case of Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation, in which case an injunction was issued on the application of the receivers against the board of estimate of the city, to restrain an announced hearing for the purpose of forfeiting the franchise of the street railroad company defendant in that action. The

appeal from that decision was decided February 24, 1920. 266 Fed. 625.

In the opinion the Circuit Court of Appeals holds that an order of this sort is a final order from which an appeal will lie to the Circuit Court of Appeals, and that also an application for an injunction of this sort can be brought on by a proceeding on petition ancillary to the main action, in the court in which that action is pending. The Court of Appeals then holds that if the District Court, in stating that "the injunction is not asked against the legislative power of the state, but against threatened action by the city in taking property as to which the resolution of the board of estimate would be a step in the acquisition of that property," intended to hold "that the passage of the contemplated resolution does not involve an exercise of legislative power, being a resolution instead of an ordinance, we are unable to agree in that conclusion." The Court of Appeals then goes on to discuss the proposition, citing *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518, *Dillon's Municipal Corporations* (5th Ed.) vol. 2, § 582, *McQuillin's Municipal Corporations*, vol. 5, § 2503, and volume 1, § 705; also *High on Injunctions* (4th Ed.) vol. 2, § 1243, p. 1250. In the latter text-book it is stated that courts of equity will not enjoin purely legislative acts by a municipal body, but may, in a proper case, prevent their enforcement and enjoin proceedings thereunder which would otherwise result in irreparable injury.

The Court of Appeals seems to hold that the action of the board of estimate, in declaring, by the passage of legislation, that a charter has been forfeited, is acting in a legislative capacity, as distinguished from actions of a judicial or executive nature. There can be no question that a municipal body, in adopting resolutions granting charters, under such circumstances as were shown in the *New Orleans Case*, *supra*, is in a sense legislating, as well as exercising executive functions. Whether the fact that a municipal body must act by resolution or ordinance makes all of its actions legislative in nature may be still arguable, but since the decision in the *Manhattan & Queens Case*, *supra*, the determination of this question is no longer a necessity in the present case. The order of an executive official may involve judicial determination, and may be subject to review by the courts. If, instead of a single executive, authority is being administered by a board, which must act by resolution or ordinance, there would seem to be some question whether it could be said to be legislating, as it would be doing if it were granting a franchise.

There seems to be room for argument as to whether all acts of executive officers or of an executive municipal government must be divided into the three classes, legislative, executive, and judicial, and that all acts performed in a legislative way are therefore legislative acts. It would seem that many of these acts might be purely executive, even if they involved, as has been said, some judicial determination. They may have none of the characteristics of the enactment of legislation or the exercise of what could properly be called the exercise of any legislative power of the state or the municipality as such. But all such acts are undoubtedly governmental operations. The Court of Appeals

decision seems to go so far as to hold that a court of equity has no jurisdiction to interfere with the exercise of governmental authority by a municipality until this governmental authority has passed to the point of purely administrative action or the carrying out of the determination as to which governmental authority has been exercised in the form of enacting an ordinance or resolution.

[1] The decision of the Circuit Court of Appeals is controlling over the present application in this respect, and it must be held that this court has no authority to determine whether the passage of a resolution forfeiting a charter is purely an executive act, like the canceling of a contract by a single official involving possible judicial determination. The court, therefore, cannot grant the motion to enjoin the board of estimate from considering and passing a resolution declaring the franchises forfeited, and the temporary injunction order must be vacated.

In the Manhattan & Queens Case, *supra*, the actual decision of the Court of Appeals was apparently based upon the merits of the intended forfeiture, but the question of jurisdiction was disposed of in such a way as to be a part of the decision, and not a mere dictum in discussing the case. On the present application, as in the Manhattan & Queens Case, *supra*, the merits of the proposition have been brought before the court for consideration in the alternative that jurisdiction should be held sufficient for such consideration, and the record shows that this court has already issued an injunction order broad enough to prevent any further action, if a resolution of forfeiture should be adopted which would interfere with the properties in the possession of the receiver of this court, until an application had been made to this court to vacate that injunction.

The record also shows that the alleged grounds for forfeiture are involved in other litigation in which the same questions may be finally determined. This outside litigation is set up in the answer filed by the city, as well as in the petition of the receivers. It now appears from the decisions in certain of this outside litigation that some of the questions have apparently been disposed of in favor of the receivers and contrary to the claim of the board of estimate that it has sufficient ground for forfeiting the charter in question. New York Supreme Court in *City of New York v. Richmond Light & Railroad Co.*, John J. Kuhn, as Receiver of the Richmond Light & Railroad Co., N. Y. L. J. July 3, 1920, pp. 1143, 1144, and *Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District*, opinion filed by Mr. Justice Tierney on July 2, 1920, 183 N. Y. Supp. 922; New York Court of Appeals in *People ex rel. City of New York v. Lewis Nixon, etc.*, Begg & Hume as receivers, etc., 128 N. E. 255, opinion filed July 7, 1920; *Brooklyn Rapid Transit Co. v. Public Service Commission*, three cases, 128 N. E. 255, opinion filed July 7, 1920; *Court of Appeals of New York, Niagara Falls Case*, 128 N. E. 247, opinion filed July 7, 1920. But with the merits of these contentions this court has now nothing to do. If the city of New York has no proper ground for forfeiture, this can be determined in the proper forum therefor.

[2] Under the decision of the Circuit Court of Appeals in the Manhattan & Queens Case, *supra*, this court has no right to determine collaterally that the city of New York, through its board of estimate, might be acting with no foundation of law and entirely outside its authority, in declaring the franchises in question forfeited, if the board of estimate should see fit, acting under advice of its legal representatives, to attempt to pass such a resolution. But no individual employé or agent of the city, even if a resolution of forfeiture should be adopted, can, under the general injunction, proceed to interfere with the operation of the receivers before this court has an opportunity to pass upon the validity of the resolution in question. Under the circumstances now set forth in the present case, the restraining order should be continued, and the injunction applied for granted, to the extent of specifically forbidding any physical interference with the operations of the receiver, or any attempted action under or enforcement of a resolution declaring the franchises forfeited, if the threatened action be taken, until application has been made to this court for an order vacating the injunction forbidding such action.

Probable cause for considering the ordinance invalid is sufficiently made out, and the possible action under the ordinance, if adopted, is sufficiently imminent and threatening to give this court jurisdiction to issue the injunction to that extent.

Order may be entered accordingly.

WESTINGHOUSE ELECTRIC & MFG. CO. v. RICHMOND LIGHT & R. CO.
(District Court, E. D. New York. July 17, 1920.)

1. Courts ⇨264(3)—Ancillary proceedings may involve litigation of separate issues.

Proceedings ancillary to receivership may be brought in aid thereof, though they involve litigation of other issues.

2. Courts ⇨264(3)—Ancillary proceedings, involving independent action, should be set forth in form of pleadings.

Where ancillary proceedings in aid of a receivership involve the trial of an independent action, they should be set forth in the form of pleadings, not merely by affidavit.

3. Receivers ⇨73—Ancillary proceedings to restrain interference with receiver may be instituted by affidavit.

Ancillary proceedings to restrain interference by municipal officers with a receiver do not involve the trial of an independent action, and may be instituted by affidavit and petition for order to show cause.

In Equity. Suit by the Westinghouse Electric & Manufacturing Company against the Richmond Light & Railroad Company. On application for instituting contempt proceedings. Preliminary objection to application overruled.

See, also, 267 Fed. 490.

I. R. Oeland, of New York City, for the motion.

John P. O'Brien, Corp. Counsel, and William B. Carswell, Asst. Corp. Counsel, both of New York City, appearing specially, opposed.

CHATFIELD, District Judge. An application for instituting contempt proceedings has, upon cessation by the commissioner of plants and structures of the various acts complained of, been adjourned until further application on the part of the receiver. The balance of the motion asking for a specific injunction against continued operation of the busses, and against further interference with the operations of the receiver, has been met by a preliminary objection which deserves some consideration.

[1] This contempt proceeding has been brought into this court as an ancillary proceeding to the action in which the receiver was appointed. Ancillary proceedings involving even the litigation of issues may be brought in aid of the main action in the court in which that action is pending. *Gas & Elec. Sec. Co. v. Manhattan & Queens Tr. Corp.*, 266 Fed. 625, Circuit Court of Appeals opinion filed February 24, 1920; *City of Shelbyville, Ky., v. Glover*, 184 Fed. 234, 106 C. C. A. 376; *Pell v. McCabe*, 256 Fed. 512, 168 C. C. A. 18; *Hume v. City of New York*, 255 Fed. 488, 166 C. C. A. 564.

The precise form of such ancillary proceedings would necessarily depend upon the matter itself. The ancillary proceeding might have to do with a claim in which a trial by jury was demanded and could be had as a right. The ancillary proceeding might have to do with the ownership of certain property in the hands of the receiver and be equivalent to an equity action or an action of foreclosure. It may have to do with punitive or compulsory restraint to compel obedience with an order of the court. *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797. But we have not yet reached that point in this litigation, and the corporation counsel raises a preliminary objection that, although such proceedings may be started upon petition, yet, if they are in effect equivalent to an independent suit or action, the petition upon which they are started should be a regularly verified pleading, and not an affidavit, such as is ordinarily used to obtain an order to show cause.

The preliminary objection which was made to the petition, in so far as it seemed to ask punitive relief only, illustrates the point. As was said in the *Buck Stove Case*, *supra*, if the proceeding is to be carried on as a criminal prosecution, it should proceed in a form which could properly be deemed for the purpose of vindicating the authority of the court only, and in which the rights of the respondent or defendant could be preserved.

[2, 3] In the present case, if the application involved the trial of an independent action, the respondent would have the right to apply to the court to have the cause of action urged against him set forth in the form of a pleading. But the present application is not an ancillary suit in that sense. While the issues involved may be important, the question is merely whether the respondent should be restrained from certain acts which are alleged to interfere with the receiver. An order to show cause and ancillary proceedings of this sort do not require the employment of pleadings, such as would be necessary in the institution of an action.

The preliminary objection will be overruled, and the temporary restraining order continued until the matter of punishment for contempt is further brought on for hearing, when an answer to the merits of the motion may be interposed.

UNITED STATES v. NEZ PERCE COUNTY, IDAHO, et al.

(District Court, D. Idaho, C. D. On Motion to Dismiss Complaint, June 1, 1916. On Motion to Dismiss Amended Bill of Complaint, February 27, 1917.)

1. Indians ⇐15(2)—Construction of statute; "noncompetent" Indians are those without full power of alienation.

In Act March 1, 1907 (Comp. St. § 4225), providing that "any non-competent Indian," who has an allotment of land in severalty subject to restrictions on alienation, or an interest in such an allotment by inheritance, may sell the same under such rules and regulations as the Secretary of the Interior may prescribe, the word "noncompetent" is not used as denoting mental incapacity, but as descriptive of any Indian who holds only under a trust patent, and is inclusive of all Indians who are without full power to alienate their property.

2. Taxation ⇐181—Land bought with proceeds of trust allotment to Indians exempt from taxation.

Where trust allotments of Indians are sold as authorized by Act March 1, 1907 (Comp. St. § 4225), with the consent of the allottees, and the proceeds invested in other lands, which are also held in trust for them, such substituted lands are exempt from taxation.

In Equity. Suit by the United States against Nez Perce County, Idaho, and others. On motion to dismiss bill. Denied.

J. L. McClear, U. S. Atty., and J. R. Smead, Asst. U. S. Atty., both of Boise, Idaho.

Charles L. McDonald, of Lewiston, Idaho, and Henry S. Gray, of Portland, Or., for defendants.

On Motion to Dismiss Complaint.

DIETRICH, District Judge. The plaintiff seeks a decree declaring invalid the proceedings of the defendant county, whereby taxes were levied upon five different tracts of land held by "Theodore Sharp, superintendent of Ft. Lapwai Indian School, in trust," severally, for certain Nez Perce Indians, who, it is alleged, still maintain their tribal relations and are wards of the government. In brief, it is shown that these Indians are allottees on the Nez Perce Indian reservation, and that with their consent the government sold the lands allotted to them, and with the proceeds thereof purchased the lands in question, and holds the title in trust for them.

[1] The contention of the plaintiff is that, inasmuch as, up to the time of the sale, the original allotment was held in trust for the allottee, and was therefore exempt from taxation, the proceeds of the sale are likewise exempt. The defendants concede the general proposition that during the trust period Indian allotments cannot be taxed,

and also that, if such allotment is sold under warrant of law, the proceeds of the sale continue to be exempt. It is contended, however, that there is no authority for making such sale until after the termination of the trust period, and that the attempted sales here were void, and that therefore in law the government still holds in trust the original allotment, which continues to be exempt from taxation, and that therefore the lands in question cannot be deemed to represent the proceeds of the sale of exempt property.

Upon examination I have not been able to find any statute authorizing a sale of allotted lands until after the termination of the trust period, and I am therefore inclined to sustain the defendant's position. It is now suggested in the written brief filed upon behalf of the government that in fact it can be shown that the lands in question were purchased with the proceeds of heirship lands, which admittedly the Secretary of the Interior has the power to sell; but in the absence of appropriate averments I cannot give heed to such a statement. The motion to dismiss must be disposed of upon the facts alleged in the complaint, and upon those alone.

[2] The further contention is made upon behalf of the defendants that, even if it should appear that the lands in question were purchased with the proceeds of heirship lands, the fact would not avail the plaintiff, for the reason, as contended, that the Secretary of the Interior has no authority under the law to reinvest such funds, but may only deposit them in an approved bank. This view seems to be predicated upon the Act of June 25, 1910 (Comp. St. § 4226), where it is provided:

"That hereafter any United States Indian agent, superintendent, or other disbursing agent of the Indian service may deposit Indian moneys, individual or tribal, coming into his hands as custodian, in such bank or banks as he may select: Provided, that the bank or banks so selected by him shall first execute to the said disbursing agent a bond, with approved surety, in such amount as will properly safeguard the funds to be deposited."

But I am inclined to think that the authority thus conferred is permissive, and not mandatory. It will be noted that the statute further provides that heirship funds "shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure" for incompetent heirs. Apparently, therefore, if the Indian heir is competent, the proceeds arising from the sale of the heirship lands may be paid directly to him, and if incompetent they may be held intact, or may, within the discretion of the Secretary of the Interior, be used and expended for his use and benefit. However, this question is not directly before us at this juncture, and I do not finally decide it.

The motion will be allowed, and the plaintiff given 30 days in which to amend.

On Motion to Dismiss Amended Complaint.

I find it necessary to revise the view I formerly entertained as to the power of Indians to dispose of allotted lands held under trust patents or under patents with restrictions against alienation. By the Act of March 1, 1907 (34 Stat. 1018 [Comp. St. § 4225]), it is provided:

"That any noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under

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any law or treaty, or who may have an interest in any allotment by inheritance, may sell or convey all or any part of such allotment or such inherited interest on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so disposing of his land or interest, under the supervision of the Commissioner of Indian Affairs."

In passing upon the original motion, the meaning of the term "non-competent," as here used, was not discussed, and I accepted it as being the equivalent of "incompetent," and as implying legal incapacity, due to nonage, imbecility, or insanity. But upon further consideration I am persuaded that such restriction is too narrow. While undoubtedly the "competency" of an Indian is generally understood to imply a mental capacity, it is to be inferred, from expressions in both the acts of Congress and in reported judicial decisions, that there is in the legislative and judicial mind a close connection between the mental status of the Indian and his power or right to alienate his land, and that therefore in practice the legal power to alienate implies mental competency, and, upon the other hand, the absence of such power or right implies incompetency. For example, by section 6 of the act of 1887, as amended by Act May 8, 1906 (34 Stat. 182 [Comp. St. § 4203]), it is provided:

"That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 5 of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside."

Whatever may be the actual mental status of the Indians at the end of the 25-year period, there is here an assumption of their legal competency at that time, with all the rights and responsibilities of full citizenship. Again, by the provisions of section 1 of Act June 25, 1910 (36 Stat. 855 [Comp. St. § 4226]), the Secretary of the Interior is—

"authorized in his discretion to issue a certificate of competency, upon application therefor, to any Indian, or, in case of his death, to his heirs, to whom a patent in fee containing restrictions on alienation has been or may hereafter be issued, and such certificate shall have the effect of removing the restrictions on alienation contained in such patent."

The certification of the competency of the grantee under a restricted patent thus ipso facto operates to revise the patent. See, also, *United States v. Debell*, 227 Fed. 775, 142 C. C. A. 299, and *United States v. Nice*, 241 U. S. 591, 36 Sup. Ct. 696, 60 L. Ed. 1192. While, therefore, it may render the language of the provision above quoted from the Act of March 1, 1907, somewhat tautologous, the view seems to be unavoidable that Congress intended to use the term "noncompetent" as descriptive of an Indian holding only a trust patent or other patent containing restrictions against alienation, or, what is perhaps the equivalent, an Indian to whom, even though he may be actually competent, a certificate of competency has not been issued by the Secretary of the Interior, and that therefore the description "noncompetent Indian" is inclusive of all Indians who are without full power to alienate their property. Putting it in another way, while as applied to

Indians the terms "competency" and "noncompetency" or "incompetency" are used in their ordinary legal sense, there is a presumption, conclusive upon the courts, that until the restriction against alienation is removed in the manner provided by law, either through the lapse of time or the positive action of the Secretary of the Interior, the allottee continues to be an "incompetent" Indian, at least in so far as concerns the land to which the restriction relates. That being true, whatever may have been the status of the Indians referred to in the complaint, it was within the power of the Secretary of the Interior to sell or authorize the sale of their allotments, and use, or permit the allottees to use, the proceeds of such sales for the purchase of the property which the defendant county asserts the right to tax. In other words, if the Indians were "competent," a sale could be consummated under the Act of May 8, 1906, and if they were "noncompetent" or "incompetent" it could be effected under the provision above quoted from the Act of March 1, 1907.

I see no reason for changing the view originally expressed touching the other question submitted. Accordingly, the motion will be denied, and the defendants will be given 30 days from the date hereof in which to answer.

MARKLE et al. v. KIRKENDALL, Internal Revenue Collector.

(District Court, M. D. Pennsylvania. September 27, 1920.)

No. 287.

1. Internal revenue ☞28—Collection of tax imposed against corporation after expiration of charter cannot be restrained.

Whether a corporation continuing business after the expiration of its charter is conducting the business as a corporation or as a copartnership is a question within the jurisdiction of the collector of internal revenue to determine in assessing the income and excess profits tax, so that the collection of such tax cannot be restrained under Rev. St. § 3224 (Comp. St. § 5947), prohibiting suits to restrain the assessment or collection of any tax.

2. Internal revenue ☞28—Distraint of property cannot be restrained, unless exemption from liability is clear.

Unless it appears clear beyond doubt that property seized or about to be seized by the collector of internal revenue to satisfy an income and excess profits tax is not liable for such assessment, the court will not interfere to restrain distraint and sale, under Rev. St. § 3224 (Comp. St. § 5947), forbidding suits to restrain the collection of a tax.

In Equity. Suit by Alvan Markle and others against Fred C. Kirkendall, Collector of Internal Revenue for the Twelfth District of Pennsylvania. On motion to dismiss the bill. Motion granted, and bill dismissed.

John H. Bigelow, of Hazelton, Pa., for plaintiffs.

R. L. Burnett, U. S. Atty., of Scranton, Pa., for defendant.

WITMER, District Judge. The plaintiffs, Alvan Markle and others, have filed this bill in equity to enjoin Fred C. Kirkendall, collector of

internal revenue of this the Twelfth district of Pennsylvania, from distraining and selling certain real and personal property in payment of an income and profit tax assessed by him against the Hazelton Manufacturing Company.

The bill alleges that the plaintiffs and numerous other persons are copartners doing business as the Hazelton Manufacturing Company, engaged in the business of manufacturing caskets and coffins, and general planing mill work; that they own certain described real and personal property used in connection with such manufacturing business, and that the defendant collector, claiming that the plaintiffs and associates in business "comprise a corporation and joint-stock association did on March 17, 1919, unlawfully and without legal warrant impose such income and excess profits tax against the Hazelton Manufacturing Company as a corporation; and that on April 15, 1919, the collector and his deputies entered upon their premises and threatened to seize and distrain upon all of plaintiffs' personal property, and to proceed by bill in equity to sell their land owned and held by them as a copartnership in satisfaction of the taxes assessed against the corporation.

The bill further alleges that plaintiffs had tendered a partnership return to the collector, which he unlawfully refused, and that he then levied the tax in suit ex parte, and not in pursuance of any return made by them; that the collector intends to sell their property to pay the tax levied, and that if he does so it will cause them irreparable loss and damage; that plaintiffs have no adequate remedy at law, and they pray for relief.

The defendant has filed a motion to dismiss the complaint for lack of jurisdiction. One of the reasons assigned in support of the motion, and the only one that requires consideration, is that, being a suit to restrain the collection of a tax, it may not be maintained because it falls within the provisions of section 3224, R. S. U. S. (Comp. St. § 5947), which provides that—

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

That a suit can be maintained to restrain the collection of taxes is not questioned. Plaintiffs concede that it may not be done. They insist, however, that taxables are only disqualified from maintaining such suit. For instance, the Hazelton Manufacturing Company, against whom the tax is assessed as a corporation, if a taxable, and being aggrieved, could find redress only by pursuing the provisions of sections 3220, 3226, and 3227, R. S. U. S. (Comp. St. §§ 5944, 5949, 5950), in paying under protest, by appeal, and ultimately by suit at law; yet it is argued it did not apply to the plaintiffs, whose property was being seized for taxes not assessed against them, not being parties to the proceedings, hence being unable to avail themselves of the remedies provided by statute.

Plaintiffs' bill further sets forth that the Hazelton Manufacturing Company was incorporated March 12, 1883, for a period of 20 years, and that by virtue of its limitation contained in its charter of incorporation its corporate existence expired April 12, 1903, and that no action

has been taken since to extend, renew, or revive its charter. It is furthermore insisted that upon the dissolution of the corporation the stockholders became partners, and the property is now theirs, and the business conducted by them as copartners.

[1] Whether the property is owned and the business of the Hazelton Manufacturing Company is conducted by it as a corporation or as a copartnership is the question presented. Whatever may be the ultimate conclusion, it is evident that the collector is proceeding against a person within his jurisdiction, the Hazelton Manufacturing Company, and its property held either as a corporation or as a copartnership. Whichever is the fact need not be decided here. All that need be said is that the matter is in dispute, and it is therefore not clear that the proceeding on the part of the commissioner is an absolute nullity. Unless it clearly so appears, interference by a court of equity will not be sanctioned. As was said in *Kissinger v. Bean*, Collector, Fed. Cas. No. 7,853:

"If the plaintiff is within a class of persons against whom the commissioner may make assessments, though his proceedings be ever so irregular and erroneous, the court cannot interfere. * * * If by possibility he can be brought within the terms of the law, though the commissioner may have made an erroneous decision in that regard, the proceeding is not void. It is not a nullity, so as to authorize this court to arrest the collection * * * by injunction."

[2] And whatever may be said regarding the assessment against the person applies with equal force to the property against which the collector is proceeding in order to secure the assessment made by him. Unless it appears clear beyond doubt that the property seized or about to be seized is not liable for such assessment, the court will not interfere, since the statute includes the collection of the tax as well as the assessment in its inhibitive mandate. *Snyder v. Marks*, 109 U. S. 189, 3 Sup. Ct. 157, 27 L. Ed. 901; *Dodge v. Osborn*, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. Ed. 557; *Dodge v. Brady*, 240 U. S. 122, 36 Sup. Ct. 277, 60 L. Ed. 560.

It may be conceded that in the present case great hardship is imposed by demanding that the assessment be first paid before an action can be brought for its recovery. As much may be said for nearly all cases of this character, however, it is well understood that the court may not interfere with the collection of taxes on the ground of any such consideration, if at all. Mr. Justice Miller, delivering the opinion of the court in *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663, recognizing this fact, says:

"It shows the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy, [having reference to the provisions of Rev. Stat. § 3224]. It is founded in the simple philosophy, derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice."

Realizing that by these means injustice is sometimes done, Congress has provided a complete system of corrective justice in regard to all taxes imposed and collected, founded upon appeals within the executive department, and, if the aggrieved does not obtain satisfaction in this mode, he may have his day in court by suit against the collecting officer for recovering the tax paid.

Defendant's motion is allowed. Plaintiffs' bill is dismissed.

UNITED STATES v. ONE MACHINE FOR CORKING BOTTLES, etc.

(District Court, W. D. Washington, N. D. April 26, 1920.)

No. 4537.

1. Criminal law §163—Forfeiture proceeding after conviction for illicit distilling, not objectionable as a double penalty.

That defendant had been convicted of illicit distilling does not deprive the court of authority to condemn or forfeit the property involved, under the rule against invoking a double penalty or punishing defendant twice for the same offense; the forfeiture proceeding being a proceeding in rem, and comprehended within the penalty fixed by statute.

2. Internal revenue §46—Forfeiture for illicit distilling not limited to property used in the illegal operation, "personal property."

Money and a cashier's check found on premises of one convicted of illicit distilling, in such relation to the contraband articles and apparatus used in the operation of distilling as to raise a clear inference that they were the proceeds of the illegal enterprise, and used in the operation and carrying forward of such business, held subject to forfeiture, as against the objection that such property was not used in the operation of the illegal enterprise; for money, as well as a certified check, is "personal property," within Rev. St. §§ 3258, 3281, 3453 (Comp. St. §§ 5994, 6021, 6355).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Personal Property.]

Forfeiture Libel. Proceeding by the United States against One Machine for Corking Bottles, etc. Property decreed forfeited.

Robert C. Saunders, U. S. Atty., of Washington, D. C.

Wm. R. Bell, of Seattle, Wash., for defendant.

NETERER, District Judge. A libel of information was filed, praying condemnation and forfeiture of corking machine, shotgun, copper kettles, rubber hose, \$1,100 in currency, one cashier's check for \$600 unindorsed, copper still, and other property, all of which it is charged were used and intended to be used in the manufacture of distilled spirits contrary to law.

The defendant by answer admits the ownership of the property, and that it was found in a building belonging to the claimant, admits that it was taken possession of by the agents of the government, together with approximately 400 gallons of wine and 16 gallons of raisin brandy, and further states his readiness and willingness to pay to the collector of internal revenue whatever may be determined just and proper, "in

settlement of his civil and criminal liability under section 3229 of the Revised Statutes [Comp. St. § 5952], * * * and prays return of the property.

[1] The defendant was indicted, being charged with violation of section 3281 (Comp. St. § 6021), carrying on the business of a distiller without complying with the statute. He was duly tried and convicted, and conviction was affirmed by the Circuit Court of Appeals (*Pinasco v. U. S.*, 262 Fed. 400), and forfeiture is sought pursuant to the provisions of statute. At the time of the trial of this case it was conceded by counsel for the defendant that the allegations of the libel were true, and consented to forfeiture of all property except the money and check, as to which authorities were to be presented challenging the government's right. It is now contended in the argument presented that the defendant, having been convicted under an indictment involving the very same acts and evidence involved herein, that the court is without authority to condemn or forfeit the property involved, and that it would be invoking a double penalty, or punishing the defendant twice for the same offense, and that the property sought to be condemned is not included within the scope of the statute. As to the double penalty, suffice it to say that this is a proceeding in rem, and is comprehended within the penalty fixed by statute. *U. S. v. 3 Copper Stills* (D. C.) 47 Fed. 495; *Wood v. U. S.*, 204 Fed. 55, 122 C. C. A. 369.

[2] Section 3281 (Comp. St. § 6021) provides that—

"All personal property owned by or in possession of any person who has permitted or suffered any buildings * * * to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or enclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States."

Section 3258 (Comp. St. § 5994) provides that—

"Every still or distilling apparatus not so registered, together with all personal property in the possession or custody, or under the control of such person, and found in the building, or in any yard or enclosure connected with the building in which the same may be set up, shall be forfeited."

Section 3453 (Comp. St. § 6355) provides that—

"All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the Internal Revenue Laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy * * * and shall be forfeited to the United States; * * * and all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or enclosure where such articles or raw materials are found, may also be seized by any collector * * * as aforesaid, and shall be forfeited. * * *"

Each section provides for a forfeiture of all property.

Defendant seeks to apply the rule *ejusdem generis* to the interpretation of the provisions of the statute, limiting it to property only which was used in the operation of the illegal enterprise, and cites, in support

of his contention, *Creditor's Collection Association v. Bisbee*, 80 Wash. 358, 141 Pac. 886, in the state Supreme Court. While this case has no application, it is proper to say that it was reversed by the Supreme Court in *Lemagie v. Acme Stamp Works*, 98 Wash. 34, 167 Pac. 60. At 98 Wash. 38, 167 Pac. 62, the Supreme Court, referring to the *Creditor's Collection Ass'n v. Bisbee*, supra, said:

"That case has been severely critized. In *re Crook*, 219 Fed. 979, Neterer, District Judge, where the cases cited and relied upon as sustaining the decision in the *Bisbee* Case were analyzed and interpreted differently. In *Hills v. Joseph*, 229 Fed. 865, on an appeal from a similar decision by Neterer, District Judge, where the debtor selected merchandise from his stock, involving the same subdivision of the exemption statutes, Rudkin, J., for the Circuit Court of Appeals, also analyzes and distinguishes the questions involved * * *"

—and affirmed the lower court. And (98 Wash. at page 41, 167 Pac. 63), the Supreme Court said:

"Since no long-established public practice has evolved upon the decision in the case of *Creditors' Collection Association v. Bisbee*, supra, and no rule of property has grown up thereon, we feel under no necessity of observing the rule of stare decisis in this case, nor any compunction in overruling it. We feel compelled to overrule that case in order to promulgate the correct rule of law for the future."

Money is personal property (In *re Crook*, supra), as well as a certified check. A reading of the several provisions of Congress, with relation to the forfeiture of personal property found upon the premises in which illicit spirits are distilled, makes clear the intent to forfeit personal property, whether it is subject to the special tax or not. The money and the check were found in such a relation to the contraband articles and apparatus, from which a clear inference can be made to justify the conclusion that it was the proceeds of the illegal enterprise, and used in the operation, and carrying forward of such business.

I think the right to forfeit this property is clearly contemplated by the laws of the United States. *U. S. v. Quantity of Rags*, 27 Fed. Cas. 638.

Form of decree may be presented.

LOVELACE et al. v. SOUTHWESTERN PETROLEUM CO. et al.
(District Court, E. D. Kentucky, at Catlettsburg. September 25, 1919.)

No. 524.

1. Deeds ⚡95—Unambiguous word not subject to construction.

If a word used in a deed has a definite meaning in the common, popular, understanding, it must be given that meaning, and it cannot be shown, to change the effect of the instrument, that the parties afterward treated it as having a different meaning.

2. Mines and minerals ⚡55 (5)—Reservation of "minerals" includes oil.

A reservation in a deed of "all the minerals in, on, or under" the land conveyed *held* to include oil under the surface.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mineral.]

3. Mines and minerals ⚡55 (5)—"Minerals" defined.

The word "minerals," in its popular meaning, includes petroleum.

At Law. Action by Ollie Lovelace and others against the Southwestern Petroleum Company and others. On motion to direct verdict for defendants. Motion granted.

Judgment affirmed 267 Fed. 513.

J. F. Stewart and S. S. Willis, both of Ashland, Ky., for plaintiffs.
Stephen T. Davis, of Winchester, Ky., and Robert H. Winn, of Mt. Sterling, Ky., for defendants.

COCHRAN, District Judge. This case involves the construction of two deeds, the deed from the Millers Creek Lumber Company to John S. Robinson, made the 8th day of January, 1908, and the deed from John S. Robinson and wife to Pendergrass, made December 8, 1910. The question presented as to the first deed is whether or not the grantor reserved one half of the oil rights in the lands covered thereby, and as to the other whether John S. Robinson, by the deed of December 8, 1910, passed to Pendergrass his half of the oil rights acquired under the Millers Creek Lumber Company deed. Those are the two questions.

The reservation in the first deed is of all of the minerals in, on, or under the lands described therein. It is a reservation of one-half—I should say, of all—of the minerals in, on, or under the lands described in the deed. Was that a reservation of one-half of the oil? The claim of the plaintiffs is that it was not, that the reservation did not include the oil that was in the land, and they make that out by taking the position that both parties, grantor and grantee, by subsequent deeds show that they did not understand the word "minerals" to include "oil"; i. e., that both parties to that deed thereby construed the word "minerals" not to include "oil."

[1] Now, assuming for the sake of the argument, that these subsequent deeds indicate that the grantor and grantee in that deed did not understand the word "minerals" to include "oil"; can any effect be given to this except on the basis that the reservation was ambiguous? If the reservation is ambiguous, the subsequent construction by the

parties of the reservation may be resorted to; but, if the reservation is not ambiguous, it cannot be affected by subsequent interpretation.

As expressed in a quotation by Judge Winn from Judge Holmes:

"If a deed says 500 feet, and there is nothing in the deed tending to show that they didn't intend 500 feet, it cannot be otherwise shown that the parties meant 500 inches."

If the instrument says 500 feet, that is not ambiguous, and there is nothing in the deed creating an ambiguity, so it cannot be shown that the parties meant inches. The parties are to be taken to have meant what they have unambiguously stated. Another illustration that he uses there is, if in an instrument a man referred to the Bunker Hill Monument, it cannot be said that he intended the Old South Church. That rule is applied to the construction of deeds, contracts, and statutes, and is applicable to the interpretation of all documents. An unambiguous document cannot be shown to mean what it does not say, and an unambiguous document is taken to mean what it says. The Supreme Court has applied that rule to statutes in some striking language in the case of Board of County Commissioners of County of Lake v. Frank W. Rollins, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060, where Justice Lamar says:

"To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural significance of the words, in the order of grammatical arrangement, in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning apparent on the face of the instrument must be accepted, and neither the courts, nor the Legislature have the right to add to it or take from it. [Cases cited.] So, also, where a law is expressed in plain and unambiguous terms, whether those terms general or limited, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

In *Hamilton v. Rathbone*, 175 U. S. 414, 20 Sup. Ct. 155, 44 L. Ed. 219, Justice Brown says:

"The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when, standing alone, it is fairly susceptible of but one construction, that construction must be given to it. * * * Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to to solve, but not to create an ambiguity."

[2] So, then, we must approach this reservation. The construction by the grantor and grantee on the word that they used has no bearing, and can be given no effect, unless you first determine that the reservation is ambiguous. The reservation is of one-half of all the minerals, but it is a reservation of all of the minerals, and it is not simply a reservation of all of the minerals, but it is a reservation

of all of the minerals in, on, and under the lands. You can hardly get a more sweeping reservation than "all the minerals in, on, and under the lands." Now, is the word "minerals" an ambiguous word? In determining whether it is ambiguous, whether it covers the oil, I accept the position taken in the case of *Dunham v. Kirkpatrick*, 101 Pa. 36, 47 Am. Rep. 696, where it is said that the word is to be construed as the masses of mankind understand it, or in the language of the Supreme Court in the case of *Burke v. Southern Pacific*, 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527, according to the ordinary and popular sense of the word.

Is or not the popular sense of the word "minerals" that it includes oil? Does or not the mass of mankind take it that the word "minerals" does include oil? Is there any question as to that? A starting place on that question is the Supreme Court of the United States, what it has said in the case of *Northern Pacific Railroad Co. v. Soderberg*, 188 U. S. 526, 23 Sup. Ct. 365, 47 L. Ed. 575, and *Burke v. Southern Pacific Railroad Co.*, 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527. In the *Soderberg* Case they had up the question whether the word "granite" was a mineral, and in the *Burke* Case they had up the direct question whether oil was mineral, and the question was treated, not as to whether scientifically granite in the one case and oil in the other case was a mineral, but whether, according to the ordinary and popular sense of the word, the word as used by the mass or bulk of mankind, the word "minerals" in the one case included granite and in the other oil. In the *Soderberg* Case the plaintiff contended that the word "minerals" only included metals.

I should have said, before I entered upon the subject of whether the word "minerals" is ambiguous or not, that the question is whether the words "minerals," if used alone or with the sweeping language, "all the minerals in, on, and under the land," is ambiguous, not whether there is ambiguity when, in connection with the word "minerals," other specific words, that may affect the meaning to be given to the word "minerals," are used. It must be conceded that there may be ambiguity as to the meaning of the word "minerals" where there are other words in the deed that have a bearing on the question as to what the mineral is, the particular substance that was intended to be included. In such case the other word or words used may go to show that the word "minerals" in that particular instrument was not intended to include oil.

The most striking case of that sort is the *West Virginia* case (*Sult v. A. Hochstetter Oil Co.*, 63 W. Va. 317, 61 S. E. 307), where the grant was of "all the minerals, coal," etc. The Supreme Court of West Virginia held that the word "coal" was an intensification of the word "minerals," and hence did not include oil. There may be other specific words which may create an ambiguity as to the sense in which the word "minerals" is used. But here there are not specific words, nothing said except the broad and sweeping language of "in, on, and under." No ambiguity exists, unless ambiguity inheres in the word "minerals" when used solely and by itself.

In the *Soderberg* Case, as stated, the contention that the Supreme

Court had to decide was whether the word minerals only included metals. After disposing of the contention that it should not be limited to metals, it goes on to show affirmatively and positively that it includes granite. It says:

"The rulings of the Land Department, to which we are to look for the contemporaneous construction of these statutes, have been subject to very little fluctuation, and almost uniformly, particularly of late years, have lent strong support to the theory of the patentee that the words 'valuable mineral deposits' should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including nonmetallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum, limestone, building stone and coal. [That now is the construction of the Land Department and they laid down that rule.] The cases are far too numerous for citation, and there is practically no conflict in them. The decisions of the state courts have also favored the same interpretations. Thus in *Gibson v. Tyson*, 5 Watts, 34, chromate of iron was held to be included in a reservation of all minerals. In *Hartwell v. Camman*, 10 N. J. Eq. 128, 64 Am. Dec. 448, a grant of 'all mines, minerals, open or to be opened,' was held to include paint stone, on the ground that it was valuable for its mineral properties; the court distinctly repudiating the idea that the term should be confined to metals or metallic ores. In *Funk v. Haldeman*, 53 Pa. 229, and in *Gill v. Weston*, 110 Pa. 313, 1 Atl. 921, petroleum was held to be mineral, although the act authorizing the lease of mining lands was passed before petroleum was discovered. See, also, *Gird v. California Oil Company*, 60 Fed. 531. The same principle was extended in *Westmorland & Co. Natural Gas Company v. De Witt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724, to natural gas, which was said to be a mineral *ferre naturæ*."

For some reason no mention is made of the case of *Dunham v. Kirkpatrick*. I think probably in the brief it was cited.

"In *Armstrong v. Lake Champlain Granite Co.*, 147 N. Y. 495, 42 N. E. 186, a conveyance of 'all minerals and ores' was held to include granite subsequently discovered on the premises, though it would not pass under the name of 'mineral ores.' In *Johnston v. Harrington*, 5 Wash. 78, 31 Pac. 316, the Supreme Court of that state thought it would hardly be disputed that stone was a mineral, though it seems inconsistent with the subsequent case, in the same volume, of *Wheeler v. Smith*, 5 Wash. 704, 32 Pac. 784, holding that the term 'mineral' was only intended to embrace 'deposits of ore.' The rulings of the English courts have, with a possible exception in some earlier cases, adopted the construction that valuable stone passed under the definition of minerals. Said Baron Parke in *Rosse v. Wainman*, 14 Mees. & W. 859, 872: The term 'minerals,' * * * though more frequently applied to substances containing metals, in its proper sense includes all fossil bodies, or matters dug out of mines; and Dr. Johnson says that all metals are minerals, but all minerals are not metals; and mines, according to Jacob's Law Dictionary, are quarries or places where anything is digged; and in the Year Book, 17 Edw. III, c. 7, *mineræ pierre* and *de charbon* are spoken of. Beds of stone, which may be dug by winning or quarrying, are therefore properly minerals, and so we think they must be held to be in the clause in question, bearing in mind that the object of the act was to give the surface for cultivation to the commoners and to leave in the lord what it did not take away for that purpose. This case was followed in *Micklethwait v. Winter*, 6 Exch. 644, in which the same act of Parliament was held to include stone dug from quarries. In *Midland Railway Co. v. Checkley*, L. R. A. 4 Eq. 19, stone for road making or paving was held to be a mineral; the Master of the Rolls observing: 'Stone is, in my opinion, clearly a mineral, and in fact everything except the mere surface which is used for agricultural purposes. Anything beyond that, which is useful for any purpose whatever, whether it is gravel, marble, fire clay, or the like, comes

within the word "mineral" when there is a reservation of the mines and minerals from a grant of land.' In *Midland R. Co. v. Haunchwood Brick & Tile Co.*, L. R. 20 Ch. Div. 552, brick clay was held to be a mineral; and in *Hext v. Gill*, L. R. 7 Ch. 699, the House of Lords held that china clay, and every substance which may be obtained 'from underneath the surface of the earth for the purpose of profit,' was a mineral, unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning. The same rule was applied in several analogous cases of granite, sandstone, flint stone, and in other similar circumstances. *Atty. Gen. v. Welsh Granite Co.*, 35 Week. Rep. 617 (granite); *Bell v. Wilson*, 2 Drew. & S. 395 (sandstone); *Tucker v. Linger*, L. R. 8 App. Cas. 508 (flint-stone); and a dozen other cases to the same effect."

In that same case Justice Brown says:

"We do not deem it necessary to attempt an exact definition of the words 'mineral lands,' as used in the act of July 2, 1864. With our present light upon the subject, it might be difficult to do so. It is sufficient to say that we see nothing in that act, or in the legislation of Congress up to the time this road was definitely located, which can be construed as putting a different definition upon these words from that generally accepted by the text-writers upon the subject. Indeed, we are of opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include, not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture."

In the *Soderberg Case* the contention was, as to the meaning of the word "minerals," whether it included granite, that, according to the popular and ordinary sense of the word—that is, according to the interpretation that the bulk or mass of mankind put upon it—it is not limited to metals. This contention was upheld. In the *Burke Case* the contention which they seem to have had to meet was the claim that oil was not scientifically a mineral, because oil was of a vegetable origin, and therefore was not scientifically a mineral. There the contention was that there were three different divisions of matter, the animal, vegetable, and mineral kingdoms. The mineral division includes everything that is not embraced in the animal and vegetable. The contention was that oil was not in the mineral division, because it was of vegetable origin. This would also exclude coal. In the case of *Mullan v. United States*, 118 U. S. 271, 6 Sup. Ct. 1041, 30 L. Ed. 170, they had up the question whether or not coal was a mineral, on the ground that it was of vegetable origin. It was held that it was. In the *Burke Case* it was contended that oil was not a mineral, not because, according to the popular and ordinary sense of the meaning of the word by the masses or the bulk of mankind, it was not, but because scientifically it was of vegetable origin. Like coal, it was of organic origin.

Mr. Justice Vandevanter makes no reference to *Dunham v. Kirkpatrick*, for some reason or other. He says:

"Petroleum has long been popularly regarded as a mineral oil. As its derivation indicates, the word means 'rock oil,' an oily substance so named because found naturally oozing from crevices in rocks. Its existence in this country was known from very early times, and when this and other railroad land grants, containing an exception of mineral lands, were made, the extraction of oil from its natural reservoir in subterranean rocks had come to be a promising industry, and was extending over an increasing area through dis-

coveries of new oil fields. An official report laid before Congress a few months before this grant was made showed that the daily output of the oil wells in Pennsylvania, Ohio, West Virginia, and Kentucky was 12,000 barrels. H. R. Ex. Doc. No. 51, 39th Cong. 1st Sess. In the same year the Supreme Court of Pennsylvania, in disposing of an oil land controversy, not only treated the oil as a mineral, but spoke of the work of extracting it from the containing rocks as 'mining for oil,' and, in concluding the opinion, said: 'Until our scientific knowledge on the subject is increased, this is the light in which the courts will be likely to regard this valuable production of the earth.' *Funk v. Haldeman*, 53 Pa. 229, 7 Mor. Min. Rep. 203. And in another case that court said: 'It is a mineral substance obtained from the earth by a process of mining, and the lands from which it is obtained may with propriety be called mining lands.' *Gill v. Weston*, 110 Pa. 312, 317, 1 Atl. 921. Its mineral character has also been affirmed by the courts of other states [West Virginia, Ohio, and Tennessee]."

Then he refers to legislation on the subject, and finally concludes by saying:

"Notwithstanding these persuasive considerations for now regarding petroleum lands as mineral lands within the meaning of the excepting clause in the granting act, we are asked to give effect to the strictly scientific view that petroleum is a resultant of the decomposition of organic matter under certain conditions of temperature and pressure, and therefore is not a mineral. As we understand it, scientists are not in full accord upon this point, some ascribing to petroleum an inorganic origin. 21 Enc. Britannica (11th Ed.) p. 318. But, passing this seeming divergence in opinion, and assuming that, when subjected to a strictly scientific test, petroleum is not a mineral, we think that it is not the test contemplated by the statute. It is dealing with a practical subject in a practical way, and we think it used the words 'mineral lands,' and intended that they should be applied, in their ordinary and popular sense. In that sense, as before indicated, they embrace lands chiefly valuable for petroleum."

[3] The Supreme Court in those two cases decides that, according to the popular sense of the word, "minerals" includes petroleum. There is no doubt about it that the cases are unanimous that it does, except the case of *Dunham v. Kirkpatrick*, the Pennsylvania case relied on by the plaintiffs. For some reason or other the Supreme Court makes no reference to this case, in which it was distinctly held that petroleum was not a mineral. How, then, did that court reach that conclusion? It held that petroleum oil scientifically was a mineral, though in the *Burke Case*, the contention was that it was not scientifically a mineral because of vegetable origin. The Supreme Court of Pennsylvania conceded that it was a mineral scientifically, and that on that ground that it belonged to the mineral kingdom, but it held that according to the popular and ordinary sense of the word—i. e., as the mass or bulk of mankind viewed it—it was not a mineral. It did not say affirmatively what the thought of the court was as to what the word "minerals" embraces according to the mass of mankind, but its impression made on me is that it was limited to metals. In the *Soderberg Case* Justice Brown said:

"Upon the other hand, a definition which would confine it to the precious metals, gold and silver, would so limit its application as to destroy at once half the value of the exception."

And, if the meaning of the word "minerals" should be limited to metals, it excludes coal.

Thus far I have treated the matter irrespective of Kentucky decisions. Of course, whatever position they take on the matter is controlling. So far as the point decided in the McKinney Case, 134 Ky. 239, 120 S. W. 314, 20 Ann. Cas. 934, is concerned, that case has no bearing here. There the grant or reservation was not limited to the word "minerals." There were other specific words used. I think in one of the deeds it said "minerals such as," and named gold, silver, and other—probably coal; I do not remember. Besides certain incidental rights were granted, which affected the construction. I have no reason to doubt the correctness of that decision. The grant, however, was not limited to the general word "minerals," as here. The grant was properly limited to solid minerals. There is this to say about that case, however, that the court gives more consideration to *Dunham v. Kirkpatrick* than it is entitled to. That case should be repudiated as wrong, but the Court of Appeals cited it as rather confirming the court in its contention. I do not recall any general expression in the opinion as to what the word "minerals," without any other words to qualify its meaning in its popular sense, includes. The language of Judge Hobson in the *Diamond Case*, 141 Ky. 97, 132 S. W. 397, Ann. Cas. 1912C, 417, gives it a broad sense, and so as to include oil. I do not recall just exactly what he said. Then in one or two other cases they speak as if there is no doubt about oil being a mineral, not simply scientifically, but in the popular sense. So I am compelled to reach the conclusion that the word "minerals," in the clause "all minerals in, on, and under the land," is not affected by the subsequent transactions of the grantor and grantee that are relied on to show that they did not understand the word "minerals" in the deed in question as including the word "oil," and that these subsequent transactions cannot be considered in determining what the word "minerals" in the grant in question was intended to cover, because the reservation is unambiguous.

Just here it should be noted that these are subsequent transactions. Always, in construing a grant or contract, the court has the right to consider it in the light of existing circumstances; not only has a right to, but it is its duty to consider the grant in the light of its environment. But these transactions did not happen until after the grant, and hence cannot be considered in interpreting the grant; it being unambiguous. Whilst, however, I take the position that these subsequent transactions can have and should have no bearing on the interpretation of the reservation in this deed, I do not admit that they are adverse to the interpretation that I have placed upon it. In none of these subsequent grants relied on was it said that they did not mean to include "oil" in the word "minerals" in the reservation in question. In the deeds from Robinson the reservation is of the oil, gas, and minerals. This, it is claimed, shows that Robinson did not think the word "minerals" included the gas and oil; that if he had thought that minerals included oil and gas, he would have only said minerals, and

not mentioned oil and gas. This does not show that he did not think that minerals included oil and gas. There is such a thing as tautology; the use of more words than are necessary; saying things over again. Some good writers do that.

These reservations are in ordinary out and out deeds. The reservations are of the oil and gas and minerals. There is no express statement that the grantor did not think the word "minerals" included oil. It is only a matter of inference, from his specifying oil and gas, that he did not think that word included them. Possibly, however, the writer of the deeds started out to specify oil and gas, and got tired using specific words, and put in the word "minerals" to cover all; or he may have thought that there might be some question whether or not oil and gas was included in the word "minerals." So, to remove the question, he may have specified oil and gas. It does not necessarily mean that, because he said "oil and gas and minerals," he thought the word "minerals" did not include the oil and gas. As I say, he may have started out to specify each one, and got tired of specifying, and put in the word "minerals," or he may have thought that there may possibly be some question about oil and gas being included by the word "minerals"; so as to leave no doubt about it, he specified them. At any rate, the grantor did not say that the word "minerals" in the deed of January 4, 1908, was not intended to include everything that was mineral in the popular sense.

It is true that only 20 days elapsed between the time of the deed to Robinson and the deeds he made. We do not know what may have come to light after that. He does not say a word about the reservation in the deed to him as to the word "minerals" therein, and as to what it was intended to include. The same may be said about the subsequent deeds made by the Millers Creek Lumber Company.

This brings me to the other question; that is, as to the deed from Robinson to Pendergrass on December 8, 1908. It strikes me that that deed shows clearly that he intended it to cover the oil. It is a sort of awkward deed, but I think the intention of it is plain. Robinson, the grantee in the deed of January 4, 1908, had before this made a dozen or so deeds conveying portions of this land to divers and sundry parties, and he makes a deed covering the rest of it to Pendergrass. He had, therefore, made two deeds to Pendergrass, one for 30 acres, and one for 560 acres. What he conveys is certain described property lying and being in Lee county, Ky., on the waters of Millers creek, contain 2,000 acres, more or less, excluding and reserving 148 acres sold to Malin Jones. I take it that this conveys all of the land, and certainly all of the minerals, oil, and gas. Then the deed proceeds to say that there is "hereby deeded one-half of all the coal," etc., "in the boundary above mentioned." It has already used sweeping language, that granted everything, and then conveyed "one-half of all the mineral and metal and mineral substances of every kind and character upon, in, and under the above described boundary," except under the said 148 acres sold to Malin Jones, 50 acres sold to McIntosh, and two tracts sold to Pendergrass, one for 560 acres and the other for 30 acres.

The deed to McIntosh contained no reservation at all. The conveyance was of one-half of the coal and all the other minerals, metals, and mineral substances upon, in, and under said 2,000 acres, except the 148 acres and the 50 acres and the 560 and 30 acres. There is no ambiguity about that. There is first a conveyance of the 2,000 acres, excepting the 148, which would include all the mineral rights; then this is followed up by a conveyance of one-half of all the mineral rights in the whole of that 2,000 acres, except what had been deeded to these other parties. The deed then enumerates certain conveyances theretofore made, in which reservations were made.

In all those deeds, except the McIntosh and the two Pendergrass deeds, there were reservations, and these reservations are then conveyed. This is the third time that he has used language covering all the mineral rights which Robinson had in the land in question. He first conveys the 2,000 acres of land, except the 148 acres; then he conveys the mineral rights in all except the four parcels mentioned; and then conveys the reservation. He was determined to cover those mineral rights. He did not leave out anything that might show that he intended to sell and convey those mineral rights.

We come to the habendum clause, "To have and to hold same, together with all appurtenances thereunto belonging, except one-half of the mineral in, upon, and under the entire tract of 2,000 acres, more or less, and all of the coal and mineral under the land heretofore sold to," etc. He did not mean to withdraw something that he had theretofore conveyed. His meaning here was to except the mineral rights from the warranty.

I am therefore constrained to hold that the deed from the Millers Creek Lumber Company to John S. Robinson reserved one-half of the oil in the lands covered by it, and that the deed from Robinson to Pendergrass conveyed the other one-half, which Robinson acquired under that deed.

Hence I instruct you to find for the defendants.

LOVELACE et al. v. SOUTHWESTERN PETROLEUM CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1920.)

No. 3353.

1. **Mines and minerals** ⚡48—"Minerals" include oil and gas.
The term "minerals," in its popular and ordinary sense, includes petroleum oils and gas.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mineral.]
2. **Mines and minerals** ⚡55 (5)—Reservation of "minerals" includes oil and gas.
Kentucky follows the generally accepted rule that a conveyance or reservation of minerals includes oil and gas.
3. **Mines and minerals** ⚡55 (2)—Conveyance held to pass minerals.
Where the grantor owned only one-half of the minerals under land, a deed including one-half of the coal and all other metal or mineral substances, the habendum clause of which recited the grantee was to hold the parcel, except one-half of the minerals, which the grantor did not own, was a conveyance of the mineral rights.
4. **Mines and minerals** ⚡54 (1), 55 (1)—Oil and gas are proper subjects of grant or reservation.
Oil and gas in the ground are proper subjects of grant or reservation.
5. **Mines and minerals** ⚡55 (6)—Easements are implied in reservation of oil and gas rights.
The easements of access implied in a simple grant or reservation of minerals are applicable to a reservation of grant of oil and gas rights.
6. **Evidence** ⚡461 (1)—Clear language will not be overthrown, because one of the parties intended other meaning.
While, in considering words used by way of conveyance or reservation, account will be taken of the circumstances under which the agreement was made, the otherwise clear and unambiguous meaning of words may not be overthrown by testimony that the parties, one or both, intended a different meaning.
7. **Mines and minerals** ⚡55 (8)—General reservation of oil and gas not precluded by fact that exception was made in other deeds.
That the grantor in other deeds reserving mineral rights excepted oil and gas does not show that his reservation of one-half of the mineral rights without specification did not include oil and gas, and that the parties so understood the conveyance.

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit by Ollie Lovelace and others against the Southwestern Petroleum Company and others. From a judgment for defendant (267 Fed. 504), plaintiffs appeal. Affirmed.

J. W. M. Stewart and S. S. Willis, both of Ashland, Ky. (Willis & Davis and Hager & Stewart, all of Ashland, Ky., on the brief), for appellants.

Stephen T. Davis, of Winchester, Ky., and Robert H. Winn, of Mt. Sterling, Ky. (Benton & Davis, of Winchester, Ky., Worthington, Cochran, Browning & Reed, of Maysville, Ky., and John A. Judy, of Mt. Sterling, Ky., on the brief), for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. This is a suit to recover the oil and gas rights in certain parcels of land in Lee county, Ky. The controversy arises thus: On January 4, 1908, the Miller's Creek Lumber Company conveyed to John S. Robinson a tract of 2,000 acres, excepting therefrom 148 acres, known as the Malin Jones parcel. The deed of conveyance in terms reserved "a one-half undivided interest in all the minerals in, on, or under the land embraced by this conveyance." Prior to December 8, 1910, Robinson and wife conveyed to one McIntosh 50 acres of the land without reservation, and to D. B. Pendergrass two parcels, aggregating 590 acres, as to which one-half the coal was reserved. They also made to various other parties separate conveyances of other portions of the land, aggregating several hundred acres, reserving all minerals, oil, and gas. On the last-mentioned date Robinson and wife conveyed to Pendergrass the remainder of the original tract, by deed containing this further provision:

"The said D. B. Pendergrass is hereby deeded one-half of all the coal in said boundary above mentioned [the original 2,000-acre tract] and also one-half of all the minerals, metals, and mineral substances of every kind and character on, in, or under said above-described boundary, except" the Jones, McIntosh, and two Pendergrass parcels before mentioned.

Defendants respectively claim title to an undivided one-half interest in the oil and gas rights in separate portions of the tract through deeds from Pendergrass based on Robinson's deed of December 8, 1910. Plaintiffs claim to own, as heirs at law of Robinson, the entire of the oil and gas rights, on the theory that no effective reservation of one-half of such rights was contained in the lumber company's deed to Robinson, and that the latter's deed to Pendergrass of December 8, 1910, was ineffectual to convey any interest therein. Upon trial by jury, the court, being of opinion that the lumber company's deed to Robinson effectually reserved, and that the latter's deed to Pendergrass of December 8, 1910, effectually conveyed, an undivided one-half of the oil rights in question, directed verdict for defendants. That action was rested upon this reasoning:

The word "minerals" in its ordinary and popular sense, includes petroleum rights; the broad term "all the minerals on, in, or under" a given parcel of land, when used in a deed, by way of either reservation or conveyance, and without qualifying or limiting language, clearly and unambiguously embraces petroleum rights; and that in neither the deed from the lumber company to Robinson nor in that from Robinson to Pendergrass of December 8, 1910, is there anything qualifying or limiting the ordinary meaning of the term in question.

[1] That the word "minerals," in its ordinary and popular sense, includes petroleum rights, is too firmly established to admit of substantial controversy. The question has more than once come before the Supreme Court of the United States in construing land grants from which "mineral lands" were in terms excluded. In *Northern Pacific Ry. Co. v. Soderberg*, 188 U. S. 526, 534, 23 Sup. Ct. 365, 368 (47 L. Ed. 575), where land chiefly valuable for granite quarries was held to be "mineral land," although not metalliferous, reference was made to the rulings of

the Land Department that the words "valuable mineral deposits" should be construed as including "all lands chiefly valuable for other than agricultural purposes, and particularly as including nonmetallic substances, among which are held to be * * * diamonds, * * * petroleum * * * and coal." Reference is also made with apparent approval to the decisions of the Pennsylvania courts holding both petroleum and natural gas to be mineral, as well as (188 U. S. 536, 23 Sup. Ct. 369, 47 L. Ed. 575) to the "overwhelming weight of authority to the effect that mineral lands include, not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture."

Burke v. Southern Pacific Co., 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527, involved the question whether petroleum or mineral oil was within the meaning of the term "mineral," as used in certain acts of Congress reserving mineral lands from railroad land grants. In answering this question in the affirmative, there were cited the decisions of courts of Pennsylvania, West Virginia, Ohio, Tennessee, and New York, affirming the mineral character of petroleum, and attention was called to the fact that Congress had at different times spoken of it as a mineral, and that the Supreme Court of the United States had done the same in *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 202, 20 Sup. Ct. 576, 44 L. Ed. 729, and (234 U. S. 679, 34 Sup. Ct. 911, 58 L. Ed. 1527) advertng to the apparent disagreement among scientists as to whether petroleum was strictly a mineral, or merely a "resultant of the decomposition of organic matter under certain conditions of temperature and pressure, and therefore not a mineral," the court, without passing upon that question, held that the words "mineral lands" should be applied in their ordinary and popular sense, and that in that sense petroleum lands were embraced therein. This holding was renewed in *United States v. Southern Pacific Co.*, 251 U. S. 1, 40 Sup. Ct. 47, 64 L. Ed. —.

The courts of the oil-bearing states, so far as we are advised, now generally, if not uniformly (so far as they have spoken), hold that petroleum and natural gas in place are minerals and part of the realty, and, with the exception of Pennsylvania, that a reservation or conveyance of "all minerals," or "all mineral rights," in land, not otherwise limited or qualified, so as to show a different intention, embraces petroleum and natural gas.

Isom v. Rex Crude Oil Co. (1905) 147 Cal. 659, 661, 82 Pac. 317, 318: "Oil is a mineral, and as a mineral is part of the realty." *Kelley v. Ohio Oil Co.* (1897) 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765, 63 Am. St. Rep. 721: "Petroleum oil is a mineral, and, while it is in the earth, it forms a part of the realty." *People v. Bell* (1908) 237 Ill. 332, 337, 86 N. E. 593, 594 (19 L. R. A. [N. S.] 746, 15 Ann. Cas. 511): "In some of the states petroleum forms a very valuable part of the natural wealth, and has been given careful consideration by the courts, and they have uniformly held, so far as the authorities we have examined show, that it should be classed as a mineral." An oil and gas lease was held taxable as "a mining right," and included in the

statutory term "other mineral." *Lanyon Zinc Co. v. Freeman* (1904), 68 Kan. 691, 696, 75 Pac. 995, 997 (1 Ann. Cas. 403): "Whatever may be the origin of petroleum and natural gas, and the question appears as yet to be matter of controversy; it is well settled that they are minerals."

In *Murray v. Allred* (1897) 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 246, 66 Am. St. Rep. 740, the question is elaborately considered, and the conclusion announced that petroleum oil and natural gas are minerals, within a reservation by deed of all "mines, minerals and metals in and under the land." *Beckett-Iseman Oil Co. v. Backer*, 165 Ky. 818, 819, 178 S. W. 1084: "It is well settled that oil and gas are minerals, and are a part of the realty. * * *" In *Sult v. Oil Co.* (1908) 63 W. Va. 317, 325, 61 S. E. 307, 311, it is said: "Legally and scientifically, oil and gas are universally held to be minerals. At the present time, they are popularly so considered"—and upon careful consideration and discussion of the authorities it was held (63 W. Va. 324, 61 S. E. 310) that a clause in a deed reserving to the grantor the "right to all minerals in and under" a certain portion of the land conveyed, not limited or qualified as to intention by any clause of the deed, or by any facts within the knowledge of the parties which may properly be deemed to have determined their intention, saves to the grantor, not only solid minerals, but petroleum oil and natural gas. In *Barker v. Campbell, etc., Co.* (Okl. 1917) 167 Pac. 468, L. R. A. 1918A, 487, it was held that oil and gas are minerals within the meaning of a reservation by deed "of all mineral rights" upon the land described therein. And see *Ontario Natural Gas Co. v. Gosfield*, 18 Ont. App. Rep. 626.

The original decision of the Supreme Court of Pennsylvania to the contrary effect—*Dunham v. Kirkpatrick* (1882) 101 Pa. 36, 43, 47 Am. Rep. 696—is rested upon the proposition that while petroleum is a mineral, yet in popular estimation it is not so regarded, and therefore would not be embraced within the reservation of "all minerals." Its doctrine has been reaffirmed in *Silver v. Bush*, 213 Pa. 195, 198, 199, 62 Atl. 832, and in *Preston v. South Penn Oil Co.*, 238 Pa. 301 et seq., 86 Atl. 203. In both these later decisions the fact that *Dunham v. Kirkpatrick* has become a rule of property in Pennsylvania, and that many land titles rest upon it, is emphasized. *Dunham v. Kirkpatrick* seems not to have been followed by the courts of any other state, except to the limited extent hereafter stated. It has been more than once disapproved. See *Weaver v. Richards*, 156 Mich. 320, 324, 120 N. W. 818; *Sult v. Oil Co.*, supra, 63 W. Va. at page 325, 61 S. E. at page 311; *Murray v. Allred*, supra, 100 Tenn. at page 116 et seq., 43 S. W. 355, 39 L. R. A. 246, 66 Am. St. Rep. 740; *McCombs v. Stephenson*, 154 Ala. 109, 113, 44 South. 867.

Detlor v. Holland (1898) 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266, is not, in our opinion, opposed to the general rule we have stated respecting the construction of the words "all the minerals," when not otherwise qualified or limited. In that case it was held that petroleum oil and natural gas were not covered by a conveyance of "all the coal of every variety and all the iron ore, fire clay, and other valuable minerals in, on, or under" the described premises, coupled with "the

right in perpetuity" to the grantee or his assignees "of mining and removing such coal, ore, or other minerals," and with the right in the grantee or his assignees to "the use of so much of the surface of the land as may be necessary for pits, shafts, platforms, drains, railroads, switches, side tracks, etc., to facilitate the mining and removal of such coal, ore or other minerals and no more." As aptly said in *Sult v. Oil Co.*, supra, 63 W. Va. at page 325, 61 S. E. at page 311:

"This decision was based partly on *Dunham v. Kirkpatrick*, and partly on the view that other clauses of the deed, providing for rights of way and giving mineral privileges, disclosed intention not to include oil."

[2] We thus come to the controlling question whether the law of Kentucky is opposed to the general rule we have stated. The first decision in that state upon this subject is *McKinney's Heirs v. Central Ky. Natural Gas Co.* (1909) 134 Ky. 239, 120 S. W. 314, 20 Ann. Cas. 934. In that case three conveyances were involved. In the first the mineral rights were described as the—

"whole entire right, title, and interest in all minerals such as coal, iron, silver, gold, copper, lead, bismuth, antimony, zinc, or any other mineral of any marketable value contained within the following boundary of land, * * * with the right to explore, prospect, mine, and dig upon any of said land for any of the above minerals, or any other of any marketable value, together with the right of timber, stone, or any other material necessary for improvements for mining, to sink shafts, open drifts, or do anything else on said land necessary to the development of said minerals."

In the second the description was:

"All the coal and mineral interests and privileges, together with the right of way to and from all the mines or openings; also the right to open mines for and develop the same, with a sufficiency of timber for mining purposes and the construction of cabins for miners."

In the third case the description was:

"One-half of all the mineral or coal on the above-described boundary, with all necessary timber and coal yards and rights of way."

The only question was whether the conveyances referred to included natural gas. This question was answered in the negative (134 Ky. 246, 247, 120 S. W. 314, 316 [20 Ann. Cas. 934]), upon the ground that, while the words "other minerals," or "other valuable minerals," taken in their broadest sense, would include natural gas, an intention not to include it was shown by the fact that at the time of these conveyances (1871-77) natural gas had no marketable value in Kentucky, and that the easements granted in connection with the mineral rights conveyed "are not applicable to the production of natural gas, which shows that it was not intended that gas was to be included in the conveyances." While both *Detlor v. Holland*, supra, and *Dunham v. Kirkpatrick*, supra, were cited as in point, *Murray v. Allred*, supra, was held not to conflict with the cases cited by the Kentucky court, for the reason that in the *Allred* Case the deed of reservation was of "all mines, minerals and metals in and under the land," without any—

"reservation of any easement or privileges, as in the case at bar and the ones cited above; and, as stated in all the cases, the word 'minerals' technically included oil and gas, and it was presumed in that case that the parties intend-

ed to reserve just what the words included. There were no other words used in the conveyance, as in the case at bar and the ones above cited, to show a different intention."

The McKinney Case is plainly not opposed to the general rule we have stated above. As has already appeared, *Murray v. Allred*, so distinguished in the McKinney Case, directly sustains the conclusion of the court below in the instant case. The Court of Appeals of Kentucky has since spoken upon this subject. In *Ky. Diamond Mining & Devpt. Co. v. Ky. Transvaal Diamond Co.*, 141 Ky. 97, 132 S. W. 397, Ann. Cas. 1912C, 417, the question presented was whether diamonds were included within a description of "all the mineral and timber on the following described tract or parcel of land," with certain exclusions and reservations not specially important. It was held that diamonds were included in the broad term "minerals." Replying to a contention that, while a diamond is a mineral, the description should not be held to include diamonds, because no one had in mind diamonds being on the land when the deed was made, the case of McKinney's Heirs v. Central Kentucky Co., *supra*, was distinguished, for the reason that the words "other minerals" in the description in issue in that case were "to be read in connection with the things previously named, and must be confined to things of that character"; the court adding:

"The deed here simply conveys 'all the mineral.' These words aptly include every kind of mineral found on the land. * * * When the language of the deed is broad enough to cover everything that may be found on the land, it is not material to the effect of the deed that the parties in fact contemplated at the time that a particular thing might be found on the land;" and, further, that where a grantor "conveys all the mineral, the court must enforce the contract according to the natural meaning of the language used."

The McKinney Case was thus distinctly construed as in the *eiusdem generis* class. But whatever doubt might be thought to remain respecting the rule in Kentucky, and the construction of the McKinney Case, was removed by *Scott v. Laws*, 185 Ky. 440, 215 S. W. 81, decided since the instant case was decided below. That case involved the question whether oil and gas passed under a conveyance of "all of the mineral right and coal privileges and rights of way to and from said minerals and coal privileges, also the right to search for all undiscovered minerals and coals upon the lands hereinafter described." The question was answered in the affirmative. The McKinney Case was here again distinguished as being in the *eiusdem generis* class. The Kentucky Diamond Case, *supra*, was also cited in that connection. The opinion in *Scott v. Laws* closes with this pregnant statement:

"Since oil and gas are minerals, and there is nothing in the language of the deed in question which shows that the parties contemplated something less general than all substances legally cognizable as minerals, we conclude that the title to the oil and gas necessarily passed by the conveyance."

This decision, in our opinion, conclusively sustains the correctness of the decision below, for there is nothing in the language of either the deed from the lumber company to Robinson, or in that from the latter to Pendergrass, which shows "that the parties contemplated something less general than all substances legally cognizable as minerals." Neither

contains any words of limitation. The language of the deed to Robinson, "all the minerals in, on, or under the land," is absolutely without qualification anywhere. The words in the deed *from* Robinson, "all the minerals, metals, and mineral substances of every kind and character on, in, or under said above described boundary," have no tendency to limit the minerals to those of a metalliferous nature. It is difficult to conceive of general language more comprehensive than that last quoted, especially in view of its final and sweeping clause. Nor do we find elsewhere in Robinson's deed to Pendergrass anything throwing doubt upon the meaning of the words we have been considering, and there is no evidence that petroleum and natural gas had then no market value in Kentucky. Such testimony, indeed, would run counter to general public knowledge.

[3] We may add that we see no merit in the contention that in the deed from Robinson to Pendergrass "apt words" were not used to convey the oil and gas reserved and severed from the surface estate in the several deeds Robinson had previously made. Following the words of conveyance we have already quoted in the opening paragraphs of this opinion, specific exception is made in the deed of each of the several parcels of land so previously conveyed; in practically all of which minerals, oil, and gas had been reserved. Immediately thereafter is the following:

"The coal in each of the above exceptions which have been heretofore sold was reserved, except in deeds which were made to Millard McIntosh, Malin Jones, and two deeds to D. B. Pendergrass, and one-half of said coal and all other minerals, metals, or mineral substances on, in, or under all the foregoing exceptions, except Millard McIntosh, Malin Jones, and two deeds to D. B. Pendergrass, is hereby conveyed to D. B. Pendergrass in this deed."

The habendum clause reads:

"To have and to hold the same [the 2,000-acre tract], together with all appurtenances thereunto belonging (except one-half of the minerals [which Robinson never owned] under the entire tract of 2,000 acres, more or less, and all of the coal and minerals under the lands heretofore sold to D. B. Pendergrass, Malin Jones, and Millard McIntosh, also subject to all exceptions for land heretofore sold out of said 2,000 acres, more or less, to the parties herein named), unto the party of the second part, his heirs and assigns, forever, with covenant of general warranty."

These provisions of the deed, considered together, in our opinion clearly indicate that Robinson intended to pass to Pendergrass all his mineral rights, including oil and gas, which he had reserved in former conveyances. *Kincaid v. McGowan*, 88 Ky. 91, 4 S. W. 802, 13 L. R. A. 289, contains nothing in our opinion to the contrary.

[4] We see no force in the further contention that oil and gas in the ground are not proper subjects of a grant or reservation. The authorities are distinctly otherwise.

[5] We must also reject, as applied to this case, the proposition that the easements implied in a simple grant or reservation of minerals are not applicable to oil and gas. The lumber company's conveyance to Robinson passed the fee of the land, together with all mineral rights, except those expressly reserved. Robinson thus acquired complete right to mine one-half the minerals so conveyed. These rights never

passed from him until the conveyance to Pendergrass, which as matter of law vested in the latter the ownership (to the extent of one-half) of all the minerals which the latter and his grantee should find and reduce to possession. If Robinson could effectively reserve such easements by the mere reservation of mineral rights contained in the deeds of the surface we have been considering, he could as effectively pass them in the same way; and unless such reservation was effective plaintiffs are not interested in this question.

[6, 7] The court did not err in rejecting the deeds by the Miller Lumber Company and by Robinson, respectively (made subsequently to the former's deed to the latter), which were offered by plaintiffs in support of their construction of the term "minerals," as contained in the lumber company's deed to Robinson of January 4, 1908. The rule is too well settled to justify citation of authority that while, in considering words used by way of conveyance or reservation, account will be taken of the circumstances under which the agreement was made, yet that the otherwise clear and unambiguous meaning of words may not be overthrown by testimony that the parties, one or both, intended a different meaning. The Case of McKinney's Heirs is not authority for the proposition that the meaning of clear and unambiguous words of conveyance may be varied by proof of wholly extraneous facts and circumstances. This appears from the discussion already made of this case. The same is true of our decision in *Kentucky Block Cannel Coal Co. v. Sewell*, 249 Fed. 840, 162 C. C. A. 74, 1 A. L. R. 556. Titles to real estate may not be so impaired or defeated.


In so saying we must not be understood as recognizing that the offered deeds have the evidential effect which plaintiffs claim for them. In one of the lumber company's deeds (that to Jones) the exception was of "oil and minerals"; in another (to Robinson), "one-half the coal"; in the third (also to Robinson), of "one-half of the coal and all other minerals." In several of Robinson's other deeds the exception was of "minerals, oil and gas"; in others, of "coal, oil, and gas and minerals," with differing arrangement of the nouns; in another, of "one-half of all the coal"; in another of "coal, oil, gas, and all other minerals and metals." These deeds, considered singly or collectively, have, in our opinion, no substantial tendency to show that at the date of the *previous* conveyance from the lumber company to Robinson the minds of the grantor and the grantee met in an understanding that "minerals" did not include oil and gas, which would mean that the lumber company reserved no oil and gas. Whether the language of such subsequent deeds was prompted by excessive caution, or by suggestions of draftsmen, or resulted from mere tautology, is not important.

The judgment of the District Court is affirmed.

CASTLE v. CASTLE et al. *

(Circuit Court of Appeals, Ninth Circuit. August 2, 1920. Rehearing Denied October 18, 1920.)

No. 3443.

Descent and distribution  52(2)—Widow in Hawaii entitled to share in proceeds of life insurance as "movable effects in possession or reducible to possession at time of death."

Under Rev. St. Hawaii 1915, § 2977, providing that a married woman on the death of her husband shall "be entitled by way of dower to an absolute property in the one-third part of all his movable effects in possession or reducible to possession at the time of his death," a widow *held* entitled to one-third of the proceeds of her husband's life insurance policies.

In Error to the Supreme Court of the Territory of Hawaii.

In the matter of the estate of James Bicknell Castle, deceased. William R. Castle, Lorrin A. Thurston, and Alfred L. Castle, trustees under the will, appealed from an order of distribution of the circuit court, and from a judgment of the Supreme Court of Hawaii, reversing such order, Julia White Castle brings error. Reversed.

Francis M. Hatch, of Honolulu, T. H., for plaintiff in error.


A. G. M. Robertson, Alfred L. Castle, Clarence H. Olson, W. A. Greenwell, and Arthur Withington, all of Honolulu, T. H., for defendants in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Julia White Castle is the widow of James Bicknell Castle, who died in Hawaii in 1918, leaving a will under the terms of which the widow was bequeathed certain real estate and a monthly allowance of not less than \$1,500. Among other assets of the estate were the proceeds of insurance policies, which, after deducting certain allowances properly due the companies, aggregated approximately \$54,000. The widow elected to take her dower right in the estate, and property to the amount of \$181,250 was assigned to her. When the final account of the trustees under the will was presented for approval, the probate court directed that one-third of the total amount of the life insurance policies should be added, as distributive share by way of dower under the statute of Hawaii. The trustees were not satisfied, and appealed to the Supreme Court of the territory, which reversed the order of the probate court, and the widow then brought the matter to this court.

Section 2977, Rev. Stat. Hawaii 1915, provides as follows:

"Every woman shall be endowed of one-third part of all the lands owned by her husband at any time during marriage, in fee simple, in freehold, or for the term of fifty years or more, so long as twenty-five years of the term remain unexpired, but in no less estate, unless she is lawfully barred thereof; she shall also be entitled, by way of dower, to an absolute property in the one-third part of all his movable effects, in possession, or reducible to possession, at the time of his death, after the payment of all his just debts."

 For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari granted 254 U. S. —, 41 Sup. Ct. 148, 65 L. Ed. —.

As originally enacted the statute read as follows:

"The wife shall, in virtue of her marriage, be entitled in law to receive upon the death of her husband, by way of dower, a life estate in one-third part of all immovable and fixed property owned by him at the time of her intermarriage, or acquired by him during her marriage; and an absolute property in the one-third part of all his movable effects in possession or reducible to possession at the time of his death, after the payment of all his just debts." Laws Kamehameha III (1846) p. 59, § 4.

The Supreme Court of the territory held that the statute did not give to the widow by way of dower an interest in all the personal property of her deceased husband; that the right to the money due upon the insurance policies did not come into existence until after the death of the insured; that the only thing which the insured could grant was an interest in the insurance contract; and that, as the proceeds of the policies of insurance upon the life of Castle were payable to his executors, administrators, or assigns, and collected by them after his death, such proceeds were not movable effects in possession or reducible to possession at the time of his death, and therefore the widow possessed no dower right therein. In *Matter of Estate of James B. Castle*, 25 Haw. 38. But we have reached a different conclusion. It is our opinion that "at the time of the death of the husband" means at the time that he has died. The wife becomes a widow the instant that the husband is dead, and at that instant her right becomes consummate. *Randall v. Kreiger*, 90 U. S. (23 Wall.) 137, 23 L. Ed. 124. The policies of insurance became payable the instant that death occurred. Therefore the sums provided to be paid to the beneficiaries then become "reducible to possession." *Gould v. Emmerson*, 99 Mass. 154, 96 Am. Dec. 720. The original statute was not less liberal than the present one.

In an anonymous case reported in 1 P. Wms, 268, 24 Eng. Rep., in 1714, the question was, on a devise of all goods, whether a debt by bond passed to the devisee. Lord Chancellor Cowper decreed that it did, that the words seemed at common law to pass a bond, and to extend to all the personal estate but that the will should be construed according to the rules of the civil law, where bona mobilia and bona immobilia are made the membræ differentia of all estates.

"Bona immobilia are lands; bona mobilia are all movables, which must extend to bonds, and therefore, by the devise of all the testator's goods, the bond must pass."

Blackstone wrote that things personal include all sorts of things "movable," which may attend a man's person wherever he goes, and which were not regarded as of so high a nature as things that were in their nature more permanent and immovable, as lands and houses and the profits issuing thereout. He also wrote of the different ideas which were conceived of the subject, and how the courts subsequently came to regard the personality of a man in a light nearly, if not quite, equal to his realty, and how things personal, not only included things "movable," but also something more; the whole being comprehended under the general name of chattels. He defined chattels personal as, properly and strictly speaking, "things movable." "Such are animals, household stuff, money, jewels, and everything else that can properly be put in mo-

tion and transferred from place to place." He treated choses in action as including all property in action which depends entirely on contracts, express or implied. In *N. Y. M. L. Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997, it was held that a policy of life insurance, without restrictive words, is assignable by the assured equally with any other chose in action.

In *Randolph v. Kraft*, 128 La. 743, 55 South. 340, the court was construing article 935 of the Civil Code of Louisiana and article 929 of the Code of Practice of that state in connection with jurisdiction of the place of the opening of successions. Comparison of the two articles showed that in one the word "landed" was substituted for the word "immovable," and the words "principal property" were substituted for "principal effects," and "fixed property" substituted for "immovable effects." The court said:

"The word 'effects,' as used in the present Civil Code, was a translation of the word 'biens,' used in the French text of article 929 of the Civil Code of 1825. * * * Both words mean property in its general sense. It is apparent that the lawmaker, in the enactment of article 929 of the Code of Practice, intentionally avoided the use of the general words 'immovable' and 'effects,' and substituted therefor specific words clearly indicating real estate."

The decision is pertinent, because the present statute of Hawaii, as quoted, gives to the widow one-third part of all "lands" owned by her husband, and also, by way of dower, an absolute property in one-third part of "all his movable effects in possession or reducible to possession," etc.; whereas the original statute of 1846 gave to the wife, by way of dower, a life estate in one-third part of "all immovable and fixed property" owned by him at the time of her intermarriage or acquired by him during marriage, and an absolute property in one-third part of "all his movable effects in possession, or reducible to possession, at the time of his death." In the Hawaiian, as in the Louisiana, statute, the substitution of the word "lands" for "immovable and fixed property" was a specific indication of real estate, while movable effects in possession or reducible to possession means all property not real estate.

In *Burdett v. Burdett*, 26 Okl. 416, 109 Pac. 922, 35 L. R. A. (N. S.) 964, certain life insurance policies were payable to the executors, administrators, or assigns of the deceased. Under the statute of Oklahoma the widow was entitled as part of her dower, absolutely in her own right, to one-third part of the personal estate, including cash, bonds, and evidences of debt, whereof her husband died seized or possessed. The court held that the deceased, having insured his life, naming himself, his executors, administrators, or assigns, the beneficiary of the policy, had a sole beneficial or assignable interest therein, and that, the policies being choses in action, he could at any time before his death have parted with such interest, as with his interest in other choses in action; that the title to the policies and the money to become due was, from the date of their delivery to the deceased as beneficiary, vested in him, and so remained up to the time of his death; that he was the owner of the policies, and had the title to the personalty, when he died; and that it was too great a refinement to say that the proceeds of the

policies, because payable to the executors, administrators, or assigns, or the estate of the deceased, were personalty, of which he was not the owner, and of which he did not die seized or possessed.

It will be conceded that the federal courts lean toward the interpretation of a local statute adopted by the local courts; but a question of dower is very broad, and clearly of a more general nature than are matters confined merely to local usages. *Trustees of Ena Estate v. Ena*, 18 Haw. 588, is not a decision against the views we have expressed. The question there involved related to what debts should be paid before allowances to the widow could be made.

The *Estate of Alexandre*, 19 Haw. 551, arose out of a mutual agreement by members of a society wherein a member was entitled under the by-laws of the society to designate by will the person to whom certain moneys, collected by the society from its members, should be paid by the society; the by-laws providing that for all legal purposes the donation should not be regarded as assets of the estate of the deceased. The decedent there directed the donation to be paid to his executor for the benefit of his estate, and the court held that the widow had no statutory dower in the fund, although it was a part of the estate of the decedent. The donation was made with a condition embodied in the by-laws, and the direction in the will excluded the widow and was treated as effective.

Our conclusion being that proper construction of the statute sustains the right of the widow to dower interest in the proceeds of the policies, it follows that the judgment of the Supreme Court against *Julia White Castle* was erroneous, and must be reversed, and the original order of the Circuit Court of the First Circuit, Territory of Hawaii, filed on the 5th day of April, 1919, is affirmed, and the cause is remanded to the Circuit Court with such directions.

Reversed and remanded.

BLOCK v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 28, 1920. Rehearing Denied September 13, 1920.)

No. 5394.

1. Criminal law ⚡822(1)—Entire charge must be considered.

On assignments of error to the charge of a court, the entire charge must be considered.

2. Conspiracy ⚡47—For illegal transportation of liquor shown by evidence.

A conviction for conspiracy to transport liquor into a prohibition state, in violation of Reed Amendment, § 5 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a), *held* sustained by evidence tending to show that defendant, who was a wholesale dealer in Missouri, had made an arrangement with a customer in Omaha, pursuant to which on three occasions he delivered to an agent of such customer an automobile load of whisky, knowing that it was to be transported to Omaha in a prohibition state.

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Criminal prosecution by the United States against Meyer Block. Judgment of conviction, and defendant brings error. Affirmed.

Benjamin Phillip, of St. Joseph, Mo. (R. E. Culver, of St. Joseph, Mo., on the brief), for plaintiff in error.

Thomas S. Allen, U. S. Atty., of Lincoln, Neb. (Frank A. Peterson, Asst. U. S. Atty., of Omaha, Neb., on the brief), for the United States.

Before HOOK and CARLAND, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. The plaintiff in error, hereinafter referred to as the defendant, was jointly indicted with Henry Gaspari and Sherman Chinberg, charged with violation of section 37 of the Penal Code (Comp. St. § 10201) by conspiring with his codefendants to violate the Reed Amendment (Act of March 3, 1917, c. 162, par. 5, 39 Stat. 1069 [section 8739a, U. S. Comp. St. 1918, Comp. Stat. Ann. Supp. 1919]). Chinberg was not placed on trial and testified as a witness for the government. Gaspari and Block were tried jointly, and both were found guilty by the jury. Block alone prosecutes this writ of error.

The assignments of error which are insisted on are: (1) That the court erred in refusing to direct a verdict of not guilty; (2) the refusal of certain instructions asked in behalf of this defendant; (3) the failure of the court to call the jury's attention to some of the testimony of the defendant, and calling the jury's attention to Chinberg's testimony as to his conversations with Block at the time of the purchases of the whisky.

In their brief and oral argument counsel for defendants also complain of the charge relating to the defendant's proof of good character. As to the latter contention, there was not only no exception taken to that part of the charge of the court, but it is more favorable than the special request asked in behalf of the defendant on that issue. He cannot complain of that.

The assignment that the court did not call the jury's attention to the denials by the defendant relating to his conversation with Chinberg is without merit, as the court, when this exception was taken, told the jury:

"Mr. Strode calls my attention to the fact that I did not say Mr. Block denies Mr. Chinberg's testimony. I hardly think that is necessary, because you remember he did that. I refer to the testimony simply as showing the basis for some legal propositions. I haven't indicated to you my opinion of the guilt of the defendants here, although I might do so if I desired. I have the right to do so, but I intend to leave that to you entirely."

[1] Although there were no other exceptions to the charge of the court, the personal liberty of the defendant being at stake, we have carefully examined the charge and find no prejudicial error. Counsel point to some parts of the charge which, if separated from the rest of the charge, might have been erroneous. But this may not be done. The entire charge must be taken as a whole. *Stout v. United States*,

227 Fed. 799, 142 C. C. A. 323, certiorari denied by the Supreme Court 241 U. S. 664, 36 Sup. Ct. 549, 60 L. Ed. 1227.

In addition to the excerpt from the charge complained of, the court after reviewing the evidence, and charging the jury as to his codefendants, told the jury:

"Now, does this evidence suffice to show, if you believe it, that Block was a party in the conspiracy to cause intoxicating liquor to be transported in interstate commerce? That is, to procure it to be transported in interstate commerce, there must be an intentional participation by a defendant, such as Block, in transactions with a view of the furtherance of the common design and carrying out the purpose of the scheme. Now, did Block have knowledge of the design of the conspiracy and intentionally participate in the scheme? It would not relieve him, if he sold the liquor for the purpose of having it carried in interstate commerce, that he was a licensed dealer in St. Joseph. The act of Congress doesn't say, as I read it to you, and you understand it that one may cause it to be carried in interstate commerce into a dry state, if he is a liquor dealer or saloon keeper some place. There is no exception of this kind.

"It would not relieve Mr. Block, if in pursuance of a common mutual understanding between the parties he furnished the liquor to be transported in interstate commerce, that he got pay for it. The act of Congress makes no exception of that kind.

"The act of Congress says that no one may cause intoxicating liquors to be transported. Now, if the act of Congress had said no one may transport liquor in interstate commerce, the evidence here would not show that Mr. Block transported it; but the act of Congress says no one may cause it to be transported, and when the charge is that there was a conspiracy to cause it to be transported, that means he shall do no effective act that will cause, or which will result in, its being transported.

"Now one man in a conspiracy may arrange to furnish the money to buy, another may agree to go and get and bring back the liquor, another may sell it; but if the common purpose and agreement is that the liquor is to be caused to be transported in interstate commerce, then each one may be said to be engaged in a conspiracy to cause the liquor to be transported in interstate commerce."

The special instructions asked in behalf of the defendant, aside from that asking for a directed verdict, in favor of the defendant were fully covered by the general charge, and it therefore was not incumbent on the court to give them in the language requested by the defendant.

[2] Was the evidence sufficient to warrant the submission of the question of guilt or innocence to the jury? The rule is too well established to require the citation of authorities that, if there is substantial evidence to warrant a verdict of guilty, it is the duty of the court to submit the case to the jury, although there is evidence which, if believed by the jury, would justify an acquittal. Evidently the jury believed the testimony of the government's witnesses, rather than that of the defendant. This they had a right to do, as they are the sole judges of the credibility of the witnesses, and the weight to be given to their testimony.

There was substantial evidence to justify the jury to find the following facts: The main witness for the government was the defendant Chinberg. As he was one of the conspirators, the court properly charged that his evidence must be taken with some caution, unless corroborated by other witnesses or circumstances, although the jury may ren-

der a verdict of guilty on the uncorroborated testimony of a coconspirator, if satisfied that he testified truthfully. The court in its charge on that point followed what was declared to be the law in *Caminetti v. United States*, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168.

The testimony of this witness was to the effect that the defendant Gaspari, who resided at Omaha, Neb., proposed to him that he would pay him \$100 for every trip he would make to St. Joseph, Mo., to get a load of whisky from the defendant Block, with whom he had made arrangements to that effect, and bring it to him at Omaha, Neb. The witness, being the owner of an automobile, agreed to do so, and in October, 1917, he made the first trip to St. Joseph in his automobile, and obtained the whisky from this defendant. He was accompanied on this trip by one Ed Davis, and the route selected by him was the Washington Highway, which runs through the state of Kansas. Upon his arrival at St. Joseph, he went to the liquor establishment of the defendant Block, telling him that he had come for a load of whisky for the man in Omaha, who had contracted for 100 cases of whisky; that the defendant replied, "I recollect," or "I understand." He obtained 20 cases of whisky from him, and paid him \$17.50 a case, the money to pay for it having been given to him by the defendant Gaspari, who at the time told him that he wanted it for the purpose of selling it in Omaha.

The whisky purchased from the defendant was not placed in his automobile at Block's establishment, but he told him to go to a livery barn, where it would be delivered to him. As Chinberg was a stranger in St. Joseph the defendant sent one of his employes with him to show him where the barn, where he was to receive the whisky, was located. A short time thereafter the witness went back to the barn and found the whisky there, placed it in his automobile, and carried it to Omaha to be delivered to Gaspari. The same week Gaspari sent him for another load. On that trip he was again accompanied by Ed Davis. It is proper to state that Davis did not testify at the trial, as it was shown that he was then in a hospital, suffering from some wounds he had received in a fight, and was therefore unable to appear in court.

On that trip he purchased again 20 cases of whisky from the defendant, paid for them, and was told to call for them at the livery barn where he received the whisky on the former occasion. Later he went to the barn, found the whisky he had bought from Block there, and carried it to Omaha. When he arrived on that trip at Block's liquor establishment, the defendant Block asked him how everything was in Omaha, and how the road was, and suggested to him that he would find the roads through Missouri better than through Kansas, where the Washington Highway was; but the witness again carried the whisky to Omaha through Kansas.

In November, 1917, Gaspari sent him for a third time to get whisky from Block. On that trip he was again accompanied by Ed Davis and by one Henry Klok. When he came to the defendant's liquor establishment, he asked him for pints, when Block said to him that:

"They must be pretty dry up there (referring to Omaha). You are using more whisky than I am able to keep bottled up in pint bottles; that he could not let him have all the whisky in pint bottles, as Gaspari wanted them, but he could let him have part of them in pint bottles."

He thereupon sold him 11 cases of quarts, 10 cases of pints, and a 10-gallon keg of whisky. Block gave him a statement showing the purchase. Davis and Klok were present at that time. This statement, which was introduced in evidence, he testified was written by Block in his presence and handed to him. He testified to the following conversation with Block at that time:

"I said, 'I came back for another load of whisky for the dago.' He said, 'All right. How much did you want?' and I said, 'Twenty quarts,' and after we got to figuring we took 20 cases and a 3-gallon keg. He instructed his help to load the whisky on a transfer wagon and take it to the barn, and told me to go to the barn the next morning and get it, which I did. It was loaded into my car at the barn."

He received \$100 from Gaspari for each of the three trips that he made. The last load of whisky was seized by the sheriff of Cass county, at Plattsmouth, Neb. He further testified that he did not go to any other wholesale house at St. Joseph, because he was sent by Gaspari to Block's place, although there were a number of wholesale houses in that vicinity.

The witness Klok testified that on his last trip of Chinberg's he went with him to St. Joseph, and to the store of the defendant Block. He then related what took place:

"When we came into the store, Mr. Block greeted us with, 'How are you, boys? How is everything in Omaha?' and Chinberg said, 'I am here for another load for the dago,' and Block said, 'Owing to business conditions, he would have to give him some quarts, and he couldn't give him all pints, and he thought it would be all right with Gaspari.' I saw Mr. Block figure up this paper (identifying the bill or memorandum of the sale of the whisky which had been introduced in evidence by Chinberg), and saw Chinberg pay for the whisky. Mr. Block then told him he would have the whisky down to the barn about 8 o'clock in the morning. The conversation and purchase were in the evening. In the morning we stopped first at Mr. Block's place, and he told us that he hadn't sent the load down to the barn yet. He invited us to take a drink, and told us he would have it down to the barn as soon as possible. 'When we went to the barn, the liquor wasn't there yet; but a little later it was brought there on a truck. That was about 10 or 15 minutes after we had left Block. It was then unloaded from the truck and put into our car, and we started home through Kansas. When we reached Plattsmouth, Neb., we were arrested and the liquor taken from us. They locked us up during the night, and the next morning Chinberg gave bond for both of us, and we went to Omaha, to Mr. Gaspari's house, and we told him we got caught, and he said he had been down to the bridge two or three times trying to locate us."

By stipulation of the parties it was agreed that if Mr. Quinton, the sheriff of Cass county, who had seized the whisky at Plattsmouth, were present he would testify that he seized 20 cases of whisky, one keg of whisky, and one bottle of gin from Chinberg, who was transporting it in an automobile through Plattsmouth, and that the contents were whisky. The sheriff was unable to be present at the trial, and this agreement was entered into by the government and the defendants.

This certainly was sufficient to require the cause to be submitted to the jury.

It is also claimed that there was no evidence that the conspiracy, if there was one, was formed in Cass county, Neb., as charged in the indictment, but could only have been formed in St. Joseph, Mo., as Block never was in Cass county, Neb. But it is sufficient if an overt act was committed in Cass county, although the conspiracy was formed in another state. *Hyde v. Shine*, 199 U. S. 62, 76, 25 Sup. Ct. 760, 50 L. Ed. 90; *De Orozco v. United States*, 237 Fed. 1008, 1013, 151 C. C. A. 70; *Shea v. United States*, 236 Fed. 97, 101, 149 C. C. A. 307.

Other alleged errors, not excepted to at the trial, have been argued by counsel. They have received careful consideration, but they are so clearly without merit that it would serve no useful purpose to prolong this opinion by referring to them.

The record is free from error, and the judgment is affirmed

HOLMES et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 9, 1920. Rehearing Denied June 6, 1920.)

No. 3449.

1. Criminal law ⚡13—Statute punishing stealing of arms void for uncertainty of punishment.

Criminal Code, § 36 (Comp. St. § 10200), providing that whoever shall steal arms or stores, etc., furnished for the army or navy, "shall be punished as prescribed in the preceding section," held inoperative as a criminal statute for uncertainty as to the punishment prescribed; the preceding section prescribing different punishments for different offenses therein defined.

2. Conspiracy ⚡47—Larceny ⚡55—Evidence sustaining conviction for conspiracy and stealing arms.

A conviction for conspiracy to steal arms furnished for the army, and for stealing such arms, held sustained by evidence tending to show that defendant, through another, induced soldiers to commit the thefts for purpose of procuring the arms to be illegally carried by him into Mexico.

3. Conspiracy ⚡47—Sufficiency of evidence to sustain charge.

Evidence held to sustain a conviction for conspiracy to export arms to Mexico without license.

4. Criminal law ⚡1169 (5)—No error in admitting evidence competent as to some defendants, where court instructed jury as to bearing on other defendants.

Error cannot be predicated on the admission of evidence which is competent and admissible as to some of the defendants being tried together, where the jury is correctly instructed as to its bearing on the other defendants.

In Error to the District Court of the United States for the Western District of Texas; William R. Smith, Judge.

Criminal prosecution by the United States against George Holmes and Frank Miller. Judgment of conviction, and defendants bring error. Affirmed.

Certiorari denied 254 U. S. —, 41 Sup. Ct. 13, 65 L. Ed. —.

Leander A. Dale and F. G. Morris, both of El Paso, Tex., for plaintiffs in error.

W. H. Fryer, Asst. U. S. Atty., and Edmund B. Elfers, Sp. Asst. U. S. Atty., both of El Paso, Tex.

Before WALKER, Circuit Judge, and CALL and HUTCHESON, District Judges.

CALL, District Judge. The plaintiffs in error, with three other persons, were tried in the United States District Court for the Western District of Texas at the April term, 1919, of the El Paso Division, on two indictments consolidated. One of the indictments charged in the first count a conspiracy to steal certain arms and ammunition, the property of the United States; in the second count a conspiracy to export arms and ammunition without a license to export same. The other indictment charged the theft of certain described arms and ammunition. On the trial all the defendants were convicted. The date alleged in the conspiracy counts is the 17th day of December, 1918. The dates alleged in the theft counts are December 18th, 22d, and 23d, respectively, in the first, second, and third counts. Holmes and Miller pleaded not guilty, and this writ of error was sued out by them, the other three defendants not joining.

The government's testimony shows that Miller, Stalder, Harrell, and Minahan were acting together in stealing certain arms and ammunition from supply tents of certain companies of United States troops, and tendency of that testimony is to show that Holmes was engaged in running stuff into Mexico to be used by Villa. It also tends to prove that Miller was cognizant of Holmes' plans, and that the other defendants were also informed on this point, and that the arms and ammunitions were stolen for and delivered to Holmes after the thefts, under such conditions as would charge them with such knowledge. Two of the defendants, Stalder and Minahan, were enlisted men, wearing the uniforms of their respective branches of the service. Holmes was cognizant of the fact, at least as to one of them. The relations between Holmes and Miller negative the idea that Holmes was not fully informed of the transactions. The testimony of the conversations with Miller by the other defendants indicates his full knowledge and participation in Holmes' plans.

There are five points urged in brief for Holmes; separate briefs being filed by the two plaintiffs in error. A discussion of the points urged in the brief for Holmes will dispose also of the points urged in behalf of Miller.

[1] The first contention is that defendants were indicted for a conspiracy to violate, and the violation of, section 47 of the Penal Code (Comp. St. § 10214) in the first count of one indictment and the three counts of the other indictment, that the proof showed a violation, if any, of section 36 of the Penal Code (sec. 10200) and that section 36, being a special provision as to certain specified property, supersedes section 47, which is general, covering all property. This principle is recognized by the court, and, if the contention of plaintiffs in error

can be applied in this case, error was committed by the trial court, and the jury should have been instructed as requested.

The trial court took the view that section 36 was inoperative as a criminal statute because of the indefiniteness of the punishment prescribed; in fact, that no punishment was in fact prescribed. Section 36 of the Penal Code reads as follows:

"Whoever shall steal, embezzle or knowingly apply to his own use or unlawfully sell, convey or dispose of any ordnance, arms, ammunition, clothing, subsistence, stores, money or other property of the United States furnished or to be used for the military or naval service, shall be punished as prescribed in the preceding section."

Section 35 (Comp. St. § 10199) defines a number of offenses for making false claims, etc., by officers civil or military against the United States, and prescribes the punishment therefor of a fine not exceeding \$5,000, or imprisonment of not more than five years, or both. It then proceeds to define certain other crimes, prohibiting the purchase or receiving in pledge of certain obligations, etc., from soldiers and sailors, etc., and affixes as punishment to these last-mentioned offenses a fine of not more than \$500 and imprisonment of not more than two years.

In order that the contention of plaintiffs in error should prevail, it is necessary that section 36 should be a valid, existing law. It is undoubtedly the law that a valid criminal statute should be certain in its terms, and not leave uncertain the acts intended to be prohibited or the punishment to be inflicted thereunder. The punishment in the event of conviction must be as certain as any other provision of the statute. 16 Corpus Juris, 68. In the instant case, who can say what punishment the lawmakers intended? The section itself is silent as to that punishment, and refers us to section 35 to ascertain it. When we look at the last-named section, we find two punishments prescribed of very different severity: One, a fine of not more than \$5,000 or imprisonment of five years, or both; and the other a fine of not more than \$500 and imprisonment of not more than two years. It is contended for both plaintiffs in error that the lesser punishment must have been intended, because the subject-matter of the last portion of the section is germane to the subject treated of in section 36. But this contention is in our judgment untenable. In a criminal statute the citizen must not be left in uncertainty or to speculation or argument as to what acts constitute a violation, or what punishment, if any, is visited upon a violation when the terms are definite. There was no error in the view taken by the trial court.

[2] It was also urged on the part of Holmes that the charge should have been given, for the reason that there was no evidence to convict him of the charge of conspiracy to steal arms and ammunition, and no evidence connecting him with the theft. A conspiracy, in so far as this case is concerned, may be defined to be a combination or agreement between two or more persons to violate a law of the United States, and doing by one or more of the parties of an overt act or acts to carry such design into effect. No formal agreement between the parties to do the act charged is necessary. It is sufficient that the minds of the parties meet understandingly, so as to bring about an intelligent and

deliberate agreement to commit the offense charged, although such agreement is not manifested by any formal words. 12 Corpus Juris, 544. A person coming into a conspiracy after its formation is deemed in law a party to all acts done by any of the other parties, either before or after, in furtherance of the common design. 12 Corpus Juris, 579. This combination, this acting from a common design, may, and in most cases must, be shown by the circumstances, acts of the parties, etc., of the particular case, from which the common purpose is deduced. There must be participation, intentional, in the transaction, with a view to the accomplishment of the common design. Mere knowledge or acquiescence, without this participation, is not sufficient to make one a conspirator.

Testing this case by these considerations, could the court have charged the jury that there was no evidence before them from which they could find that Holmes was guilty of the conspiracy charged, or connecting him with the thefts proven? We think not. The testimony, after a careful consideration, impresses us with the view that Holmes, through Miller, induced the two soldiers to commit the thefts for the purpose of procuring the arms and ammunition, with the intention of exporting it to Mexico without license. It cannot well be said, in the light of Holmes' knowledge that the parties from whom the arms and ammunition were to be procured were United States soldiers, enlisted men, men who were in position to commit the thefts, and the secrecy of deliveries, the hiding after delivery, his knowledge before such deliveries and arrangements to receive them, his dealings with Miller, payment of moneys, his statement before at least one of the soldiers of his desire to procure arms, etc., all point indubitably to our minds to his active participation in the conspiracy to steal, and inducing and procuring the soldiers to commit the thefts, and this would make him guilty under the first count for conspiracy and the counts for the thefts, provided the jury believed the testimony. There was no error in refusing the charges requested.

[3] It is next urged on behalf of Holmes that the court should have instructed the jury that he could not be convicted on the second count, charging conspiracy to export arms to Mexico without license. As we understand the contention, it is not questioned that this was the intention of Holmes, but that there was no proof to show that it was participated in by any of the other defendants. This is untenable. The statements of Miller show his knowledge of Holmes' intentions, the object for which the arms, etc., were procured, etc. All of the defendants seem to have been informed of the purpose and destination of the arms, and by their acts were aiding in accomplishing that object. It is of no moment that the object was defeated by the action of the authorities in recovering them before actual exportation. There was no error in submitting the second count to the jury.

What we say above also disposes of the second contention on the part of Miller.

[4] This disposes of all the contentions of Holmes, except his sundry objections reserved in the record to testimony of witnesses of what Miller had said during the continuance of the conspiracy and the state-

ment made by Miller after his arrest. The court recognized the correctness of Holmes' contention, and charged the jury specifically on the points. The testimony in each case was admissible against the defendant Miller. Its effect and bearing upon Holmes could be controlled only in the court's charge, and was done, and correctly. Error cannot be predicated upon the admission of competent and admissible testimony as to some of the defendants, especially where the court correctly instructs the jury as to its bearing upon the question of the guilt or innocence of other defendants.

Finding no reversible error, the judgment is affirmed.

BRAY et al. v. UNITED STATES FIDELITY & GUARANTY CO.

In re EVANSVILLE CONTRACT CO.

(Circuit Court of Appeals, Fourth Circuit. July 6, 1920.)

No. 1782.

1. Bankruptcy ⚡269—Denial of fraud in sale of claims conclusive, without proof, unless contradicted by admissions.

An answer by the trustee in bankruptcy and the buyer from him, denying fraud in the sale of claims of the bankrupt, is conclusive, in the absence of proof to the contrary, unless other admissions in the answer established fraud.

2. Bankruptcy ⚡269—Evidence held not to show fraud in sale of claims.

Evidence that a trustee sold claims by the bankrupt against the United States on which suits were pending in the Court of Claims, after notice was given to all the creditors, held insufficient to show fraud, though the buyer was the former manager of the bankrupt, and judgments had already been rendered on some of the claims for more than the amount received, subject to appeal by the United States.

3. Bankruptcy ⚡269—Creditor can set aside trustee's sale after 7 years' delay only for clear fraud.

Where a creditor had knowledge of the facts which he claimed showed fraud by the trustee in making a sale of the bankrupt's claims against the United States, or had notice of the creditors' meeting at which those facts were fully disclosed, he cannot set aside the sale for the fraud on a petition filed 7 years thereafter, unless there was the most cogent and convincing evidence of fraud.

4. Bankruptcy ⚡269—Delay in seeking avoidance of trustee's sale held not excused.

Delay by a creditor in seeking to avoid a sale by the bankrupt's trustees of the bankrupt's claims against the government is not excused by the creditor's ignorance of a letter from the trustee to the referee, stating that judgments subject to appeal had been recovered on some of the claims for an amount in excess of the purchase price, where the creditor had notice of the meeting at which the fact stated in the letter was made known to the creditors.

5. Bankruptcy ⚡263—Knowledge by former manager of bankrupt does not preclude buying claims.

The fact that the buyer of claims of a bankrupt against the United States was the former manager of the bankrupt, who had more knowledge of the merit of the claims and more confidence of ultimate success than the creditors, does not require the sale to be set aside, where there was

no fraud or concealment, and the creditors had opportunity to ascertain for themselves the situation of the claims.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Bankruptcy proceedings against the Evansville Contract Company. From a decree granting the petition of the United States Fidelity & Guaranty Company to set aside as fraudulent a sale of claims by the bankrupt, made by M. J. Bray, as trustee in bankruptcy, to Jacob Eichel, the trustee and the buyer appeal. Reversed and remanded, with directions.

George W. Johnson, of Parkersburg, W. Va., for appellants.

B. M. Ambler, of Parkersburg, W. Va. (Van Winkle & Ambler, of Parkersburg, W. Va., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. On February 27, 1904, the Evansville Contract Company, an Indiana corporation, was adjudicated bankrupt by the District Court for the Northern District of West Virginia. The trustees appointed were the appellant M. J. Bray and two others, of whom one died and the other resigned, so that in March, 1906, Bray became the sole trustee. Among the assets of the bankrupt which passed to the trustees were certain claims against the United States, growing out of previous transactions with the government, on which suits had been brought and were then pending in the Court of Claims. On April 30, 1908, the referee confirmed a sale of these claims to Jacob Eichel, the other appellant, for the sum of \$6,500, and the relinquishment by him of a claim of \$700 for services rendered and expenses incurred for the bankrupt estate.

In 1915, 7 years later, the United States Fidelity & Guaranty Company, appellee here, by petitions filed with the referee, asked that this sale be set aside, on the ground that it had been procured by fraud and collusion on the part of Bray and Eichel, and that they be required to pay into court for the benefit of creditors the difference between the amount for which the claims were sold to Eichel and the amounts subsequently collected on the judgments rendered by the Court of Claims against the United States. In his report and order of February 24, 1919, the referee in substance granted the relief prayed for, by sustaining the charge of fraud, and directing Bray and Eichel to pay to the estate the sum of \$17,387.78, with interest from July 30, 1912. By decree of September 22, 1919, the court below confirmed the report and order of the referee. Bray and Eichel appeal.

In order to decide the controversy on the merits, we put aside all other questions and proceed to inquire whether the decision under review is warranted by the evidence. Were the appellants guilty of the fraud of which they stand accused? It is to be observed at the outset that no oral testimony was introduced, and no witness offered for examination, at the hearing before the referee. On this issue of fraud and collusion the proofs consist wholly of what appears in the several

petitions filed by the appellee, in the sworn answers of Bray and Eichel, and in other papers of record in the bankruptcy proceeding. It is also to be noted that these pleadings of the parties, to so describe them, which set forth their respective contentions, disclose no substantial dispute as to the demonstrative facts; that is, facts which could be testified to by a witness or evidenced by a written document. In other words, there is little, if any, disagreement as to what actually happened prior to and in connection with the sale of the claims to Eichel. It follows that the wrongdoing asserted, if any there was, is purely a matter of inference from facts that are not in contradiction. This prepares us for taking up somewhat in detail the transaction in question.

Bray and Eichel both lived in Evansville, and their relations were undoubtedly friendly. For some years, perhaps from the first, Eichel had been the president and general manager of the Evansville Contract Company, and was presumably familiar with the affairs of that concern, including its contracts with the government, which were in course of performance when the bankruptcy occurred, and its claims against the United States then pending in the Court of Claims. By order of April 11, 1904, the trustees were authorized to complete these unfinished contracts with the government, and for that purpose to employ Eichel at a salary of \$500 a month. In their petition for this order the trustees urged the employment of Eichel on the ground that it would be impossible without his aid to carry on the work of completing the contracts, or to properly prepare for trial the claims against the United States. He was in fact employed and paid for 13 months, that is, until some time in May, 1905, when the contracts were practically completed, as we understand, and his services terminated accordingly. From that time, which was nearly 3 years before his purchase of the claims, he had nothing whatever to do with the administration of the bankrupt estate and sustained no fiduciary relation thereto. In the meantime, however, in February, 1905, the other trustees, Bray being absent, made a general report to the referee of the situation of the estate, in the course of which it is briefly stated, regarding the suits in the Court of Claims, that the Washington attorneys say in a recent letter:

"That they can form no estimate either as to the amount we can hope to recover or as to the time when we can hope to recover."

On September 1, 1906, Bray, then sole trustee, filed a petition with the referee, which set forth in substance that practically nothing remained to be done in the administration of the estate, except to prosecute the claims pending in the Court of Claims, a descriptive list of which was annexed; that it was impossible to tell when the suits would be decided; that to await their decision might delay for years the settlement of the estate; and that meanwhile considerable expense would be incurred for office rent, looking up witnesses, taking depositions, and the like. He therefore asked for authority to sell these claims, and all other choses in action, at public auction, after such notice as might be directed. The referee thereupon called a meeting of creditors to pass on this petition, and such meeting was held on the 11th of Septem-

ber, the appellee being represented by its attorney, Mr. Ambler. Bray was interrogated in regard to the claims and filed his deposition. On consideration of the matter, no one objecting, an order was made for a sale of the claims at public auction on the 29th of September, and prescribing the notice to be given. On the day named the claims were sold to Eichel for \$3,000, he being the only bidder. On the 17th of October objections to the sale were filed and its confirmation opposed by two creditors, on the ground that the price was inadequate, and that the claims should not be sold to the former president of the bankrupt company until the creditors were put in possession of all his information regarding the same, "and the full details of all the evidence relating thereto are laid before the referee in bankruptcy."

Three days later Bray filed a sworn answer to these objections, in which he states, among other things, that the sale was advertised in the manner and for the length of time required by the order of the referee; that the sale was open and fair in all respects; that Eichel was the only bidder; that he "is anxious to realize all that can be realized out of these claims, but not having sufficient foreknowledge to guess with any degree of accuracy as to how a law suit will terminate, and more especially how half a dozen or more law suits will terminate, he has no recommendation to make to this court as to the confirmation or rejection of this sale, but he does desire, however, before the court acts in this matter, to have it consider the following facts as bearing thereon"; that all the claims in question had been passed upon adversely by the engineers in charge of the works out of which the claims arose, by the Chief Engineer of the United States, and by the Comptroller of the Treasury; that the taking of testimony had not been concluded in two of the suits and not commenced in a third; that in the remaining cases the testimony was supposed to be complete, but there was no assurance that further testimony would not be taken by one side or the other; that the taking of such testimony was expensive for reasons mentioned; that the aggregate amount of the claims on their face was \$125,818.50; that the attorneys prosecuting the same had "contracts for 20 per cent. and 25 per cent. of the recovery"; and that the sale should not be set aside unless the objecting creditors gave bond to protect the estate against loss.

On these objections and the answer of Bray there was a hearing before the referee, with the result that two lawyers were appointed, one for the trustee and one for the objecting creditors, to investigate the condition of the claims and report thereon. These gentlemen soon afterwards went to Washington, made their examination, and on November 15th filed a report which describes generally the status of the claims, expresses the opinion that "a considerable portion of said claims so matured appear to be meritorious and seem to deserve a favorable consideration and determination by the court, but of course we do not pretend by this statement to guarantee a judgment in favor of the claimant as to any of these matters," and recommends that the sale be not confirmed. Following this was an order refusing confirmation and setting aside the sale.

In January, 1907, Bray filed another petition with the referee, briefly reciting the prior sale and its rejection, stating that the holders of a large amount of the proven debts had requested that a meeting of creditors be called to determine whether the claims should be again offered for sale, with the view of winding up the trust, and asking the court to decide whether such sale should be ordered at that time or deferred until after decision by the Court of Claims. The trustee also set forth the existing situation of the suits as to the taking of depositions, printing testimony, filing briefs, and the like, and added:

"That a copy of the entire printed records in all of these cases pending in the Court of Claims is now in the hands of the attorney for this trustee, and that any creditor of this estate, or the attorney of any such creditor, who may desire to inspect these records so as to inform himself as to the status of these several cases, of their amounts and the possibility or probability of recovery upon any of them, can have access to said records upon application to said attorney," and such investigation was invited, "so that creditors may form their own judgment as to the value of these claims, and be prepared to bid in the event another sale is ordered, or be prepared to vote intelligently upon the question as to whether there shall be another sale ordered at this time."

For reasons not disclosed by the record, no meeting of creditors was then called or other action taken on this petition. Indeed, nothing further appears to have been done about these claims until the latter part of March, 1908, when Eichel wrote the referee that he would pay \$5,000 for them. Thereupon, under date of April 1st, the referee addressed a letter to all the attorneys representing creditors of the estate, informing them of this offer and asking their advice as to its acceptance. The same information was sent to Bray, the trustee, who answered on the 5th of April as follows:

"Yours of April 1st reached me just as I was leaving home. Through our attorneys, Dudley & Michener, I learn that judgments have been rendered in our favor in three cases amounting to \$9,730, subject to appeal by the government. After all fees and expenses are paid, we ought to have something over \$5,000 left. In view of the above judgments I think Mr. Eichel might raise his bid. I hardly think it worth going to the expense of calling a meeting of the creditors until you are ready to make a decision, as to the moneys now on hand, which I sincerely hope will have a tendency to draw the warring factions together, and enable us to close up this long drawn out piece of business."

One of the letters to the lawyers was addressed to Mr. Ambler, appellee's attorney, who returned on April 3d the following reply:

"I represent no interest whatever in that estate except the United States Fidelity & Guaranty Company, having resigned all connection with other claims. My client is only a surety, and holds a contract or bond of indemnity executed by certain banks of Indiana and Parkersburg, and will rely upon recourse against those banks for any liability that may be imposed. These facts are shown by records pending before the referee, and before the District and Circuit Courts of the United States. In the circumstances the United States Fidelity & Guaranty Company is not in position, nor has it authorized its counsel to make any agreement that could affect or release funds or claims to which indemnitors have a right to resort, and for that reason, we beg to be excused from expressing an opinion as to the probability that the offer would be accepted. My clients will neither accept nor decline, for the reason that it concerns the indemnitor banks rather than the Fidelity Company;

but you will permit me to say that, before your appointment, some of the creditors thought that matters were being somewhat juggled in the handling of these claims, and it would be well now to hold a meeting of the creditors to have decisive action taken upon that subject."

On due notice to creditors, including the appellee, a meeting was called for the 29th of April, but adjourned to and actually held the next day. At that meeting Eichel submitted a written offer for the claims of \$6,500, and a release of his claim of \$700 for services rendered and expenses incurred for the estate. A list of the claims, showing their respective amounts and the contracts out of which they severally arose, was annexed to the offer. The action taken appears of record as follows:

"After having considered the said proposition, the creditors present, as well as the attorneys present, representing sundry creditors (except Jacob Eichel, who declined to vote on account of being an interested party), unanimously accepted said proposition and directed the trustee to accept the said offer on the terms and conditions contained in said writing, and the court being of the opinion that it is and will be to the best interest of the estate to dispose of said claims on the terms named in said written proposition, it is adjudged, ordered, and decreed that said proposition, and its acceptance by the creditors present and represented, be and the same is hereby confirmed, and the trustee is hereby ordered and directed to execute to the said Jacob Eichel a proper and legal assignment of the said claims, the same to be without recourse, and on the terms set forth in the written proposition of said Jacob Eichel, the same to be executed and delivered to the said Eichel by the said trustee upon the payment of the sum of \$6,500 by the said Jacob Eichel to the said M. J. Bray, trustee."

With this summary of the incidents leading up to and culminating in the sale of the claims to Eichel, we come to consider the grounds upon which that sale is attacked by the appellee. The bankruptcy of the Evansville Contract Company brought on many complications, and much litigation followed, of which the present proceeding is but a minor feature. Indeed, the greater part of the record relates to matters which have no appreciable bearing upon the controversy now before us. In July, 1912, the appellee filed a lengthy petition, which purports to amend a prior petition of February, 1906, but which contains no reference to the sale 4 years before of these claims against the United States.

Three years later, however, by petition filed in June, 1915, the appellee alleges the recent discovery of misappropriations by Bray and Eichel of thousands of dollars belonging to the estate, sets up the facts above stated as to the purchase of the claims by Eichel, avers that he controlled a majority of the creditors voting for the order of April 30, 1908, that appellee was not present or represented at the meeting held on that day, that no information was given of the value or condition of the claims, that important facts were concealed, which did not come to the knowledge of appellee until 1915, that Bray and Eichel violated their fiduciary duties and were guilty of actual fraud, gives the dates and amounts of the judgments rendered by the Court of Claims, and the dates of the payment thereof to Bray, and prays that the sale to Eichel be set aside, that Bray and Eichel answer the interrogatories addressed to them in regard to the moneys received from the govern-

ment, and that they be required to account for and pay over the same to the bankrupt estate.

A motion by Eichel to dismiss the petitions was overruled, and thereupon he and Bray filed separate answers under oath, in which each of them reviews the transaction in great detail, admits the facts above set forth regarding the sale of the claims, explains certain matters alleged to indicate wrongdoing, and denies every charge or insinuation of concealment, collusion, fraud, or other improper conduct. Among other things, Eichel says:

"That the recovery on said judgment for \$9,700 was subjected to 20 per cent. discount for attorneys' fees, so that the net recovery thereon was \$7,740, in round numbers; that said judgment was subjected to appeal by the government, and the right of appeal still existed; that said purchase was not the purchase of this one claim, but of all claims against the government; that all claims against the government were subject to a contract with Dudley & Michener, by which said estate was compelled to prosecute said claims to final judgment at the expense of said estate, attorney's fees alone excepted; that the prosecution of said claims could not be dropped without the consent of said attorneys, and without paying them just compensation for the services already rendered by them in prosecuting said claims; that this respondent offered for said claims \$7,200, in round numbers, with the understanding that this respondent then got behind said claims and became personally responsible for the prosecution thereof, and the expense of all litigation incurred in the prosecution thereof; and this respondent now says that in the further prosecution of said claims he spent more than 2 years of his own time without further compensation than the additional recoveries obtained by him on said claims, and that he also expended in the further prosecution of said claims the sum of \$3,000 or \$4,000, which he risked and which said estate was unwilling to risk in the further prosecution thereof; and this respondent says that he had no greater assurance than any one else had that further judgments would be rendered in favor of said bankrupt's estate, as the result of further prosecution of said claims.

"This respondent again denies that at the time of the purchase of said claims he sustained any relation of trust or confidence whatsoever towards the estate of said bankrupt, or towards any of the parties interested therein or connected therewith, and respondent says in this respect that the records of the bankruptcy proceedings plainly show that this respondent was not in the employ of said trustees in bankruptcy in any manner or for any purpose after February 12, 1905. * * * This respondent says that the purchase of said claims was a speculation pure and simple; that time and money had to be expended in prosecuting said claims, and that there was no assurance that there would be any recovery on any more of them; that it was a speculation in which money might be lost or won, and this respondent was willing to take the risk of losing money therein, and the creditors of said estate were not willing to take said risk; and this respondent now says that while judgments were thereafter rendered in favor of said bankrupt's estate, on some of said claims, yet judgment was rendered against said bankrupt's estate on several of said claims, and that before judgment was finally rendered on all of said claims this respondent spent several thousand dollars out of his own pocket in procuring witnesses and in paying their traveling expenses and the traveling expenses of counsel, as well as his own expenses, and in otherwise maturing said claims for hearing, and also spent a great deal of valuable time, for all of which this respondent would not have been reimbursed if he had charged at the rate of \$500 per month for his said services and the money so expended."

And Bray says in his answer, among other things:

"This respondent says that the said Jacob Eichel was not in the employ of this trustee in bankruptcy, or of the estate of said bankrupt, in any manner whatsoever, in the year 1906, or in the year 1907, or in the year 1908, or in

any subsequent year, and that it is not true that the said Jacob Eichel sustained any relation of employment or of confidence or trust to said bankrupt's estate on the 30th day of April, 1908, when he purchased the claims against the United States government and the Monongahela River Consolidated Coal & Coke Company, mentioned in the fourteenth paragraph of said petition. * * * This respondent says that it was known to the referee in bankruptcy at the time of said creditors' meeting on the 30th day of April, 1908, and was known to the creditors present and represented at said meeting, that said judgment had been rendered; and this respondent says that said referee in bankruptcy and the creditors of said bankrupt had been kept fully advised of the status of the litigation pending in the Court of Claims at Washington on said claims, and of the prospects of recovery thereon, as fully and completely as any one could be advised of such matters."

In January, 1917, the appellee filed another petition, which, so far as it relates to the present controversy, is in some sense a replication to the answers of Bray and Eichel, and in part a repetition of the original charges, and in which it is prayed that each of them be required to make specific answers to certain interrogatories respecting the amounts of money received from the several judgments against the United States, and the disposition made of the same. To this petition separate answers under oath were filed by Bray and Eichel, each of which answers seriatim the interrogatories propounded and repeats a denial of the charges of fraud and collusion. In Bray's answer it is stated, as alleged in appellee's petitions of June, 1915, that he received on the judgments mentioned, on August 12, 1908, \$9,725.10, on July 16, 1910, \$14,381.90, and on September 23, 1910, \$1,639.57, or a total of \$25,746.57, and no more. His answer also contains an itemized statement of the payment of this total, showing that \$7,780.08 was paid to Eichel, \$5,231.33 to Dudley & Michener, and the balance applied on an indebtedness of Eichel to Bray individually, the nature and circumstances of which he explains.

Eichel's answer, in addition to answering seriatim the specific interrogatories, repeats his denial of any fraud, concealment or collusion, and prays that his former answer—

"be taken and read as an answer to this latest petition, and this defendant denies each and every allegation in said petition contained, not admitted in this answer or in said answer to said petition of the 15th day of June, 1915."

It was on these petitions and answers, the nature and contents of which we have thus outlined, and without the testimony of witnesses or other evidence, that the referee made and the court below confirmed the order which convicts the appellants of fraud, sets aside the sale to Eichel in 1908, and directs the payment by him and Bray of many thousands of dollars to the bankrupt estate. It would extend this opinion to undue and unprofitable length to discuss in detail the somewhat complicated facts involved, and we shall attempt little more than a general statement of the reasons which impel us to a different conclusion.

[1, 2] In the first place, it is to be noted that all the charges of fraud, collusion, concealment, misappropriation, and the like, are met with sworn denials which are positive, unqualified, and responsive to the allegations of the petitions in that regard. This being so, and the appellee offering no evidence, the charges fall for want of supporting

proof. *Vigel v. Hopp*, 104 U. S. 441, 26 L. Ed. 765; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678. It follows, therefore, that the asserted fraud must be found, if found at all, in the admissions made by Bray and Eichel in their several answers. But what is true of the legal effect of denials is equally true of answering explanations of facts and circumstances claimed to justify the inference of wrongdoing. If the explanations are adequate, not improbable, or inconsistent with honest conduct, they must be accepted as truthful, in the absence of any evidence of their falsity; and reading the answers of the appellants in the light of this principle, we are unable to find therein any substantial basis for the accusations of the appellee.

For example, much is sought to be made of the fact that Eichel did not pay over the \$6,500 for which he bought the claims in April, 1908, although the order provided that they should be assigned to him on payment of the purchase price. Unexplained, this might have some adverse significance. But Bray says, and his statement is nowhere discredited, that he overlooked this provision of the order, and supposed that the creditors had accepted and the referee confirmed the offer submitted by Eichel in writing, which was to pay the cash into court, "or as ordered by the referee on the day that a decree of distribution of the funds to the credit of this proceeding or suit is made and entered by the referee." When in July following attention was called to the actual terms of the order, Bray at once charged himself in account with the \$6,500 and deposited the money to his credit as trustee in one of the designated banks. It seems to us that this is a reasonable explanation, and that it serves to relieve the transaction of any unfavorable bearing. The bankrupt estate got the full amount of Eichel's offer, that amount was included in the funds distributed, and whether Eichel paid the \$6,500 himself, or Bray paid it for him, is of no practical importance. And we have some difficulty in understanding why the referee now stresses this incident as indicating fraudulent purpose, when the record shows that he himself accepted the explanation at the time it was made, as did all the creditors at the July meeting, and that he specifically approved of Bray's action in the order then entered.

Another illustration: It is broadly charged, and the referee finds, that Bray appropriated to his own use the sum of \$12,735.19 from the moneys collected on the judgments against the United States. If this were true, it would go far to sustain the appellee's contention. But in his answer to the amended petition, in May, 1917, responding to a specific interrogatory in that petition, Bray gives a detailed statement by dates and amounts of the disposition made by him of the total sum received. He admits that he retained \$12,735.19 of that total and applied the same on an obligation of Eichel, the nature and origin of which he explains; and he shows that the money he is accused of appropriating was actually used by Eichel's direction to pay Eichel's debt. And Bray had a perfect right to do this, if the facts were as he under oath alleges. No attempt was made to show that his statement in this regard was false, nor is it in any respect discredited, and therefore, for

the purposes now in hand, it must be accepted as truthful. In short, the charge that Bray shared in the profit which Eichel realized on the claims is wholly unsupported by proof. Moreover, and this seems to have been ignored by the referee, if there was a fair and valid sale of the claims to Eichel, the benefit of the bargain belonged to him, and what was done with the money recovered is not the concern of the creditors or the appellee.

And so of other circumstances which are put forward as evidence of a conspiracy to defraud the bankrupt estate. If the statement of them in the petitions can be said to warrant suspicion, that suspicion disappears when the denials and explanations of the answers are taken into account and their legal effect considered. It is only repeating to say that on the record as a whole the charges of appellee are unsustained by proof.

In the second place, we are of opinion that the appellee is not entitled to set aside the sale to Eichel, because it knew at the time, or had the opportunity of knowing, all the facts then available respecting these claims, and the status of the suits pending thereon in the Court of Claims. The appellee was a party to the bankrupt proceedings, and had due notice of all meetings of creditors. Its attorney was present at the meeting on the 11th of September, 1906, when a sale of the claims at auction was ordered. The trustee's report and application for leave to sell had been filed with the referee, and its contents were presumably known to all those in attendance. Attached to that report was a list of the claims, showing the amount of each and the several contracts out of which they arose. The trustee was interrogated, his deposition filed, and a sale agreed to without objection. In March, 1908, the referee received the offer of Eichel to pay \$5,000 for the claims, and thereupon wrote to all the attorneys of record, including the appellee's attorney, for their views as to accepting the offer. Mr. Ambler's letter above quoted shows that the appellee was then relying, as the records of this court show it is still relying, on the bond of indemnity mentioned by him, and it is not doubtful that the appellee at that time was quite indifferent as to how, or when, or at what price the claims were sold, or whether they were sold at all. But a meeting was called, as Mr. Ambler advised, of which the appellee was duly notified, and it was at that meeting that Eichel's later and increased offer was unanimously accepted by the creditors and confirmed by the referee.

[3] In short, it is evident that all the creditors and the appellee were aware of these claims and the suits pending thereon, and had opportunity to make any desired investigation, for more than a year and a half before the sale to Eichel; and the sale was not then made in haste or without consideration by those who cared to be concerned. To annul a judicial sale made under such circumstances, at the instance of a party that so long regarded the matter with indifference and took no steps to that end for nearly 7 years, could only be justified by the most cogent and convincing evidence of fraud; and to our minds no such evidence has been produced.

[4] The appellee seeks to excuse the delay by alleging that it did not learn until 1915 of Bray's letter to the referee, under date of April 5,

1908, informing him of the judgments shortly before recovered on three of the claims, and suggesting, therefore, that Eichel should raise his bid. But the obvious answer to this plea of ignorance is that it might have known and would have known of that letter and its contents, if it had attended the meeting on the 30th of April, of which it had due notice. The referee says in his report "that on April 5, 1908, said M. J. Bray had written to the referee that a judgment had been rendered in favor of the trustee amounting to \$9,730.00, subject to appeal by the government," and suggesting, as just stated, that Eichel should increase his offer. It must be presumed that this letter, or at least the information it contained, was submitted at that meeting. To intimate otherwise is in effect to charge the referee with concealment of important facts. And here again we are unable to understand why the referee should say in his findings that "there is no evidence that this fact had been communicated or known to any party in interest except the said Bray or Eichel." But the referee himself knew it; for he states in the same paragraph that he had received Bray's letter. Further comment seems unnecessary. We must hold that the appellee is estopped from questioning the validity of the sale to Eichel by its failure to investigate when it had the opportunity.

[5] It is undoubtedly the fact that Eichel, who had been for years the manager of the bankrupt concern, knew more about these claims than the creditors or the appellee, and had greater confidence that the pending suits would be successful; but such knowledge on his part was an advantage which rightfully belonged to him, and he was not thereby debarred from buying the claims, if in so doing he acted fairly and without deception. It stands uncontradicted that he had not been in the employ of the trustee or otherwise in any fiduciary relation to the estate for some 3 years before the claims were purchased; and for aught we can see he was as much at liberty to bid on the claims and become their owner as was any creditor or outside party. It was more or less a speculative venture, to say the least, and when all the circumstances are taken into account it cannot be said that he made an unconscionable bargain. True, a judgment had been recovered on three of the claims which would net about the amount of his offer, and if that judgment were paid without further contest he stood to win whatever more he might get by prosecuting the other suits. But all this was known to the creditors when they voted to accept his proposition. Since the government might take an appeal, and it is a matter of common knowledge that the government frequently appeals from adverse judgments, they may well have thought that the trustee was making a fortunate sale, as in that case there would be at best considerable delay and the risk of reversal; and clearly the sale is not to be set aside because that judgment was paid without appeal, and because other judgments were afterwards recovered, though at considerable expense and after 2 years more of litigation. It is enough to say, without further discussion, that from whatever point of view the case is considered it seems manifestly to lack that clear and convincing proof which is always necessary to establish a charge of fraud.

The decree below will be reversed, and the cause remanded, with in-

structions to dismiss the petitions so far as they seek to set aside the sale in question and to obtain a personal judgment against the appellants.

Reversed

OLIVER v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 6, 1920.)

No. 1745.

1. Internal revenue § 2—Harrison Narcotic Act is constitutional.

The Harrison Narcotic Act (Comp. St. §§ 6287g-6287q), forbidding the sale of preparations of opium not for use as a medicine, without having paid the tax therein required, is constitutional.

2. Indictment and information § 111(1)—Indictment need not negative exceptions to Harrison Narcotic Act.

Under Harrison Narcotic Act, § 8 (Comp. St. § 6287n), the indictment need not negative the exemptions from the act, so that an indictment for sale of a preparation containing more than the specified minimum of opium, substantially in the language of section 6 (Comp. St. § 6287l), was not only sufficient, but was unnecessarily specific in negating the exception of sale for medicinal purposes by alleging the sale was not as medicine, but for the purpose of evading the act.

3. Internal revenue § 47—Evidence held to warrant submission to jury of question of intent to evade Narcotic Act.

In a prosecution for the sale of a preparation containing opium without a license, contrary to Harrison Narcotic Act, § 6 (Comp. St. § 6287l), evidence that sales were knowingly made to drug addicts *held* sufficient to go to the jury on the question of intent by defendant to evade the provisions of the act.

4. Internal revenue § 47—Charge that Harrison Drug Act was to discourage trade held not error.

In a prosecution for violation of the Harrison Narcotic Act (Comp. St. §§ 6287g-6287q), a charge that the purposes of the act were, first, to obtain a license tax, and incidentally to prevent sales being made to addicts, was not error.

5. Criminal law § 1153(2)—Determination of competency of child witness is in trial court's discretion.

The determination of the competency of a child to testify is very largely intrusted to the discretion of the trial court, and its ruling will not be reviewed, in the absence of abuse of discretion.

6. Witnesses § 79(1)—Appearance and manner considered in determining competency.

In determining the competency and intelligence of a witness, the court should take into consideration the general appearance and manner of the witness, as well as statements made by him.

7. Internal revenue § 47—Compromise is bar to prosecution.

Under Rev. St. § 3229 (Comp. St. § 5952), a compromise with the consent of the Commissioner of Internal Revenue before suit, and with the consent of the Secretary of the Treasury, and the Attorney General, after suit, is as complete a discharge from a prosecution for violation of the revenue laws as would be an acquittal by the jury.

8. Criminal law § 304(17)—Consent of officers to compromise by Commissioner is presumed.

The duty of securing the consent of the Secretary of the Treasury and the recommendation of the Attorney General to a compromise of a viola-

tion of the internal revenue laws after prosecution is begun devolves upon the Commissioner of Internal Revenue, and not upon accused, and it will be presumed that the Commissioner of Internal Revenue performed that duty before entering into the compromise

2. Internal revenue —47—Receipt of money by Commissioner evidence of compromise.

In a prosecution for a violation of the Harrison Narcotic Act (Comp. St. §§ 6287g-6287q), the receipt by the Commissioner of Internal Revenue of an amount paid by defendant in alleged satisfaction of a compromise of the prosecution is at least competent evidence from which the jury could infer a compromise which would bar the conviction, so that the exclusion of such receipt from evidence was error.

Waddill, District Judge, dissenting.

In Error to the District Court of the United States for the Southern District of West Virginia, at Bluefield; Charles A. Woods, Judge.

Edward T. Oliver was convicted of violating the Harrison Narcotic Act, and he brings error. Reversed.

William E. Ross and Joseph M. Sanders, both of Bluefield, W. Va. (Sanders & Crockett and A. G. Fox, all of Bluefield, W. Va., on the brief), for plaintiff in error.

J. N. Kenna, Asst. U. S. Atty., of Charleston, W. Va. (Lon H. Kelly, U. S. Atty., of Charleston, W. Va., on the brief), for the United States.

Before PRITCHARD, Circuit Judge, and WADDILL and WATKINS, District Judges.

WATKINS, District Judge. Edward T. Oliver, the plaintiff in error, a druggist at Bluefield, W. Va., was convicted in the District Court of the Southern District of West Virginia upon an indictment charging him in two counts with violation of the Harrison Narcotic Act (Comp. St. §§ 6287g-6287q). Each count charged him with having in his possession and under his control a certain fluid compound, manufacture, derivative, and preparation of opium, commonly called paregoric, which contained two grains of opium in each fluid ounce thereof, and that he feloniously, unlawfully, and in violation of the aforementioned act sold, dispensed, and distributed to the purchasers named in the indictment 16 fluid ounces of said preparation, without having registered under the terms of the act, and without having paid the tax therein required, and that the preparation was sold, not as a medicine, but for the purpose of evading the intentions and provisions of the act.

The crime is charged substantially in the language of the statute. The assignments of error may be grouped and considered under the following general classifications: (1) Constitutionality of the act. (2) Sufficiency of the indictment. (3) Sufficiency of certain evidence. (4) Oral charge of the court. (5) Competency of the testimony of a thirteen year old witness. (6) Evidence as to compromise.

[1] 1. While the constitutionality of the act is questioned, it is conceded that the Supreme Court has settled this question in the cases of *United States v. Jin Fuey Moy*, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854; *United States v. C. T. Doremus*, 249

U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493; *W. S. Webb and Jacob Goldbaum v. United States*, 249 U. S. 96, 34 Sup. Ct. 217, 63 L. Ed. 497.

[2] 2. The indictment charges an offense under the act, and the demurrer and motion to quash were properly overruled. The first section of the act (Comp. St. § 6287g) makes it unlawful for any person to sell any derivative or compound of opium whatever without registration and without the payment of the special tax provided. Section 6 (Comp. St. § 6287i) does not purport to exempt from the operation of the act the sale of all preparations which do not contain more than two grains of opium to the fluid ounce, but only such preparations of that character as are sold, distributed, given away, dispensed, or possessed as medicine, and not for the purpose of evading the intentions and provisions of the act. So far from being demurrable, the indictment is unnecessarily specific in negating the exceptions contained in section 6. Section 8 of the act (Comp. St. § 6287n) makes it unnecessary to negative the exemptions, and also places the burden of proof of any such exemptions upon the defendant. The case of *Webb & Goldbaum v. U. S.*, supra, recognizes the right of the government to require persons, who claim the benefit of the exemptions of the act, to comply with the requirements. The charge here is not against the mere possession, for which no registry or payment of tax is required, but is for the sale under conditions prohibited by the statute. The charge, therefore, is radically different from that in the *Jin Fuey Moy* Case.

[3] 3. There was ample evidence to go to the jury upon the question of whether the drug was sold as a medicine or for the purpose of evading the intentions and purposes of the act. To begin with, there was testimony that the plaintiff in error kept on hand an abnormally large quantity of the drug. Two witnesses testified that they were addicts to the use of drugs containing opium, and that they had purchased these drugs from the plaintiff in error, with more or less frequency; one of the witnesses stating that she had been advised by him to quit the use of paregoric, because it was injurious. The testimony of J. M. Branksy, an employé of the Internal Revenue Department, was to the effect that he purchased from plaintiff in error a pint of paregoric upon the statement that it was to be used by an addict, and subsequently, through Sherman French, obtained another pint upon the representation that it was to be used for like purpose. Plaintiff in error testified in his own behalf, and did not controvert any of this testimony.

[4] 4. The presiding judge, in his remarks to the jury, stated:

"Now, the purposes of the act of Congress are, first, to obtain a license tax for the government as a part of its revenue; incidentally, its purpose is to prevent sales being made to those who are opium addicts, or administering to opium addicts."

In this there was no error. In the *Jin Fuey Moy* Case, the court said:

"It may be assumed that the statute has a moral end, as well as revenue, in view."

The exception provided for in section 6 was based upon humanitarian grounds. The government being willing to forego its claim for revenue at the demand of suffering humanity furnishes no reason for denying it

the right of a rigid enforcement of the law against those who, by falsely claiming to act under the exemptions provided, would use this pretense as a means to debauch its citizens.

[5] 5. Sherman French was permitted to testify on behalf of the government, though, after being first examined by counsel for the government touching the matter of his competency as a witness, he stated that he was 13 years of age, but that he did not know the nature of an oath. He was thereupon examined by the court, and asked if he knew what he was intended to do when he was sworn to testify the truth, and he replied, "To tell the truth." It was peculiarly within the province and discretion of the court to determine the competency of the witness, and, in the absence of an abuse of discretion, the testimony must be held to be competent.

[6] While it is true that the witness stated that he did not understand the nature of an oath, it is doubtless true that the court concluded that his answer related to his inability to give a definition of an oath in more or less technical terms, rather than to his knowledge and realization of its obligation. In determining the competency, and intelligence of a witness, the court may and should take into consideration the general appearance and manner of the witness, as well as the statements made by him. The general rule is that the question of the competency of children as witnesses rests within the sound discretion of the court, and is to be determined by the trial judge. It does not imply the necessity of defining the meaning of the word "oath." *People v. Bernell*, 10 Cal. 66; *State v. Meyer*, 135 Iowa, 507, 113 N. W. 322, 124 Am. St. Rep. 291, and note, 14 Ann. Cas. 1; 1 *Wigmore on Evidence*, § 505; *Greenl. Ev.* § 367; *Wheeler v. United States*, 159 U. S. 523, 16 Sup. Ct. 93, 40 L. Ed. 244; *Turner v. American Security Co.*, 213 U. S. 258, 29 Sup. Ct. 420, 53 L. Ed. 788.

6. At the trial plaintiff in error was introduced as a witness on his own behalf, and he testified, among other things, that after his arraignment before the commissioner, and after he had been held to the grand jury and had given bond for his appearance, he was advised by the representative of the government that his offense could properly be compromised with the Internal Revenue Department, and was also directed to take the matter up with G. C. Holt, who was one of the men connected with the office of the Revenue Department. He stated further that Holt told him that he could make an offer of compromise to the Commissioner of Internal Revenue, inclosing a certified check for the amount of his offer, and that if this offer was refused his money would be returned, and he could then make another offer. He further testified that he accordingly obtained and sent to the Commissioner of Internal Revenue a certified check for \$100, dated March 6, 1919, accompanied by a letter in which he made an offer of the said sum as a compromise and settlement of the case. This check was indorsed by the Commissioner of Internal Revenue and made payable to the order of S. A. Hays, Collector of Internal Revenue for the District of West Virginia, and it was stamped "Paid," and across its face, when returned, was also stamped the words:

"This check is in payment of an obligation to the United States and must not (sic?) be paid at par. No protest. S. A. Hays, Collector, Dist. of W. Va."

A receipt was forwarded to the defendant, signed by the said S. A. Hays, Collector, in which receipt, among other things, appeared the following words:

"Form 23, O. in C. for violation of Act of Dec. 17/14, Narcotic Law, \$100.00. Received payment Mar. 17, 1919. S. A. Hays, Collector, by Rathbone, Asst."

After admitting the aforesaid evidence for the purpose of making up the record, the court excluded the same, and directed the jury not to consider the evidence, to which ruling the defendant, by counsel, excepted. The exclusion of this evidence was error. Section 3229 of the Revised Statutes (Comp. St. § 5952) provides:

"The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney General, he may compromise any such case after a suit thereon has been commenced."

[7, 8] Under this statute a compromise once effected, whether before or after prosecution, is as complete a discharge of the defendant as a verdict of acquittal by a jury. The evidence here shows that the defendant, not only adopted the course provided by statute, but that he acted under the specific advice of a representative of the government. It is true that there was no evidence that he had obtained or attempted to obtain directly from the Secretary of the Treasury his advice and consent, or that he had directly obtained or applied to the Attorney General for his recommendation. The statute does not expressly state how the consent or approval of these officers is to be obtained. It is evidently contemplated, however, that the advice and consent of the Secretary of the Treasury and the recommendation of the Attorney General should be sought and obtained by the Commissioner of Internal Revenue, who himself finally passes upon the matter, and who is the party charged with directly dealing with the defendant, and it is to be presumed that, when he finally accepts an offer of compromise of a defendant, he has previously discharged his duty of communicating with the other officers. To hold otherwise would bring the acts of the officers of the government under inquiry and frequently under a suspicion which ought not to be allowed to arise. It is of the highest importance that citizens, who deal with an officer of the government charged with an official duty, shall have the right to presume, in every instance, in the absence of positive proof to the contrary, that such officer did his duty. 22 R. C. L. pp. 472 to 475; Wilkes v. Dinsman, 7 How. 89, 12 L. Ed. 618; United States v. Crusell, 14 Wall. 1, 20 L. Ed. 821; Keely v. Sanders, 99 U. S. 441, 25 L. Ed. 327; Nofire v. United States, 164 U. S. 657, 17 Sup. Ct. 212, 41 L. Ed. 588; 10 Ency. of U. S. Supreme Court Rep. pp. 421, 422, and cases cited.

[9] The government offered no testimony to contradict or explain the testimony as to a compromise. So far as the evidence went, it tend-

ed to show that the money offered in compromise to the proper officer of the government had been accepted and retained by him, and it should have been submitted to the jury as at least tending to show that a compromise had been effected. In the case of *United States v. Chouteau*, 102 U. S. 603, 26 L. Ed. 246, the court held that sureties on a distiller's bond could not be subjected to the penalty attached to the commission of an offense, when the principal had effected a full and complete compromise with the government, under the sanction of an act of Congress, of prosecutions based upon the same offense and designed to secure the same penalty. The court said:

"The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless."

In the case of *Rau v. United States*, 260 Fed. 134, 171 C. C. A. 170, the court said:

"The Commissioner of Internal Revenue had the power and authority by virtue of the statute above referred to, and with the advice and consent of the Secretary of the Treasury, to compromise the criminal case as well as the civil case arising under the internal revenue laws. The compromise may have been made before the institution of the criminal proceedings or after. The provision relating to the necessary consent of the Attorney General evidently intends a compromise after the institution of a civil or criminal action. If the defendant, in good faith, made the payment of the tax and penalty for the purpose of compromising the impending action, he is entitled to full protection and the benefits derived therefrom. If the money was accepted with the promise of immunity from further punishment in a criminal proceeding, it would be a complete defense to this indictment. * * * The fact that the money was retained by the United States is some evidence of its acceptance in compromise. We believe that under the facts disclosed in this record, as far as the defendant was permitted to show them, it was required of the court to submit as a question of fact to the jury, under proper instructions, whether or not a compromise was entered into."

The case of *Willingham v. United States*, 208 Fed. 137, 127 C. C. A. 263, is in accord with the views herein expressed.

Reversed.

WADDILL, District Judge (dissenting). I am unable to concur with my Brethren in this case, as, from my view, the trial court was clearly right in excluding from the consideration of the jury the testimony respecting the proposed settlement of the case by the Commissioner of Internal Revenue. The privilege of compromising revenue cases after indictment, by the Commissioner of Internal Revenue, with the approval of the Attorney General, should be promptly exercised and carried to completion by a defendant who seeks thus to suspend the administration of the criminal laws. It was never intended that this law, thus generously passed in the interest of an accused, should be resorted to for the purpose of having the executive authorities of the government do other than settle or refuse to settle cases, and to allow a defendant

to open correspondence looking to a settlement, and without concluding the same, to interpose his action as a further defense to the prosecution, is entirely subversive of the spirit of the act in question, and would quickly result in endless confusion and conflicts between the courts and the executive branches of the government. A defendant under indictment, seeking to avail himself of this method of meeting a prosecution, is not to so conduct himself as that a law passed in his interest, shall be used to enable him to evade trial of the offense with which he is charged. Every consideration requires of a defendant that any action looking to a compromise of his liabilities should be initiated and completed, so as not to unduly interfere with the prosecution of the case in court.

The anomaly of submitting to the consideration of the jury the question of whether there had, in fact, been a settlement of the liability must, upon reflection, be apparent, as it would be a trial, not of the offense charged in the indictment, but of whether the government had enabled the defendant to meet the prosecution in one of the ways prescribed by law, and would, most probably result in a hung jury, over the question of whether the government had or had not done something that it ought to have done, instead of the defendant doing something that he should have done, to enable him to have the prosecution discontinued. Moreover, the question of what constitutes a settlement is one of law, not of fact, and should be determined by the court, if it is open for consideration at all.

WESTERN STAR LODGE, NO. 24, F. & A. M., et al. v. BURKES CONST. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1920. Rehearing Denied June 10, 1920.)

No. 3471.

1. Bankruptcy §390—No power to enter decree pro confesso during abatement of suit by reason of plaintiff's bankruptcy.

While equity rules 12, 16 (198 Fed. xxii, xxiii, 115 C. C. A. xxii, xxiii), require a defendant to answer within 20 days after service of the subpoena, and provide that in default of such answer an order may be entered that the bill be taken pro confesso, where the suit abates by the bankruptcy of plaintiff before that time, no answer is required until a plaintiff has been substituted by order of the court, nor has the court power to order entry of a decree pro confesso.

2. Bankruptcy §156—Substitution of trustee can be effected only by order of court.

A motion by a trustee in bankruptcy to be substituted as plaintiff in a pending suit by bankrupt does not effect such substitution, which can only be made by a judicial order.

Appeal from the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge.

Suit in equity by the Burkes Construction Company and others against the Western Star Lodge, No. 24, F. & A. M., and others. Decree for complainants, and defendants appeal. Reversed and remanded.

R. H. Oliver, Jr., John M. Munholland, and Percy Sandel, all of Monroe, La., and Robert A. Hunter, of Shreveport, La., for appellants.

Henry Bernstein, F. G. Hudson, Jr., and John C. Theus, all of Monroe, La., J. Zach Spearing, of New Orleans, La., and N. T. Currie, of Hattiesburg, Miss., for appellees.

Before WALKER, Circuit Judge, and CALL and HUTCHESON, District Judges.

CALL, District Judge. This appeal presents matters of procedure in the trial court. The merits of the litigation are not before us on this record. The material facts shown by the record can be stated as follows:

On June 11, 1917, the Burkes Construction Company (herein called the appellee), a Mississippi corporation, filed at Monroe, in the Western district of Louisiana, its bill against the Western Star Lodge, No. 24, F. & A. M., of Monroe, La. (hereinafter called the appellant), and various other defendants, wherein it sought to have a building contract declared breached by the appellant, to have damages awarded for said breach, liens declared upon the building for materialmen, to have its bond released, and general relief. Subpoena was duly issued and served upon some of the defendants. On July 5, 1917, the appellant entered its appearance. On September 4, 1917, the bonding company, one of the defendants, obtained an order granting it 30 days to plead or answer the bill. On October 1, 1917, the appellant filed what is styled a plea in abatement, wherein it "shows to the court" that on June 12, 1917, the appellee had been duly adjudicated a bankrupt by the United States District Court for the Southern District of Mississippi, and that one McCullough had been duly appointed trustee for the bankrupt estate, and praying to be relieved from further answering until such trustee may be lawfully made a party to the proceeding.

On November 7, 1917, the appellant filed a motion to transfer the cause to the law side of the court. On October 3d this entry appears in the equity journal:

"Burkes Construction Co. v. Western Star Lodge, No. 24, F. & A. M.

"No. 1150 in Equity.

"In this cause, now into court comes N. R. McCullough, Esq., as trustee in bankruptcy of the complainant herein, Burkes Construction Company, and files a petition praying that he be substituted as plaintiff in this cause in the stead of Burkes Construction Company; the trustee appearing herein through his solicitors, Messrs. Currie & Currie."

On April 1, 1918, appears upon the same journal an order of continuance by consent. On April 3, 1918, an order was made by the judge of the lower court, on the application of such trustee, for service upon certain nonresident defendants. On October 7, 1918, an order of continuance appears in the equity journal. On October 8th the journal shows this entry:

"It is ordered that decree pro confesso be and the same is hereby entered as to all the defendants in this cause."

All these orders appear to have been made at the Monroe court. Upon this decree pro confesso a final decree was, on December 2, 1918, at Shreveport, La., signed by the presiding judge. The appellant seeks a reversal of this decree, and makes seven assignments of error.

[1] The fourth assignment raises the question whether the decree pro confesso could be entered against the defendants on October 8, 1918, in the then condition of the cause. If the condition of the cause did not authorize the entry of the decree pro confesso, then the passing of the final decree based thereon must fall. The decision of this question must depend on the provisions of the new equity rules promulgated by the Supreme Court. Rule 12 (198 Fed. xxii, 115 C. C. A. xxii), provides:

"At the bottom of the subpoena shall be placed a memorandum that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service; * * * otherwise the bill may be taken pro confesso."

Rule 16 (198 Fed. xxiii, 115 C. C. A. xxiii) provides:

"It shall be the duty of the defendant * * * to file his answer or other defense to the bill in the clerk's office within the time named in the subpoena as required by rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken pro confesso; and thereupon the cause shall be proceeded in ex parte."

Rule 5 (198 Fed. xx, 115 C. C. A. xx) provides that orders for taking bills pro confesso shall be deemed grantable of course by the clerk. At the time the order taking the bill pro confesso was entered, the condition of this cause, as shown by the record, was that bill of complaint had been filed; a subpoena issued and served upon some of the defendants, requiring them to file answers or other defenses in the clerk's office within 20 days from the time of service; the appellee had, the day after filing the bill of complaint, been judicially declared a bankrupt and was thereby legally unable to further proceed with the cause. This fact was called to the attention of the court by what the defendant styled a plea in abatement. It is true pleas, demurrers, and exceptions are abolished by the new rules, but the record shows without any doubt that there was no plaintiff then in existence authorized to conduct the litigation. Under this condition of the pleading, the trustee in bankruptcy, admitting the fact of bankruptcy, petitions to be allowed to come in and be substituted as the plaintiff, but no order of substitution was ever made by the court.

[2] We do not understand that any one can make himself a party plaintiff or defendant in an equity cause by simply filing a paper therein, asking to be made a party. It takes the judicial action of the court, and this action evidenced by an order made in the cause. This view is supported by a consideration of rules 43 and 44 (198 Fed. xxx, 115 C. C. A. xxx), which seem to treat the suggestion of necessary parties when made in the answer as required by rule 43 (198 Fed. xxx, 115 C. C. A. xxx) as a motion. The plea in this case can well be given the same effect.

Rule 45 (198 Fed. xxx, 115 C. C. A. xxx) provides for the revival of suits abated by the death of either party. An order of the court is required. While the adjudication in bankruptcy of the sole plaintiff in the cause may not, strictly speaking, cause the suit to abate as though he were dead, yet bankruptcy is a kind of legal death, in so far as the maintenance of suits of this nature and the purposes for which this suit was brought. It appears to us that the proceeding for making his trustee a party plaintiff to prosecute them should closely follow the requirements of rule 45 (198 Fed. xxx, 115 C. C. A. xxx). Certainly the defendants cannot be put in default for not answering a bill of complaint with no party plaintiff to prosecute it.

It was no longer the suit of Burkes Construction Company, because it had been adjudicated a bankrupt. It was not the suit of the trustee in bankruptcy, because he had never been made a party plaintiff. There was therefore no bill of complaint which could be taken *pro confesso* against the defendants. They were not in default. There had not been a time since the service of the subpoena when the appellant could have answered.

It is contended in the briefs and on argument that the court, by making the order of service on nonresident defendants on the petition of the trustee, thereby recognized him as the party plaintiff. This might be tenable if it was sought to estop the trustee from contending that he was not a party and bound by the decree, but is untenable when the defendant is sought to be bound. The appellant in no way participated in procuring said order for service. Nor do we think the order of continuance, entered on April 1, 1918, which appears to have been consented to, had the effect to estop him from insisting that there should be a party plaintiff in the cause before he can be declared in default.

There are a number of assignments urged in the brief of appellant, and discussed by the appellee; but it is not necessary to express any opinion thereon, and we therefore refrain.

There was a motion filed by appellee to strike certain portions of the record. In the view we take of the case, a consideration of those portions of the record attacked by the motion is unnecessary, and we therefore express no opinion whether said motion should be granted or denied. The final decree being based on the decree *pro confesso*, it follows that, if the decree *pro confesso* was entered without authority, said final decree must also be vacated. The cause will therefore be reversed and remanded for such further proceedings as are in conformity to law. The costs of appeal will be taxed against the appellees.

Reversed and remanded.

RUMSEY v. NEW YORK LIFE INS. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1920. On Petition for Rehearing, October 18, 1920.)

No. 3444.

1. **Appeal and error** ⚡84(3)—**Reversal and remand for proceedings consistent with opinion is not final decree.**

A decree of the Supreme Court of Hawaii, reciting that, pursuant to the opinion of that court, the decree appealed from was reversed, and the cause remanded, for such further action compatible to the decision as may be necessary, is not a final decree from which an appeal can be taken to the Circuit Court of Appeals, though the opinion in fact disposed of the merits of the controversy.

2. **Courts** ⚡403—**Circuit Court of Appeals cannot require Hawaii Supreme Court to correct its judgment.**

The Circuit Court of Appeals has not the power to direct the Supreme Court of Hawaii to correct a judgment reversing a decree, so as to set forth what further action would be compatible to the decision, and to direct the lower judge to take such action, so as to render the decree final in form and appealable.

On Petition for Rehearing.

3. **Appeal and error** ⚡1166—**Statute requiring disregard of technical errors not applicable to jurisdictional defects.**

Act Feb. 28, 1919, amending Judicial Code, § 269 (Comp. St. Ann. Supp. 1919, § 1246), which requires the court on appeal to give judgment without regard to technical errors, relates only to the determination of the case pending in court on appeal, not to the preliminary steps by which it is brought into the appellate court, and it cannot affect jurisdiction of the court, or sustain appeals or writs of error in cases where the judgment, before the enactment of the amendment, was not appealable.

Appeal from Supreme Court of the Territory of Hawaii.

Suit by Emma F. Rumsey against the New York Life Insurance Company and another. A decree for plaintiff was reversed by the Supreme Court of the Territory of Hawaii, and plaintiff appeals. Appeal dismissed.

Lorrin A. Andrews and W. B. Pittman, both of Honolulu, T. H., and T. J. O'Donnell, of Denver, Colo., for appellant.

Frank E. Thompson, John W. Cathcart, A. Lewis, Jr., B. S. Ulrich, A. G. M. Robertson, C. H. Olson, Alfred L. Castle, W. A. Greenwell, and Arthur Withington, all of Honolulu, T. H., J. M. Mannon, Jr., of San Francisco, Cal., James H. McIntosh, of New York City, and McCutchen, Willard, Mannon & Greene, of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellant brought a suit in equity in the circuit court of the territory of Hawaii to reform a policy issued by the New York Life Insurance Company on the life of her husband and to obtain a decree that the insurance company pay her the amount of the policy, and that the appellee Benson, Smith & Co., Lim-

ited, the named beneficiary of the policy, be declared a trustee for her. The case was submitted to the circuit court on an agreed statement of facts in which were included correspondence and certain depositions, with the stipulation that other testimony might be introduced at the hearing. The circuit court rendered a decree in favor of the appellant. On appeal to the Supreme Court of the territory, the contentions of the appellant were decided adversely to her, and a decree was entered reciting that, "pursuant to the opinion" of that court, the decree appealed from was reversed, and the cause remanded to the circuit judge, "for such further action compatible to the decision as may be necessary." From that decree the present appeal is taken.

[1] The appellees move to dismiss the appeal, on the ground that the decree is not final, and is not appealable. The appellant contends that the decree is in substance final, and that it leaves nothing for the court below to do but to enter a decree "compatible to the decision"; that is, a decree dismissing the appellant's bill. A similar contention was made in *Louisiana Nav. Co. v. Oyster Commission*, 226 U. S. 99, 33 Sup. Ct. 78, 57 L. Ed. 138. The court there said:

"The contention, however, is that the judgment below is final for the purpose of review by this court, because, when the opinion of the Supreme Court of Louisiana is carefully weighed, it will be found that that court practically finally disposed adversely to the title of the plaintiff of the substantial part of the lands involved in the suit, and hence that the court, in remanding the cause for further proceedings, did so only as to other lands. But, conceding this to be true, it does not justify the claim based on it. * * * The rule established by the authorities to which we have referred is that on the question of finality the form of the judgment is controlling, and hence that this court cannot, for the purpose of determining whether its reviewing power exists, be called upon to disregard the form of the judgment in order to ascertain whether a judgment, which is in form not final, might by applying the state law be treated as final in character."

In *Bruce v. Tobin*, 245 U. S. 18, 38 Sup. Ct. 7, 62 L. Ed. 123, in reaffirming that rule, it was said:

"It may be indeed said that, although the case was remanded by the court below for a new trial, the action of the court was in a sense final, because it determined the ultimate right of the father to recover and the general principles by which that right was to be measured. But that contention is not open, as it was settled under section 709, Rev. Stats. (section 237, Judicial Code), that the finality contemplated was to be determined by the face of the record and the formal character of the judgment rendered."

There are other decisions of the Supreme Court to the same effect, cases in which the court has recognized a distinction between a judgment which reverses that of the court below and remands the case for further proceeding and a judgment which reverses and remands, directing the entry of a specified judgment, as in *Mower v. Fletcher*, 114 U. S. 127, 5 Sup. Ct. 799, 29 L. Ed. 117. Said the court in that case:

"The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered. This is but carrying the judgment of the Supreme Court, which has been rendered into execution. Nothing is left to the judicial discretion of the court below."

Compelled as we are by the force of these decisions to look to the form of the decree herein for the purpose of determining the question of its finality, we find that it is a decree which reverses the judgment of the circuit court and remands the cause for further proceedings in harmony with the Supreme Court's opinion. It follows that it is not final. *Haseltine v. Cent. Bk. of Springfield*, 183 U. S. 130, 22 Sup. Ct. 49, 46 L. Ed. 117; *Schlosser v. Hemphill*, 198 U. S. 173, 25 Sup. Ct. 654, 49 L. Ed. 1000.

[2] The appellant files a petition praying that this court issue a writ, directed to the court below, requiring it to correct its judgment by setting forth what further action is compatible with the decision, and directing the circuit judge to take such action. But to do this is to exercise a power not vested in this court.

The appeal is dismissed.

On Petition for Rehearing.

[3] In a petition for rehearing the appellant earnestly contends that this court was bound to entertain jurisdiction of the appeal by virtue of the provisions of the Act of February 26, 1919 (40 Stat. 1181), amending section 269 of the Judicial Code (Comp. St. Ann. Supp. 1919, § 1246) to read as follows:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

The contention ignores the language and purpose of the amendment. The amendment relates only to the hearing and determination of a case which is pending in a court. It has no reference to the preliminary steps by which a case is brought into an appellate court, nor does it affect the question of the jurisdiction of a court, or enlarge the power of an appellate court to entertain appeals or writs of error. It does not make appealable a judgment which, before the enactment of the amendment, was not appealable. It deals only with the examination of a record which is lawfully before a court. We realize the hardship of the rule which requires the dismissal of this appeal, but we hold that this court is bound by the decisions of the Supreme Court which are cited in the opinion.

The petition for rehearing is denied.

HENKIN v. FOUSEK.

(Circuit Court of Appeals, Eighth Circuit. July 7, 1920.)

No. 5164.

1. Bankruptcy \S 440—Order adjudging bankrupt in contempt reviewable by petition to revise.

An order adjudging a bankrupt in contempt for failure to comply with a prior order requiring him to turn over property to his trustee *held* one made in a bankruptcy proceeding, and, not being appealable under Bankruptcy Act, \S 25a (Comp. St. \S 9609), reviewable only by petition to revise under section 24b (section 9608).

2. Bankruptcy \S 440—Proceedings for review mutually exclusive.

The remedies by petition to revise in matter of law and by appeal, given by Bankruptcy Act, $\S\S$ 24b, 25a (Comp. St. $\S\S$ 9608, 9609), are mutually exclusive.

Appeal from the District Court of the United States for the District of South Dakota.

In the matter of Louis Henkin, bankrupt; Charles B. Fousek, trustee. From an order adjudging him in contempt, the bankrupt appeals. Dismissed for want of jurisdiction.

See, also (C. C. A.) 262 Fed. 957.

E. E. Wagner, of Sioux City, Iowa, for appellant.

Roy B. Marker, of Sioux Falls, S. D. (Cherry & Marker, of Sioux Falls, S. D., on the brief), for appellee.

Before HOOK and CARLAND, Circuit Judges, and TRIEBER, District Judge.

CARLAND, Circuit Judge. This is an appeal from an order adjudging appellant a bankrupt guilty of contempt in failing and refusing to pay over to the appellee as trustee in bankruptcy the sum of \$6,000, in compliance with an order of the referee in bankruptcy finding such amount of money to have been concealed by said bankrupt from said trustee, and further adjudging that appellant be committed to jail until such time as he should purge himself of such contempt by paying to the trustee such sum of \$6,000. Briefly stated the errors assigned by appellant for a reversal of the judgment below are two in number: (1) The evidence before the court at the hearing which resulted in the order complained of does not show by positive and convincing proof, and beyond all reasonable doubt that the bankrupt actually had the physical possession of said sum of \$6,000 and the ability to pay it over to the trustee. (2) That the court erred in sustaining the objection made by the trustee's counsel to a question propounded to the bankrupt. These two assignments of error present questions of law only.

The question as to the sufficiency of the evidence to justify the order appealed from is the same as the question which arises on the assignment of error that the trial court erred in refusing to direct a verdict, and the error assigned as to the sustaining of the objection to the question asked the bankrupt of course presents a question of law. In this condition of the record, counsel for appellee insists that the ap-

peal should be dismissed for want of jurisdiction in this court to entertain the same. The jurisdiction of this court to review the judgments of courts of bankruptcy by appeal is provided for in sections 24a and 25a, 30 Stat. 553 (Comp. St. §§ 9608, 9609). Under the provisions of section 24a this court has appellate jurisdiction "of controversies arising in bankruptcy proceedings." Under the provisions of section 25a it has appellate jurisdiction from judgments "in bankruptcy proceedings" in the following cases: (1) Adjudging and refusing to adjudge the defendant a bankrupt. (2) A judgment granting or denying a discharge. (3) A judgment allowing or rejecting a debt or claim of \$500 or over. It is now the settled law that "controversies arising in bankruptcy proceedings" referred to in section 24a are different from and do not include "bankruptcy proceedings" referred to in section 25a. Controversies arising in bankruptcy proceedings being appealable under the general appellate jurisdiction of this court while our appellate jurisdiction in bankruptcy proceedings is limited by section 25a as above described. *In re Loving, Trustee*, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725; *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; *Century Savings Bank v. Robert Moody & Son et al.* (C. C. A.) 209 Fed. 775; *Thompson et al. v. Mauzy*, 174 Fed. 611, 98 C. C. A. 457; *Morehouse v. Pacific Hwd. & Steel Co.*, 177 Fed. 337, 100 C. C. A. 647; *Kirsner v. Taliaferro*, 202 Fed. 51, 120 C. C. A. 305; *In re Mertens*, 142 Fed. 445, 73 C. C. A. 561; *In re Shidlovsky*, 224 Fed. 450, 140 C. C. A. 654; *Knappenburg v. Rowan*, 258 Fed. 121, 169 C. C. A. 207; *Adams v. Deckers Valley Lumber Co.*, 202 Fed. 48, 120 C. C. A. 302; *Henkin v. Fousek*, 246 Fed. 285, 159 C. C. A. 15; *Horton v. Mendelsohn*, 249 Fed. 185, 161 C. C. A. 221; *In re Mueller*, 135 Fed. 711, 68 C. C. A. 349.

[1] We are clearly of the opinion that the order from which the present appeal is taken was made in a bankruptcy proceeding within the meaning of section 25a. It was a proceeding to compel the bankrupt to turn over to the trustee for the benefit of creditors money which the court had found was in his possession at the time he was ordered to turn the same over to the trustee, and which it also found belonged to the bankrupt estate for the benefit of creditors. When the turn over order was made appellant sought to have the same reviewed by this court in matter of law. *Henkin v. Fousek*, 246 Fed. 285, 159 C. C. A. 15. In that case this court decided that the bankrupt in coming to this court by a petition to revise had pursued the proper remedy. This was in effect to decide that the proceeding in which the turn over order was made was a bankruptcy proceeding. If the proceeding in which the turn over order was made was a bankruptcy proceeding then a proceeding to enforce the turn over order necessarily would be a bankruptcy proceeding. By section 24b, 30 Stat. 553, this court has jurisdiction to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. It is now the settled law that the remedy provided by this section and the appeals provided for in section 25a are mutually exclusive. *In re Loving*, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725;

In re Mueller, 135 Fed. 711, 68 C. C. A. 349; Century Savings Bank v. Robert Moody & Son et al., supra.

[2] We have examined all the cases that we have been able to find where contempt orders of the character sought to be reviewed in this case have been taken to the several United States Circuit Courts of Appeal and in every instance where the question was raised it has been decided that the proper proceeding is by petition to revise. Kirsner v. Taliaferro, 202 Fed. 51, 120 C. C. A. 305, where the several cases seeking to review contempt orders are cited. The decisions in the cases cited to the effect that the proper remedy is by petition to revise, necessarily are decisions in support of the proposition that the proceeding is a bankruptcy proceeding. It therefore results that we have no appellate jurisdiction in the present case for none is given by section 25a. As the questions sought to be reviewed are questions of law only, it would seem that the only remedy provided for is that mentioned in section 24b, and if that is so it would furnish another reason why the appeal is not proper in this case, because if the remedy is provided for by section 24b it excludes the appellate jurisdiction provided for by 25a.

Appeal dismissed for want of jurisdiction.

BAILEY v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. July 29, 1920.)

No. 3382.

1. Intoxicating liquors ☞158—Sale of liquor to soldiers in uniform unlawful, wherever made.

Selective Draft Act, § 12 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2019a), authorizing the President to make regulations governing prohibition of liquor in or near military camps, and also providing that "it shall be unlawful to sell any intoxicating liquor * * * to any officer or member of the military forces, while in uniform," prohibits the sale of liquor to soldiers in uniform from the date of its enactment, irrespective of the regulations subsequently made by the President or of the place of sale.

2. Intoxicating liquors ☞236(11)—Evidence insufficient to show sale of liquor to soldiers in uniform.

Evidence held insufficient to sustain a conviction of defendant, a married woman, of selling liquor to soldiers in uniform, where it showed without contradiction that two soldiers, one of whom was an acquaintance, and who had been sent out to obtain evidence of illegal sales, called at defendant's house and inquired for her husband, who was absent; that they asked her for liquor, which she denied having, but that on their urging their need she filled and gave them a half pint bottle from a small quantity kept for household use; that there was no question of sale, but that after they left she found some money on the table, which had been left without her knowledge.

In Error to the District Court of the United States for the Western Division of the Western District of Tennessee; John E. McCall, Judge.

☞For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Criminal prosecution by the United States against Jennie Bailey. Judgment of conviction, and defendant brings error. Reversed.

Jere Horne, of Memphis, Tenn., for plaintiff in error.

Thomas J. Walsh, Asst. U. S. Atty., of Memphis, Tenn. (Wm. D. Kyser, U. S. Atty., of Memphis, Tenn., on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. [1] The plaintiff in error was convicted of a violation of section 12 of the Act of May 18, 1917—the Selective Service Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 2019a)—in that she sold intoxicating liquor to a soldier in uniform. Her insistence in the court below upon a directed verdict and her appeal to this court for reversal have been based chiefly upon the theory that, at the time of the supposed offense, the President had not made any regulations, pursuant to the act, which would reach and cover the facts of her case, and that, by this section 12, Congress only intended to legislate concerning sales of liquor in or near military camps. More specifically, the contention arises under that clause of section 12 which reads as follows:

"It shall be unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided."

While this language is broad and general, it is insisted that, when read with the context, its effect should be restricted to such localities as should be prescribed by the regulations to be made, and that the regulations of June 27, 1918, made by the President, confirm this view. We cannot agree. We think the plain intent of section 12 and of the regulations of June 27, 1918, is this: That from and after May 18, 1917, it shall be unlawful to sell to a soldier in uniform at any time or place, except if and as permitted by the Secretary of War for medicinal purposes; that from and after May 18, 1917, it shall be unlawful to sell to any one, soldier or civilian, or have in possession, intoxicating liquor at any place being used for military purposes, except if and as permitted for medicinal purposes; and that from and after June 27, 1918, it shall be unlawful to sell or give or deliver alcoholic liquor to any soldier, whether in or out of uniform, and whether anywhere within the United States or within other places under its control, except if and as used for permitted medicinal purposes. From this construction, no inconsistency results between different sections and regulations; it gives effect, to the plain meaning of the words used, and no substantial reason is suggested why it should not be adopted. Upon this subject-matter, the action of the court below was right.

[2] For other reasons, we cannot be satisfied to let the conviction stand. The respondent is the same person who was formerly convicted of doing business as a retail liquor dealer without paying the tax, which conviction we reversed in *Bailey v. U. S.*, 259 Fed. 88, 170 C. C. A. 156. We held that the single sale, which was alleged against respondent in that case, was not, of itself, sufficient to make her a retail dealer. After that reversal, and instead of a new trial upon that indictment, she was

proceeded against by the indictment in the present case. This prosecution is based solely upon the same single transaction involved in the former case. We are convinced that there was no substantial evidence upon which any juror could rightfully conclude, beyond a reasonable doubt, that Mrs. Bailey made a sale. Her story is that two soldiers in uniform called at her house in the evening and asked for her husband, who was away; that one of them she knew personally to a considerable degree, and they were invited in; that they asked her for liquor; that she told them she had none; that they insisted upon their great need for even a small quantity; that eventually, out of the small supply kept for personal family use, and after further urging, she gave them a half pint in a bottle for them to take away; that nothing was said about a sale, but this was only a personal and friendly gift; that after they had gone, and to her surprise, she found that they had left some money upon the table; that they were then beyond her reach, and she had done nothing about returning the money when she was arrested under the first indictment.

There is really nothing in the testimony of the two soldiers to contradict any of this. They had been sent out by an officer with instructions to buy liquor, if and where they could, and report to him. They do not claim that anything whatever occurred between them and Mrs. Bailey tending to indicate that she was selling them liquor, instead of giving them a little upon their urging, save only that money was left on the table; and they do not question that this was without her knowledge or notice while they were there. We cannot resist the conviction that it is unsafe to allow a verdict of guilty to rest (as this one must) solely on the inference that, promptly after the transaction, Mrs. Bailey should have taken some effective step toward returning the money. There are too many innocent and probable explanations of such conduct to justify the adoption (without other evidence) of the possible explanation that it was because she intended, all the time, to make a sale.

In the former opinion we said that there was some evidence of a sale to go to the jury. The record there differed materially from the present one. The testimony of the soldiers then justified the inference that the money was put on the table for Mrs. Bailey in her presence, and with her knowledge, and with her acquiescence; now, it does not; and there was then proof of other sales at the house. The claim that the evidence in this particular and for this reason did not justify the conviction was first distinctly made on oral argument in this court, and yet it is so far covered by assignments of error, and by what is said in the brief, that we ought not to refuse to consider it.

For the reasons stated, the judgment is reversed, and the case remanded for a new trial.

BOEHNER v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. June 28, 1920. Rehearing Denied Sept. 13, 1920.)

No. 5400.

1. Criminal law ⚡371(1)—In prosecution under Espionage Act evidence of other statements admissible to show intent.

On trial of a defendant charged with violation of Espionage Act, tit. 1, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c), by giving counsel and advice against enlistment evidence of statements and conversations of defendant other than those charged in the indictment *held* admissible to show the intent with which the words charged were spoken, when properly limited to such purpose.

2. Army and navy ⚡40—Evidence held to show attempt to obstruct enlistments.

Evidence *held* to sustain a conviction for attempting to obstruct enlistments, in violation of Espionage Act, tit. 1, § 3 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c).

In Error to the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

Criminal prosecution by the United States against L. W. Boehner. Judgment of conviction, and defendant brings error. Reversed as to two counts, and affirmed as to one count.

John P. Organ, of Council Bluffs, Iowa (J. J. Hess, of Council Bluffs, Iowa, on the brief), for plaintiff in error.

E. G. Moon, U. S. Atty., of Ottumwa, Iowa.

Before HOOK and CARLAND, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. The plaintiff in error, referred to hereinafter as the defendant, was indicted in three counts, charged with violations of section 3, tit. 1, of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c). He was found guilty on all counts and sentenced on the first count to pay a fine of \$5,000 and the costs of the prosecution and to imprisonment for a period of three years; on the second and third counts he was sentenced on each count to imprisonment for three years, the imprisonment to be concurrent in all three counts. No fine or costs were imposed on these last two counts.

The first count charges him with making false reports and false statements, with the intent to interfere with the operation and success of the military and naval forces of the United States, and to promote the success of the enemies of the United States. The statements set out in the indictment were alleged to have been made to one Charles Conger. The second count charges him with willfully and feloniously obstructing the recruiting and enlistment service of the United States, to the injury of the service of the United States, by counseling and advising one Gordon Jones that he should forbid and should discourage young men of the proper age from enlisting in the army

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 149, 65 L. Ed. —.

and navy of the United States. The third count charges him with counseling and advising one Mrs. F. D. Shafer that she should discourage young men of the proper age from enlisting in the army and navy of the United States. A demurrer of the defendant to each count was by the court overruled.

[1] Without setting out in full the allegations in the indictment, we are of the opinion that the court committed no error in overruling the demurrers. Similar charges in indictments have been held sufficient in numerous cases. *Debs v. United States*, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. 566; *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; *Abrams v. United States*, 250 U. S. 616, 40 Sup. Ct. 17, 63 L. Ed. 1173; *Pierce v. United States*, 252 U. S. 239, 40 Sup. Ct. 205, 64 L. Ed. 542; *O'Hare v. United States*, 253 Fed. 538, 165 C. C. A. 208; *Doe v. United States*, 253 Fed. 903, 166 C. C. A. 3. The objections of the defendant to the admission in evidence of statements made to parties, other than those named in the indictment, tending to discourage enlistments in the army or navy of the United States, or obedience to the Selective Draft Law (40 Stat. 76), and evidencing a strong prejudice against the work, were properly overruled, as the court admitted them solely for the purpose of establishing the intent of the defendant, when using the language set out in the three counts of the indictment, and the court so stated at the time the objections were made. To prevent any misapprehension as to the effect of this testimony the court in its charge to the jury, after stating that the sole object of admitting that testimony was for the purpose of establishing the intent of the defendant in making the remarks set out in the three counts of the indictment, charged them:

"You cannot convict him of an offense in talking with some of these others outside of the three named in the indictment, but you may take the conversations with the others and consider them in trying to find out what his purpose was in talking with these three, or any of them, that you find he did talk with, as charged."

The court committed no error in admitting the evidence for that purpose only. *Wolf v. United States*, 259 Fed. 388, 170 C. C. A. 364.

The only other assignments of error necessary to consider are the requests for a directed verdict of not guilty on each count. We are unanimously of the opinion that the first count fails to convince that the alleged statements made to Mr. Conger, named in the first count of the indictment, were made after the enactment of this statute. In our opinion the evidence establishes that the conversation referred to by Mr. Conger was on May 15, 1917, a month before this act became a law. Nor does the evidence satisfy that the conversation with Mrs. Shafer, set out in the third count of the indictment, had the effect of counseling and advising her that she should discourage young men of the proper age from enlisting in the army or navy of the United States, which are in that count.

[2] But there was substantial evidence to warrant the submission of the second count to the jury. Mr. Jones, the person named in that count with whom the conversation was had, testified that he was the father of two boys, one 20 years of age and the other 17 years of age,

both of them living with him at home; that in the fall of 1917 the defendant said to him:

"He did not believe in the Draft Law; did not think it was right. He would not let one of his boys go if he could help it. * * * He would fight it to a finish before he would let them go."

While neither of the sons of Mr. Jones was subject to the Selective Draft Law in force at that time, both were of an age enabling them to enlist voluntarily, with the consent of the parent, to whom the remarks were made. These remarks, in connection with the statements made by him to numerous other persons, who testified to similar remarks made by the defendant, his remarks about the women employed in the Red Cross work, too filthy to be set out in this opinion, his abuse of the President, whom he charged with getting us into the war to please Wall Street and J. P. Morgan, fully warranted the submission of that count to the jury, and its verdict is conclusive.

The judgment of conviction on the first and third counts is reversed, and that on the second count is affirmed.

HARVEY HUBBELL, Inc., v. GENERAL ELECTRIC CO.

SAME v. BRYANT ELECTRIC CO.

(Circuit Court of Appeals, Second Circuit. May 26, 1920.)

Nos. 220, 221.

1. Appeal and error \S 1073(1)—Decree "pro forma" not reversed, if there was genuine decision.

The phrase "pro forma," in an appealable decree or judgment, usually means that decision was rendered, not on conviction that it was right, but merely to facilitate further proceedings; but the insertion of the phrase in a decree does not require reversal, where record shows that the decree expressed the result of a consideration of the evidence, so that it was not in fact pro forma.

2. Patents \S 130—Rebuttable presumption that earlier numbered patent, issued same day, is senior.

There is a rebuttable presumption that, of two patents dated the same day, the earlier patent in number is the earlier in publication.

3. Patents \S 35—Commercial success, due to other causes, not evidence of invention.

Commercial success of the patented device, due to a large increase in the demand for the device and to extensive advertising, based largely on claims of excellence not due to the patented invention, is not to be considered as evidence of invention.

4. Patents \S 226—Infringement implies appropriation of substantially described element.

Infringement cannot be found merely from the use of advantages contained in the commercial article, but must be based on the appropriation of something which the claims of the patent specifically describe.

5. Patents \S 168(2)—Acquiescence in limitation of claims by examiner precludes broad assertion.

Where an applicant for a patent acquiesced in the rejection of his broad claims by the examiner, and in claims which covered only his spe-

cific construction, he cannot thereafter assert that the claim has a broad application.

6. Patents ☞167(1)—Claims not restricted or enlarged by the drawings.

The description of the invention as contained in the claims cannot be restricted by the drawings, nor, on the other hand, can it be extended to include disclosures by the drawings not contained in the claims.

7. Patents ☞328—774,250, claim 1, for electrical appliance plug and cap, held not infringed.

The Hubbell patent, No. 774,250, claim 1, for electrical appliance plug and cap, as restricted by the applicant to conform to the examiner's objections, *held* not infringed by devices which did not contain independent guide holes leading to the recess.

8. Patents ☞259—"Contributory infringement" is intentional aid to infringement.

Contributory infringement of a patent essentially consists in intentionally giving aid to or intentionally co-operating in an infringement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contributory Infringement.]

9. Patents ☞255—Claim covering plug and cap not infringed by cap for use with patented plug.

A claim in a patent for an electrical appliance plug and cap is not infringed by the manufacture of a cap of different design, intended for use with the patented plug.

10. Patents ☞226—There is no partial infringement.

There is no such thing in patent law as partial infringement.

11. Patents ☞259—Intent necessary to contributory infringement not proved by compliance with decoy letters.

The fact that defendant, in compliance with decoy letters written at plaintiff's suggestion, manufactured articles described therein for use with plaintiff's patented articles, does not establish contributory infringement, in the absence of any showing that such practice had ever been followed in any other dealings.

12. Patents ☞328—774,251, claims 2-4, 6, for an electric appliance plug and cap, held not infringed.

The Hubbell patent, No. 774,251, for a plug and cap for electrical appliances, claims 2, 3, 4, and 6, *held* not infringed, when so limited as to be valid in view of the prior art.

Appeal from the District Court of the United States for the Southern District of New York.

Appeal from the District Court of the United States for the District of Connecticut.

Separate suits for infringement of two patents by Harvey Hubbell, Incorporated, against the General Electric Company and against the Bryant Electric Company, respectively. From decrees for plaintiff, defendants appeal. Reversed and remanded, with directions to dismiss the bills.

The General Electric Company appeals from a decree entered in the District Court for the Southern District of New York and the Bryant Electric Company from a similar decree entered in the District Court for the District of Connecticut. Both actions are on the same claims of the same patents viz. Hubbell patent No. 774,250, granted November 8, 1904 (claim 1), and No. 774,251, granted the same day to the same patentee (claims 2, 3, 4, and 6).

These patents (copending in the Office) both relate to "separable attachment plugs." The patent earlier in number (hereafter spoken of as the senior patent) declares as the object of invention to provide a plug "in which

the cost of construction shall be reduced to the minimum, and which shall do away with the possibility of arcing or sparking in making connection, so that electrical power in buildings may be utilized by persons having no electrical knowledge or skill." The specification is almost wholly devoted to describing the parts of the pictured means of producing this desirable result.

The problem in the patentee's mind was to attain safety and strength, accompanied by sufficient accuracy of fitting parts, notwithstanding the fact that all attachment plugs of this general kind must have a porcelain body—something made cheaply and in great quantities, and impossible of procurement "of exactly the same size." The plug of this patent shows (*inter alia*) comparatively deep recesses in the porcelain body, in the lower part of which are affixed "contact springs," which are U-springs of current carrying metal, which engage with contact posts having reduced necks, which necks snap into the springs, producing electrical connection—an action which takes place some distance below the entrance of the recess containing the spring. The part of the recess not occupied by the contact springs the patentee calls a "guide hole." Electrically there was nothing new about this plug, but the mechanical arrangement thought to be novel is thus defined in the only claim in suit as follows:

"1. A separable attachment plug comprising an insulating body having independent recesses, locking contact springs in said recesses and independent guide holes leading into said recesses, and a cap having contact posts adapted to pass through the guide holes and engage the locking contact springs, the walls of said recesses and guide holes closely surrounding the said contact springs and extending beyond the ends thereof, whereby a connection can be established only upon the passage of the contact posts through the guide holes and into the inner spaces constituting said recesses."

The contact posts of the senior patent as pictured, and not varied by the specification, are cylindrical. The junior patent (774,251) displays what in the main is the same mechanical conception of arrangement, but exhibits the cap as "provided with knife blade contacts which engage the contact plates after they have been passed through the contracted insulating passages." As in the senior patent the knife blade, in making electrical contact, must go through a passage in the porcelain body of the plug before it arrives at the chamber or recess containing the contact springs. As such springs cannot engage a knife blade as they can a post with a reduced neck, a locking spring is provided, engaging with a recess in the blade, which locking spring, however, does not ordinarily carry current.

Again, invention resides entirely in the mechanical arrangement and coordination of parts, and the patentee dwells in his specification on a depression in the base (recess 30), which, when the parts are assembled, serves "to anchor the parts firmly in place and prevents their movement relative to each other," and also upon a single screw, which fastens together the block and base when out of the mass of interchangeable parts a plug has been assembled. These various advantages are sufficiently defined in the following claims in suit:

"2. A separable attachment plug comprising a base provided with insulating chambers and insulating passages leading into said chambers, contact plates and locking springs in said chambers, an end block secured to the base and covering the chambers, and a cap provided with contacts adapted to pass through the insulating passages and engage the contact plates and locking springs in the insulating chambers."

"4. A separable attachment plug comprising a base provided with recesses, 30, insulating chambers and insulating passages leading into said chambers, contact plates in said chambers, an end block engaging the recesses in the base and secured to said base, so as to cover the chambers, and a cap provided with contacts adapted to pass through the insulating passages and engage the contact plates in the insulating chambers."

"6. A separable attachment plug comprising a base provided with insulating chambers and insulating passages leading into said chambers, contact plates in said chambers, an insulating end block which covers the recesses, a

screw passing centrally through the end block and base by which they are secured together and a cap provided, with contacts adapted to pass through the insulating passages and engage the contact plates in the insulating chambers."

For brevity, these claims of the junior patent may be referred to as the "locking spring claims" (Nos. 2 and 3), "recess" claim (No. 4), and the "screw" claim (No. 6).

The original bill against General Electric Company charged infringement of the senior patent and of the screw and recess claims of the junior in respect of one style of plug (Exhibit 10B), which style had long been abandoned and of which very few specimens had been sold. By supplemental pleadings, however, these cases came to present questions at least of commercial importance to the leading manufacturers and distributors in this country of what are generically known as "electrical appliances," because such appliances increasingly consist of a great variety of heating, cooking, and lighting devices electrically and mechanically connected by the union of a cap attached to the device and a plug or body attached more or less permanently to the house or other structure in or through which the circuit current flows. It is matter of common knowledge that such devices of domestic convenience have enormously increased in number and variety during the life of the patents in suit.

We are persuaded that plaintiff has contributed to this business development by its clever business management, economics in manufacture, and skillful, persistent, and widely extended advertisements. We also find that there is no confessed or admitted superiority between the cylindrical or pin contact post and the "knife blade" construction. The latter is certainly cheaper; the former is probably stronger and more enduring. Large manufacturers (such as all the parties to this suit) may make both styles, and by the multiplicity of advertised forms seek to cater to the whims of taste quite as much as to secure mechanical and/or electrical perfection.

The result of the supplemental pleading is that the General Electric Company is charged with infringement of the senior patent and one of the locking spring claims in respect of an article known here as Plaintiff's Exhibit 10C, with infringement of all the claims in suit in respect of Plaintiff's Exhibits 10D and 10E, and with infringement of the senior patent and the locking spring and recess claims by Plaintiff's Exhibit 10E.

The Bryant Company is accused of putting forth 16 different appliances (Plaintiff's Exhibits 4-19), all infringing the senior patent, and all infringing one or the other of the "locking spring" claims. Bryant Company is also charged with contributory infringement by selling certain caps of their own manufacture capable of use with Hubbell plugs. The charge of contributory infringement rests on the following transaction: In 1916, a few weeks before this suit was begun, two concerns at the request of plaintiff sent direct to the manufactory of Bryant Company small orders for what had been advertised as "Spartan plug caps," which orders described the caps as to be "interchangeable" with some Hubbell appliance or appliances. One order was filled with caps having parallel knife blade contacts; the other was for "tandem" contacts, and these Bryant Company did not ordinarily make, but manufactured for this order, and it never made any more.

No Bryant cap carries contacts with recesses suitable for engagement with the Hubbell locking spring. Therefore such caps could be used so as to provide electrical connection when joined to a Hubbell plug, but the only mechanical connection was frictional. For obvious reasons the sale of caps was smaller than that of plugs or bases, and caps and bases severally are articles of commerce. There is no evidence apart from the filling of these two decoy orders; and it is found as a fact that Bryant Company has manufactured caps, not with the intent of having them used with Hubbell plugs, but with the hope that the public would buy the Bryant plug for use with the Bryant cap. When so used a locking contact occurs; that a poor mechanical connection did not prevent electrical use with the Hubbell plug or base was, however, a matter of indifference to Bryant.

These cases were heard by the same trial judge, although in different districts, and were held under consideration for a long time, and until the court became engaged in a jury trial of almost unprecedented length. Finding and announcing that other engagements made it impossible to write a review of the facts, the court in a brief memorandum stated its conclusions on every point involved in either case, and entered decrees accordingly, but (for reasons not appearing of record) inserted the words "pro forma" after the words "Ordered, adjudged, and decreed" in each document.

Both defendants appealed, assigning for error failure to find both invalidity and noninfringement, and on those appeals raise the question as to the effect of the phrase "pro forma" in the decrees as entered.

Frederick P. Fish, Hubert Howson, and Samuel Owen Edmonds, all of New York City, for appellants.

Clifton V. Edwards, of New York City, and W. Clyde Jones, of Chicago, Ill., for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] It is assigned for error that the court entered "pro forma" decrees. That *Cramp, etc., Co. v. International, etc., Co.*, 228 U. S. 645, 33 Sup. Ct. 722, 57 L. Ed. 1003, ever requires reversal merely for this reason is not admitted, but need not be decided. The phrase complained of, in an appealable decree or judgment, usually means, and is asserted to mean in the present instance, that decision was rendered, not upon intellectual conviction that the decree was right, but merely to facilitate further proceedings.

But this court is not concluded by a phrase. We may examine the record to discover whether there was a genuine decision, and, having done so, are satisfied that the trial court by these decrees expressed the result of a consideration of the evidence. The decrees are not in fact pro forma, and do not become so by having a label put on them. We therefore consider the merits.

[2] Although the patents in suit issued on the same day to the same man, the senior patent is prior art. By rebuttable presumption the earlier in number of several patents dated alike is earlier in publication (*Crown Cork, etc., Co. v. Standard, etc., Co.*, 136 Fed. 841, 69 C. C. A. 200); but in this case application was made for the junior patent more than a year after that for the senior had been filed, and the former is confessedly for an improvement on the latter. Under such circumstances the art to and including the senior patent is known to the patentee, not only by legal presumption, but by personal study. *Writing Machine Co. v. Elliott, etc., Co.* (C. C.) 106 Fed. 507; *Willcox, etc., Co. v. Merrow, etc., Co.*, 93 Fed. 206, 35 C. C. A. 269.

[3] Much of plaintiff's case as to range of equivalents, existence of invention, and interpretation of claims rests on commercial success, and we are especially referred, not only to the language, but the facts, of *Benjamin, etc., Co. v. Northwestern, etc., Co.*, 251 Fed. 288, 163 C. C. A. 444. See also *Stanley Works v. Twisted Wire Co.*, 256 Fed. 101, 167 C. C. A. 340. Before success in business becomes available as evidence to aid in proving the fact of invention, or to extend the construction of words, it must be proved to have flowed from the claims in suit. A claim is for means, and those means must be proved to have been the means of success.

Until 1909 the patent of Weston (No. 480,900) was in force, plaintiff was licensed thereunder, and publicly by advertisements claimed (in effect) the advantages of Weston's invention. An examination of this patent (especially claim 1) shows on this record a basic invention, without paying tribute to which we incline to think that few plugs in evidence could have lawfully employed "detachable engagements" making electrical contact. It is quite impossible to say how much of plaintiff's success was due to manufacturing for upwards of five years under Weston's patent.

Further, this record requires mention of the decisions pointing out that commercial success as evidence is to be considered when patentability is doubtful (*Locklin v. Buck*, 159 Fed. 436, 86 C. C. A. 414); that nothing is more easily suggested by a popular new thing than an endeavor to put "mere novelty in the place of invention" (*Robins, etc., Co. v. Link Belt Co.*, 233 Fed. 1005, 148 C. C. A. 15); and that successful exploitation of a device covered by a patent is often no more than the improvement by advertising and other energetic business methods of a commercial opportunity (*National, etc., Co. v. Bissell, etc., Co.*, 249 Fed. 198, 161 C. C. A. 232).

These considerations have application here: The commercial opportunity is shown to have been afforded by the enormous growth of the electrical appliances for comfort above enumerated, and plaintiff is and has been a most pushful advertiser, setting forth in publications of record plausible reasons for patronage having no reference to whatever invention is defined by the claims in suit. We decline to consider commercial success in respect of either the fact of invention or interpretation of claims.

The accusations of infringement show that the fundamental question here is the scope or breadth of the senior patent. It is urged that plaintiff's plug shows "a combination of elements" functioning "by reason of their co-operation," which elements contained in an insulating body—that is, a single piece of porcelain—are (1) independent recesses functioning to contain and assist the contact springs; (2) locking contact springs, which are merely strips of metal bent into suitable shape and economically stamped out of sheet copper; (3) independent guide holes leading into the recesses and preventing abnormal distortion of contacts, because the walls of the holes sustain all the mechanical strain; and (4) recesses and guide hole walls closely surrounding and extending beyond the end of the contact springs, to the end that (5) the cap may and does carry plain and solid posts, which give good contact, and when of blade shape may also be economically stamped out of metal.

[4] The foregoing summary from a brief is a laudatory dissection of a popular form of plaintiff's device as commercially exploited. It is always a temptation to take a patentee's commercial article and argue that no advantage, shown by experience to reside therein, can be utilized by a competitor under pain of infringement. But legal infringement cannot be so proved; it is necessary to take the alleged infringing article, and show that the maker of that thing has appropriated what the claim substantially describes.

[5] Substantial description is an elastic term, and it may (inter alia) be restricted by prior art, or by limitation arising in the Patent Office. The rule that acquiescence in the rejection of a broad claim, when accompanied by the acceptance of a narrower one, estops the patentee from ever demanding for the claim he got an interpretation that would cover what he was not given (*Corbin, etc., Co. v. Eagle, etc., Co.*, 150 U. S. 38, 14 Sup. Ct. 28, 37 L. Ed. 989), has, we think, never been departed from in this court.

[6] The claim as granted is not restricted merely by a representation in the drawing (*Consolidated, etc., Co. v. Metropolitan, etc., Co.*, 60 Fed. 93, 8 C. C. A. 485); but neither can it be enlarged by such reference. *National, etc., Co. v. Roebing's Sons Co.*, 158 Fed. 101, 85 C. C. A. 567, cites the earlier cases, and the rule has recently been restated in *Strause, etc., Co. v. William M. Crane Co.*, 235 Fed. 128, 148 C. C. A. 620, and *Auto Pneumatic, etc., Co. v. Kindler & Collins*, 247 Fed. 323, 159 C. C. A. 417, with its appropriate limitations.

[7] It would be wasted time to do more than indicate conclusion with respect to the limitation arising as to the first claim of the senior patent by reason of its Patent Office history. The matter may be summarized thus: The first claim propounded when the application was filed was for a—

"separable attachment plug comprising an insulating body having recesses, locking contact springs in said recesses, and guide holes leading into said recesses and a cap having contact posts adapted to pass through the guide holes and engage the locking contact springs."

This was rejected on *Weston, supra*, *Cunningham*, 320,117, and *Marshall*, 714,928; the gist of objection being that locking springs and recesses were both old, and there was no invention in having two recesses, instead of one, so as to put the springs into separate compartments. The applicant was compelled to redraft the claim, so that it reads as at present, and plainly requires the contact posts to pass through guide holes before engaging the contact locking springs in the recesses. It was this provision of an approach through insulated material that was required by the Office and yielded to by the applicant, and that acquiescence procured the allowance of the patent.

It has not infrequently occurred that, after many contests with examiners, the patentee emerges from the Office with a claim which in the opinion of the courts is as broad, or perhaps broader, than some which were rejected before allowance. If such final claim is deemed to rest fairly on the disclosure, it is no objection to it that the solicitor outflanked the examiner; but that is not the case here. If this patentee had gotten the claim he first propounded, he might have summarized invention in the manner hereinabove set forth; but as the matter stands he cannot claim that anything infringes the claim in suit of the senior patent that has not an independent guide hole leading to a recess.

There is not a single one of the above-enumerated alleged infringing articles of which this is true. It is desirable to have the path of the contact posts predetermined, to get them in line for their contacts and secure alignment by insulated material, before the cap is shoved home.

If alignment is attained some distance from the point of contact, the careless or inexperienced handler is probably saved from an electric shock. Such alignment is attained by both defendants by squaring their contact posts with a central block of insulation. They have no guide holes, and in some of the forms complained of the distance from the point of electrical contact to the end of the block of central insulation is so slight that it is doubtful whether defendant's devices possess the advantage, the means for attaining which was the one thing that gave Mr. Hubbell his patent.

It follows that there is no infringement of claim 1 of the senior patent, and it becomes unnecessary to determine whether that claim is invalid, if confined, as it must be, to the exact device described and depicted. There was small room for invention left when the application was filed, and the life of the patent is now nearly spent; "concealed contacts" has been a commercial catchword used by plaintiff to advance the sale of its patented article, and it is adopting the style of interpretation urged by the plaintiff here to say, what is admitted by the patentee himself, that defendants have no concealed contacts, but do have "wide-open contacts."

In considering the question of contributory infringement, validity may be assumed for argument's sake, as to all the claims in suit.

[8] Contributory infringement essentially consists in intentionally giving aid to, or intentionally co-operating in, an infringement. In this instance the assertion is in substance that any cap that would "work" with Hubbell's patented combination plug (including the cap) became an infringement of patent rights the moment it was put in place; wherefore, since Bryant Company was told in substance that the decoy letter writer wished to use a Bryant cap with a Hubbell base, the defendants aided such imaginary purchaser to commit an infringement.

[9] Whether, in the absence of any other evidence tending to establish that tort which is infringement, the matter is not too trivial for serious consideration may be suggested, but is not made the basis of decision. Plaintiff, however, cannot prevail for two reasons: First. It is not true that any claim in suit covers the combination of any and every cap just good enough for electrical connection with Hubbell's base plug. There is nothing in any of the patents preventing the use of a frictionally engaging cap with Hubbell's base or any other base. Second. By construction so necessary as to require no explanation the combination of Hubbell is only effected when Hubbell's contact blades are engaged with Hubbell's contact and locking springs.

[10, 11] The allegation of contributory infringement cannot be supported, there having been no possibility of complete infringement within the cases cited in Walker (5th Ed.) § 407, and there is no such thing as partial infringement; nor is the intent requisite under Leeds & Catlin Co. v. Victor, etc., Co., 154 Fed. 58, 83 C. C. A. 170, 23 L. R. A. (N. S.) 1027, affirmed 213 U. S. 325, 29 Sup. Ct. 503, 53 L. Ed. 816, proved by the decoy transactions. So far as intent goes, that trick is completely offset by the whole course of business as testified to without contradiction.

[12] Discussion of the remainder of the case may be brief, after the foregoing statement of our views on the senior patent.

There was no novelty per se in the use of knife blade contacts. They had been commercially used in the Ft. Wayne-Jenney construction, and known at least since 1886. Nor was there inventive thought in securing a locking, as distinct from a frictional, engagement between contact post and current carrying spring. That was old, and is found in the senior patent, if nowhere else. The field of invention left open and occupied by Hubbell was to secure a notched or recessed blade by a supplementary spring, and this he did. That is the only idea validating the locking spring claims, and defendants do not employ that means. If the claims were read so as to cover, they would be void on the prior art.

The recess and screw claims, in so far as they advance those elements as presenting patentable novelty in attachment plugs, are void. As was candidly stated by plaintiff's expert, if anything is composed of two parts intended to be fastened together, it was common practice to prevent relative rotation by "making one end square to fit into a square hole, or some such expedient." That is what plaintiff does with its "base" and "end block."

As for the "screw passing centrally" through the parts just mentioned, the method is shown to be nearly as old as electric plugs, and could doubtless be traced through many arts dealing with small articles assembled as needed from standardized parts manufactured in quantity. It is plainly within the competence of any good mechanic.

If, however, these claims be viewed as presenting the same combination as the senior patent and the locking spring claims, with recess and screw additions, they may stand; but the additions are worthless. No one infringes merely by using recesses and central screws.

Let each decree appealed from be reversed, with the costs of this court, and the causes remanded, with directions to dismiss the bills because of noninfringement, with the costs of the District Court.

BRYANT ELECTRIC CO. v. HARVEY HUBBELL, Inc.

(Circuit Court of Appeals, Second Circuit. May 26, 1920.)

No. 222.

1. Patents ¶25—Difference between "aggregation" and "combination" is substantial.

The difference between aggregations and combinations is not academic, but is substantial, and frequently affords a valuable test of invention; the essentials of a combination being that the various elements coact with each other.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Aggregation; First and Second Series, Combination.]

2. Patents ¶328—1,169,613, for electric appliance plug, held not to disclose invention.

The Burton patent, No. 1,169,613, for an electrical appliance plug adapted for use with caps in which the knife blades were either parallel or tan-

dem, merely by having four openings for the knife blades, instead of two, held void for lack of invention.

Appeal from the District Court of the United States for the District of Connecticut.

Suit for infringement of patent by the Bryant Electric Company against Harvey Hubbell, Incorporated. Decree for defendant, and plaintiff appeals. Affirmed.

Action is upon Burton patent, No. 1,169,613, issued January 25, 1916, for an "attachment plug receptacle." Claims 1 to 3 are in suit; of these the second is a sufficient definition of invention, and is as follows:

"An attachment plug receptacle having a pair of base plates and receiving terminal means thereon having contacts suitably arranged to engage either substantially parallel or substantially tandem jack blades on a co-operating plug."

All the claims before the court, and indeed all the claims of the patent, contain the same description of the result to be reached by "arranging" contacts, viz.: They are to be collocated so as "to engage either substantially parallel or substantially tandem jack blades." The lower court dismissed the bill; plaintiff appeals.¹

Hubert Howson, of New York City, for appellant.

Clifton V. Edwards, of New York City, and W. Clyde Jones, of Chicago, Ill., for appellee.

Before WARD, HOUGH and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). By the time Mr. Burton applied for this patent separable attachment plugs whereof the caps bore as contacts variously arranged knife blades were well known. Some of the contact blades were parallel to each other, some arranged "tandem," and the defendant at least had a "polarized" plug wherein contact blades were at right angles.

Parallel and tandem blades were the commonest, and obviously a plug slit for one style would not take the other; but electrically there was no difference between them. The only concept of invention is this patent is to make four slots in the face of a plug, instead of two, and so arrange them that tandem blades would go in one pair of holes and parallel blades in the other; the plug being so wired that, whichever pair of slots was used, opposite polarity would be preserved. It is not asserted in any claim that wiring plays any part in the invention.

Much time was devoted in the court below to finding out whether Mr. Burton or Mr. Hubbell (of the defendant company) was the original inventor; the latter having taken out a somewhat similar patent, No. 1,146,938 granted July 20, 1915. To this controversy we shall not further advert, being of the opinion that the claims in suit display no patentable invention.

[1] It is said that the patent is but for an aggregation. The point is only important if the patentee asserts that his invention is for a combination, and whether such assertion is made we are in some doubt, af-

¹ The decree contains the words "pro forma," as in *Hubbell, Inc., v. General Electric Co. et al.* (opinion filed herewith) 267 Fed. 564, but the record also contains a memorandum of opinion, and the remarks as to that style of decree made in the case just referred to are applicable to this litigation.

ter perusing record and briefs. Assuming that combination is asserted, the device is an aggregation, because there is absolutely no mutuality or coercion between the two sets of slots and contacts.

The difference between aggregations and combinations is not academic; the comparison frequently affords a valuable test of invention when the subject is cumbrous if not complicated machinery; and we are not aware that this court has ever departed from the doctrine on this subject as laid down in *American Chocolate Co. v. Helmstetter*, 142 Fed. 978, 74 C. C. A. 240. To such a device as this the word "combination" is certainly a large name for a small thing, and we therefore prefer the simpler inquiry: What is there new in the patentee's performance?

[2] It was doubtless a new and attractive business idea. It rendered it easier to sell parallel and tandem contacts without asking what kind of a plug the customer had; but, assuming the commercial frequency of both kinds of blade contact, it was within the competence of any mechanic to evolve the means for economizing in plugs while encouraging prodigality in caps. The history of this device is a good illustration of the mechanic's part in the history of invention. Mr. Burton was not a mechanic in any sense of the word. As "sales manager" of plaintiff he thought it would be a good idea to have four holes in the face plate of the plug, instead of two, whereupon he rudely represented the circular section of the insulated face of the plug by a figure about the size and shape of a half dollar, marked four holes in it, and gave it to the head of plaintiff's mechanical department, and substantially told him to work it out.


As worked out it is the patented article, wherein every detail when in action is doing exactly the same thing in the same way that it was when there were two holes in the face plate, instead of four. This is no more invention than it was to make "in one piece what was before made in two" (*General Electric Co. v. Yost, etc., Co.*, 139 Fed. 568, 71 C. C. A. 552), or to put a brace in a drilling machine so as to strengthen it (*Barnes Co. v. Vandyck Churchill Co.*, 213 Fed. 636, 130 C. C. A. 300), or to put two buttonholes in one long tab of a necktie instead of one buttonhole in each of two short tabs (*Keys v. Meyer*, 234 Fed. 94, 148 C. C. A. 110).

The decree appealed from is affirmed, with costs.

AMERICAN STEEL FOUNDRIES v. DAMASCUS BRAKE BEAM CO.

(Circuit Court of Appeals, Seventh Circuit. July 9, 1920.)

No. 2819.

1. Patents  328—1,161,737 and 1,192,466, for welded fulcrum for trussed brake beams, held valid and infringed.

The Schroeder process and product patents, Nos. 1,161,737 and 1,192,466, for a welded fulcrum for trussed brake beams, held valid, as disclosing invention, and infringed.

2. Patents ☞26(2)—Production of new result to meet recognized need is invention.

The production of a new result, which met a recognized need and went immediately into general use, discloses invention, though there would be no invention in the adoption of any one of the successive steps by which the result was attained.

3. Patents ☞168(2)—Amendment to claims covered by drawings and specifications do not invalidate.

Amendments to claims do not invalidate the patent, as indicating that the patentee had added elements thereto after observing the alleged infringer's commercial structure, where the substance of the amendments was supported by the specifications and drawings in the original application.

4. Patents ☞157(1)—"Welding" defined.

"Welding," as used in the claims and specifications of a patent for a welded brake beam fulcrum, means that the molecules of one part under the applied heat and pressure mingled with and attached themselves to the molecules of the other part, so as to make an integral block.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Damascus Brake Beam Company against the American Steel Foundries. Decree for complainant, and defendant appeals. Affirmed.

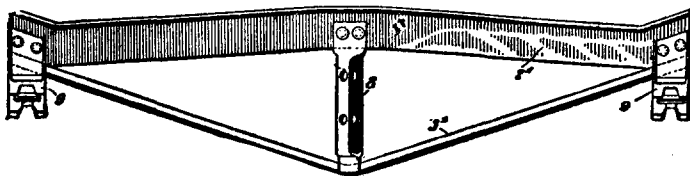
Suit to enjoin infringement of two patents Nos. 1,161,737 and 1,192,466, to Frederick J. Schroeder, and assigned to appellee. Decree for complainant.

George L. Wilkinson, of Chicago, Ill., for appellant.

Wallace R. Lane, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. [1] The process and product patents here under consideration deal with a "strut" or "fulcrum" for trussed brake beams; a forged type being used in place of the more common form of malleable castings. A common type of trussed brake beams is herewith reproduced:



4' indicates the compression member, 3' the tension member, the ends of these two members being rigidly united at the brake heads 9 upon which the brake shoes are mounted. 8' is the strut or fulcrum member which spaces the other two members apart. The lever for moving the brake is fulcrumed thereon, passing through the openings in the arms.

Claim 3 of the process patent and 2 of the product patent, quite illustrative of all the claims involved, read as follows:

"3. The improvement in the art of producing slotted fulcrums for trussed brake beams, which consists in preparing a fulcrum blank having arms spaced for providing a lever slot between them, and then while at a welding heat, confining an end of said blank embodying portions of said arms, in a mold having a cavity of substantially rectangular sections, and subjecting the confined portions of the blank to the action of a pressing die having a seat-forming projection positioned to extend diagonally from one arm to the other, and thereby welding the confined portions of the arms into a solid block integral with and longitudinally superimposed upon the two arms and bridging the slot between them."

"2. A forged metal fulcrum for brake beams, comprising a pair of substantially parallel wrought metal arms spaced apart to provide a lever slot therebetween, said arms having their ends formed with a solid, integral head provided with a recessed seat for a truss member extending diagonally across the planes of said parallel arms, each of the side walls of said diagonally extending, recessed seat constituting originally integral portions of both of said spaced arms."

The attacks made on the validity of the two patents can well be considered together.

[2] Invalidity is asserted because the improvement fails to disclose invention. To use dies and a driving head may, as appellant insists, be old. Quite similar steps for treating forged steel in the so-called "Buchanan yoke," the "swivel," and the "band for spring," clearly disclosed by appellant's testimony and well illustrated in its brief, doubtless constitute anticipation of this particular step. If invention consisted merely in using dies and a driving head, and welding forged steel, the decree could not stand, notwithstanding many expert witnesses seemed to question, prior to this discovery, whether "proper welding" of forged steel could take place, following the steps described by patentee. But obviously the structure and the process must be viewed as an entirety. It was patentee's combined conception—his appreciation of the problem, its difficulties, the remedies, and the practicability of the steps taken to accomplish the result of making the product a commercial success—that determines patentability. So viewed, invention may have existed, even though a hammer or a wrench were used, instead of the dies and a driving head. Likewise the substitution of forged steel for malleable castings may not alone have been sufficient in the present case to constitute invention. The problem confronting the patentee was one which called for a merchantable fulcrum, of great strength, of resiliency, using the least possible amount of material, a unitary structure, with one end supplying the seat for the tension member of the brake beam, so located with reference to the arms of the fulcrum as to reduce the possibility of their splitting when strain came to the finished article.

The desirability of a durable, satisfactory fulcrum, sometimes called the "king pin" in the brake system, cannot be questioned; for, if a brake be important, every link in the chain is equally essential. That appellee's fulcrum was a success is attested by abundant proof, by large and increased sales, by the demand of users that this type only be made, and lastly, but not least, by appellant's adoption of this type.

The use of the dies and driving head, of pressed steel instead of malleable castings, were but steps in the process. To build a head,

strong and resilient, in which might be erected the seat for the tension member, was but another step. To use a metal that would permit of welding, which in turn made possible a solid block head, "integral with and longitudinally superimposed upon the two arms and bridging the slot between them," and a seat extending "diagonally from one arm to the other," and perfectly designed for the purpose for which it was wrought, may be scornfully described as a "blacksmith's job," after the product has been completed, but seemed nevertheless to supply a long-sought cure for long-felt demand.

[3] We have no hesitancy in affixing to this discoverer the title of inventor. It is, however, claimed that certain elements in the product patents and steps in the process patent were added after patentee observed appellant's commercial structure. We have examined the specifications and the file wrapper, and find some of these charges are disproved by the record, while the others must be rejected, because the specifications and drawings in the original application were sufficient to support all the amendments that were subsequently made.

Infringement.—While appellant earnestly insists that for several reasons infringement does not appear, we will consider only the one which we deem the most weighty. Appellant contends that it does not infringe, because it does not, in its stamping process, weld "the confined portions of the arms into a solid block integral with and longitudinally superimposed upon the two arms and bridging the slot between them." The two arms of its fulcrum are not separated or distinct. They are composed of a single U-shaped bar. When placed in the dies, and the force of the driving head applied to the bottom of the bar heated to some 2700° Fahrenheit, there is an upsetting, a changing of position, but no "welding," of the "confined portions of the arms into a solid block integral with and longitudinally superimposed upon the two arms and bridging the slot between them." So says the appellant.

[4] We think the differences between expert witnesses arose over their inability or refusal to agree upon the meaning of the word "welding." As patentee used the words, we think there was a welding of the confined portions of the arms. Both portions of the arms were heated to a welding heat. The driving head made a block of the lower portion of the arms. Where the inner wall of the arms came in contact with the outer wall of the block, all heated as described, there was "welding," as that term is used in the patent; that is to say, molecules of one part of the arm mingled with and attached themselves to molecules of the outer and separated part of the arm, so as to make an integral block or head. It accomplished the same result by precisely the same processes, and even though a different intent or purpose was present (a fact we need not decide) infringement is nevertheless established.

The decree is affirmed.

UNIVERSAL FORM CLAMP CO. v. TAXIS et al.

(Circuit Court of Appeals, Seventh Circuit. April 27, 1920. Rehearing Denied June 5, 1920.)

No. 2756.

1. **Patents** ⚡314—**Defendant's failure to introduce evidence does not give patent standing of pioneer.**

Though defendant, charged with infringement, failed to introduce evidence, that fact does not give the patent the standing of a pioneer patent; for, if that were true, a motion to dismiss a bill for invalidity of the patent could never be sustained.

2. **Evidence** ⚡5 (2)—**Judicial notice of well known facts in patent cases.**

The courts take judicial notice of common and well-known facts in patent cases, as well as other litigation, and in construing a patent in an old field, such as that of the reinforcement of concrete, will consider matters of common knowledge.

3. **Patents** ⚡328—888,671, **for concrete floor construction, held not infringed.**

Patent No. 888,671, for a concrete floor construction, which consisted of a method for regulating and spacing the reinforcing material, etc., held, in view of the prior art, by which it must be limited, not infringed.

4. **Evidence** ⚡265 (2)—**Admission that prior device infringed not available in subsequent suit.**

Though defendant admitted that a prior device infringed complainant's patent for concrete floor construction, complainant cannot in a subsequent suit recover on the theory that defendant's last device was a mechanical equivalent of the first, for such use of the admission is improper, as it would allow the measuring of complainant's rights by the admission, instead of by the patent.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by Frederick C. Taxis and others against the Universal Form Clamp Company. From a decree for complainants, defendant appeals. Reversed, with direction to dismiss the bill.

Certiorari denied 254 U. S. —, 41 Sup. Ct. 14, 65 L. Ed. —.

William R. Rummler and Cyrus W. Rice, both of Chicago, Ill., for appellant.

George Bayard Jones, of Chicago, Ill., for appellees.

Before BAKER, EVANS, and PAGE, Circuit Judges.

EVANS, Circuit Judge. From a decree sustaining patent No. 888,671 to Frederick C. Taxis, on "a concrete floor construction," appellant prosecutes this appeal, relying upon its defense of noninfringement. Describing the object of his invention, patentee says:

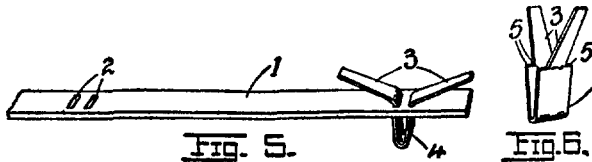
"* * * To introduce into a concrete floor construction a structural detail, which shall not only serve to properly space and tie the metallic reinforcing and supporting bars for the concrete, but shall at the same time serve as a gage for the construction of the boxing into which the cement composition is poured around the bars previously spaced and positioned. With my improvement any shifting of the reinforcing members from the positions they are intended to occupy is impossible, a thorough tying therefore is insured, and a uniform construction can always be depended on."

Claims 1 and 2 read as follows:

"1. In combination with a reinforcing member of a concrete floor, a tie member or strip having pairs of openings, anchor pieces composed of pieces of metal bent into a U-shaped form and passed with their arms through said openings, means for limiting the depth of insertion of the arms whereby a portion of the anchor piece is left projecting below the tie member and forming a gage or leg, the free ends of the arms being bent around the reinforcing member, substantially as set forth.

"2. In combination with a reinforcing member of a concrete floor, a tie member or strip having pairs of openings, anchor pieces composed of single pieces of metal bent into a U-shaped form, and terminating in reduced arms passed through the openings aforesaid, said arms being bent around the reinforcing member, and shoulders formed between the arms and body of the anchor for limiting the depth of insertion of the arms into the openings of the tie member, the portion projecting below the latter serving as a gage or leg for bearing against the roof of the boxing over which the concrete is poured, substantially as set forth."

Figures 5 and 6 herewith submitted illustrate the invention.



1 is the tie strip, containing pairs of openings. 4 is the anchor piece, bent into a U-shaped form, with its arms passing through the openings in the tie strip, and being so constructed as to provide for the depth of insertion of the arm, leaving a portion below the tie member and forming a gage or leg; the free ends of the arm being bent around the reinforcing member. 5, Fig. 6, is the shoulder upon which the tie strip rests.

[1] Appellant offered no evidence upon the trial, and appellees urge that therefore the patent must be given the standing of a pioneer. The contention hardly merits attention. If tenable, then a motion to dismiss a bill in equity, based upon the invalidity of the patent, would never be sustained.

[2] Courts take judicial notice of certain well and commonly known facts in patent cases, as well as in other fields of litigation. True, the judicial knowledge of the prior art in any patent suit must fall far short of the exact information obtainable on the trial on this phase of the litigation; but it would be erroneous to assume no judicial knowledge exists. In the present case, for example, we could hardly be totally ignorant of an art that was well developed in the days of Cæsar. Cement structures and the reinforcement thereof were matters of common knowledge long before Taxis applied for this patent. Reinforcement of concrete is almost as old as the use of this building material. The claims, then, must be read upon such a background, rather than upon the more exact and complete state of the art, which the appellant could, in the trial court, have supplied, but which it did not show.

[3] With such a background, what of the claims? They obviously relate to a very limited field—support for reinforcement in concrete.

Most favorably viewed, they disclose but little more than mechanical skill. Further, a concession of novelty and validity to both claims does not necessarily carry with it any admission as to their scope. Both claims are very narrow and they must be so construed in determining infringement.

Neither claim reads literally upon the alleged infringing device. The so-called "anchor pieces" are not provided with arms that pass through the openings of the tie strip. Neither are they U-shaped. Nor is the tie member provided with bars and openings, through which the arms of the anchor piece pass.

Among the asserted advantages of this invention, appellees claim that the two pieces "can be packed closely together for freight shipment thereby saving space and consequently freight charges"; that "the structural features of the pieces are such that the reinforcing bars can be quickly and accurately assembled"; that "the pieces thereof can be and are punched out of flat material—that is, sheet metal—and can be rapidly locked together." In view of these advantages it can hardly be asserted that the "openings in the tie member" and the "placing of the arms in such openings" are unimportant elements or an unimportant modification to an element in either claim. Their absence in appellant's structure avoids infringement.

[4] It has been suggested, however, that a certain agreement made between the parties prior to this suit and prior to the construction of any of the alleged infringing devices materially limits appellant's rights. The testimony showed that appellant had made and sold a certain form of bar support and spacer which appellees claimed infringed the patent in suit. To avoid litigation appellant paid a certain sum as damages and agreed to discontinue "the manufacture and sale of the above specified forms of bar supports and spacers." It also agreed not to infringe the patent in suit. Appellees now contend that, because the first structure was thus admitted by appellant to be an infringement, and it appearing that the second structure is the mechanical equivalent of the first, infringement by appellant's second structure is shown. This position is unsound. The claims of the patent must determine appellees' rights. An admission made in another suit, or threatened suit, respecting a different device, cannot broaden the scope of such claims. To compare appellant's present with its former device to determine equivalency would be to substitute for the elements of the claim as written the mechanical equivalents of appellant's first structure. It would be giving patentee a double or two-step test for determining equivalency.

The decree is reversed, with the direction to dismiss the bill for want of equity.

UNITED STATES v. MASTERS.

(District Court, M. D. Pennsylvania. October Term, 1920.)

1. Intoxicating liquors ⇨224—Storing liquor in hotel raises presumption of violation of law.

Where intoxicating liquor was stored in the basement of a hotel though the hotel keeper disclaimed ownership, and it was claimed by one having a permit to use it for certain stated purposes, the location and character of the place raised the presumption that the liquor was kept in violation of National Prohibition Act, § 25.

2. Intoxicating liquors ⇨101—Permits for specific purpose held not to authorize storage in hotel.

Permits giving authority to sell intoxicating liquors for other than beverage purpose, and to use it in the manufacture of certain preparations stated, do not give authority to store the liquor in the basement of a hotel, while the holder of the permits claimed to be altering his paint shop to carry on the stated business.

3. Intoxicating liquors ⇨78(1)—Permits must comply with statutory requirements.

Though National Prohibition Act, § 6, authorizes the commissioner to prescribe the form of permits for possession and sale of intoxicating liquor he cannot evade the plain provision of the act, so that permits which do not comply with the statutory requirements that they state the acts that are permitted and specify the quantity and kind of liquor to be purchased are not a protection to the possessor of liquor.

Petition for Return of Whisky Seized under the National Prohibition Act.

Petition by Henry B. Masters against the United States for the return of 15 barrels of rye whisky, in the possession of the Federal Prohibition Agent. Petition refused.

J. E. Sickler, Asst. U. S. Atty., of Scranton, Pa.
O'Brien & Kelly, of Scranton, Pa., for defendant.

WITMER, District Judge. The petitioner represents himself as owner of 15 barrels of rye whisky, now in the possession of Federal Prohibition Agent A. E. Rudisill, and on representation that it was unlawfully seized asks the court to make an order directing its redelivery to him.

[1] The liquor was found in the basement or cellar vault of the Updegraff Hotel, at Williamsport, and was seized by the internal revenue agents by authority of a search warrant, regularly issued under section 25 of the National Prohibition Act (41 Stat. 315). Whether the liquor found its way to the place it was seized, and was there kept in compliance with the provisions of this act, is the question to be decided. The proprietor and occupant of the hotel disclaims title to it. He and the claimant insist that it was there temporarily stored under a lease for a rental consideration. Whatever the facts may be, the location, and the attending circumstances and character of the place, raise the presumption that the liquor was kept there in violation of the provisions of the recited act. The claimant has attempted to disprove

this presumption, by claiming authority to store under certain permits, offered by him in evidence, issued by the Commissioner of Internal Revenue.

[2] One of these permits confers authority to—

“sell intoxicating liquors for other than beverage purpose, to wit, to others holding permits which confer authority to purchase and use intoxicating liquors for nonbeverage purposes.”

The other gives permission to use intoxicating liquor for other than beverage purposes, to wit:

“In the manufacture of the preparations listed on application dated April 13, 1920, and marked approved by this office, viz.:

	For Whom Manufactured.	Per Cent. of Alcohol.
Masters' Dandelion Tonic.....	Self	18½%
“ Bitter Tonic	“	18½%
“ Laxative Cough Syrup.....	“	19%
“ Mustard Liniment	“	60%
“ Horko Vino	“	18½%”

Mr. Masters was well provided with permits to carry on his business, which he proposed carrying on at Mill and Carter streets, when his building should be completed and made suitable to accommodate the shipment of whisky stored in the basement of the Hotel Updegraff. He had the liquor to manufacture, but the building in which this important business was staged was as yet no more than it had been for years, merely a paint shop, in which he plied his art as a painter. These permits, such as they are, have been very carelessly drawn, as will be seen by reference to the Act which authorizes them. Section 6, speaking of permits generally, concludes that—

“Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued, and shall designate and limit the acts that are permitted and the time when and the place where such acts may be performed.”

However, whether the permits with which Mr. Masters had himself supplied should be regarded as sufficient for the purposes indicated, they did not authorize him to transport and store his liquor where the same was discovered by the revenue agents.

[3] Section 6, to which reference has already been made, provides that “no one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do,” except when prescribed by a physician, or when used in the treatment of patients at a sanatorium to cure persons suffering with alcoholism, as may be allowed by the commissioner. It further provides that permits to purchase liquor for any purpose shall specify the quantity and kind to be purchased, and the purpose for which it is used. While the commissioner is given authority later on in this section to prescribe the form of permits and applications for the same, he can not evade the plain provisions of the act.

The general act is intended to prevent the sale and bartering in intoxicating beverages of every kind, with certain exceptions noted, and no one is permitted to possess such, unless he brings himself and his

business within these exceptions. And when he does so the commissioner shall give him a permit in writing, which shall set forth fully and in detail what he may do, and when and where such may be performed, in order that the government and its agents may at all times be informed of his doings, and, if desirable, to supervise and inspect his conduct, so as to ascertain whether the law is being respected. In other words, whatever is done shall be done openly and with knowledge.

The law provides that the government shall control and regulate the flow of liquor, whenever and wherever the same is in the restricted sense permitted, and to this end it is required that the whereabouts of liquor and the sale thereof must be with knowledge to the authorities at Washington charged with the enforcement of the law.

The prayer of the petition is refused.

PERRETTE v. ILLINOIS COMMERCIAL MEN'S ASS'N.

(District Court, W. D. Kentucky. June 26, 1920.)

Removal of causes  10—Suit between citizens of other states not removable.

A suit by a citizen of one state against a citizen of another, brought in the courts of a third state, is not removable, where there has been no waiver of the venue by plaintiff.

At Law. Action by Lela B. Perrette against the Illinois Commercial Men's Association. On motion to remand to state court. Granted.

Leon P. Lewis, of Louisville, Ky., for plaintiff.

Bruce & Bullitt, of Louisville, Ky., for defendant.

WALTER EVANS, District Judge. This action was filed in the Jefferson circuit court, and upon the petition of the defendant, alleging that the plaintiff was a citizen of Kentucky and that the defendant was a citizen of Illinois, an order was made by the state court removing the action to this court. After the filing of the record here, the plaintiff entered a motion to remand the case to the state court, and by her own and other affidavits has shown that at the time the suit was brought she was, and several years previously had been, a citizen of the state of Indiana, and yet is. Upon the testimony there can be no doubt that this is the fact. This, therefore, is a suit by a citizen of Indiana against a citizen of Illinois, which was brought in a state court in Kentucky, and thence removed to this court upon the mistaken allegation that she was a citizen of Kentucky.

The motion to remand has been argued, and many authorities have been cited, upon a question which is not altogether a new one to the court. The facts are precisely analogous, so far as citizenship goes, to the facts shown in the case of *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. This being so, we are by no means at liberty to disregard the decision in that case, which held that the case was not removable, because neither party was a citizen of the state in which the action was brought.

It is manifest from the decision in that case that the question is one largely of venue. That being so, the question is not jurisdictional, and the parties may by their conduct waive the question of venue. That is what was done in the Matter of Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, and in Kansas City N. W. R. R. Co. v. Zimmerman, 210 U. S. 336, 28 Sup. Ct. 730, 52 L. Ed. 1084. It will thus be seen that there was no conflict between the two last cases and the first one above named. In the recent case of E. H. Taylor, Jr., & Sons v. Julius Levin Co. (not for publication) there had been a manifest waiver by the plaintiff of all questions of venue respecting defendant's counterclaim, and the decision there was based upon that fact in accordance with the two cases last above cited.

There being nothing in this case indicating any waiver by the plaintiff of any question of venue, nor any submission to the jurisdiction of the court, it inevitably follows that the ruling in the Wisner Case is controlling, and that the motion to remand must be, and it is, sustained.

JOPLIN & P. RY. CO. v. PUBLIC SERVICE COMMISSION OF MISSOURI
et al.

(District Court, W. D. Missouri, C. D. November 10, 1919.)

No. 215.

1. Carriers  **18(6)—Showing held to authorize temporary injunction against enforcement of rate by state commission.**

An uncontradicted showing that an interurban railway was losing money, though it was charging a higher rate in its interstate traffic and traffic in another state than was permitted by a state Public Service Commission's order, is sufficient, in the absence of a satisfactory explanation why the business within that state should be more profitable than the other business, to authorize a temporary injunction against the enforcement of the order prescribing the rate.

2. Injunction  **136(3)—Granted to maintain status where questions are difficult and damage would be irreparable.**

A temporary injunction may be issued to maintain the status quo pending a final hearing, where the questions of law and fact are intricate and difficult and where the rights of all parties can be easily safeguarded if the injunction is wrongfully issued, while the injury to complainant would be irreparable if the injunction were wrongfully denied.

In Equity. Suit by the Joplin & Pittsburg Railway Company against the Public Service Commission of the State of Missouri and others. On application for temporary injunction. Injunction issued.

Clyde Taylor and John Kennish, both of Kansas City, Mo., for complainant.

John T. Gose, Asst. Atty. Gen., and J. D. Lindsay, Asst. Counsel for Public Service Commission, for defendants.

Before STONE, Circuit Judge, and VAN VALKENBURGH and WADE, District Judges.

PER CURIAM. Complainant is an electric railway company operating a standard-gauge railroad as a common carrier for hire, and is engaged in interstate and intrastate freight and passenger business, mainly between the cities of Joplin, Mo., and Pittsburg, Kan. It operates 104.52 miles of track, of which 25.04 miles are in the state of Missouri, and 79.48 miles are in the state of Kansas. In Kansas, by permission of the Kansas Public Utilities Commission, it charges a passenger rate of 2.5 cents per mile, and in interstate passenger business, by permission of the Interstate Commerce Commission of the United States, it charges a rate of 2.6 cents per mile. Prior to the final action of the Public Service Commission of the state of Missouri, of which complaint is made, it charged for intrastate passenger business in the state of Missouri an average rate of 1.93 cents per mile.

On October 30, 1917, complainant filed with the Public Service Commission of the state of Missouri its application to be permitted to increase its intrastate passenger rates in Missouri to 2.5 cents per mile; the commission denied this application as made, but permitted a charge of 2.12 cents per mile; thereafter, upon motion for rehearing, complaint amended its application, whereby it asked permission to charge 3 cents per mile, instead of 2.5 cents per mile, for such passenger business. This amended application was denied on the 8th day of September, 1919, and the commission reaffirmed its former order, fixing the value of the property involved in passenger business at \$195,000, and refusing permission to charge in excess of 2.12 cents per passenger mile.

On October 1, 1919, complainant filed its bill of complaint praying an injunction restraining defendants from the enforcement of this order of the Public Service Commission upon the stated ground that the rate thereby established is unreasonable, unremunerative, and confiscatory. A temporary restraining order was granted by the resident judge, and the application for interlocutory injunction came on to be heard before three judges in conformity with the provisions of section 266 of the Judicial Code (Comp. St. § 1243).

We are of opinion that a temporary injunction should be granted, and will state, as briefly as may be, the reasons which compel this decision.

[1] Complainant operates a homogeneous line of electric railway between two cities approximately 97 miles apart, located, respectively, in the states of Missouri and Kansas. Compared to its passenger traffic, its freight business is negligible. Taking the figures of the Public Service Commission, or uncontroverted figures of complainant, as a basis, the value of the entire property is \$3,785,000. The excess of total operating income over total operating expenses is said to fall far short of the sum necessary to pay its fixed charges, including interest upon its conceded bonded indebtedness. In any event, the claim that no substantial return upon its total investment is possible under existing rates stood undisputed at this hearing. The commission fixed the value of the intrastate passenger property in Missouri at \$195,000, computed the gross income therefrom to be \$43,002.94, the operating expenses at \$33,528.11, leaving a net profit on operations of \$9,474.83; a gross re-

turn of 4.8 per cent., at the existing passenger rate of 1.93 cents. Fixing 7 per cent. as a reasonable return, the commission concedes that complainant should be permitted to earn in Missouri in intrastate passenger business an additional amount of \$4,175.17, which it assumes may reasonably be expected from the rate of 2.12 cents per mile. It is not deemed necessary to restate in detail the undisputed figures adduced at the hearing; but it will be sufficient to state that the increased amount thus expected to be derived from passenger traffic, if realized, would inappreciably affect the large deficit suffered annually upon the system as a whole.

It will be observed that the valuation assigned to the Missouri intrastate passenger business is distinctly insignificant as compared with the valuation assigned to the system as a whole. The Missouri mileage is approximately one-fourth of the whole and one-third of the mileage in Kansas. The gross income from Missouri intrastate passenger traffic is likewise insignificant, when compared with the total gross operating income of \$665,000. That this distinctly Missouri business, forming such a small part of the complex whole, should be at once so small in volume and so disproportionately profitable, challenges acceptance. We have before us at this hearing no facts from which such an unlikely result is made either apparent or probable; nor, in the nature of things, could such a situation be revealed, if at all, except upon a fuller hearing on the merits. No comprehensive view of the workings of the entire system, its freight business, its passenger traffic, interstate and intrastate, in Missouri and Kansas, is presented. No wide difference is disclosed between the operations of the system in the two states, and between the two states; and yet it would appear that the road is operating at a loss in its interstate business at a rate of 2.6 cents per passenger mile, in its Kansas intrastate business at a rate of 2.5 cents per passenger mile, and in both, combined with the Missouri intrastate business, at existing rates. The commission itself seems to have been sensible of this incongruity, because in its opinion it says:

"The probable explanation, however, of the greater profit of intrastate over interstate traffic on the Joplin & Pittsburg, as found by commission accountants, is due to the fact that a higher rate per mile obtains in the first, second, and third stops out of Joplin. Traffic there is exceptionally dense, and this fact is probably the explanation of the increased return from intrastate traffic."

But this cuts both ways. It is claimed by the company that under the previous average rate of 1.93 cents per mile there were established zones out of Joplin, as the commission states, where a higher rate per mile obtained, and that there, as is said, population, and hence traffic, is more dense; that under the 2.12-cent rate these zones are abolished, and therefore that the new rate will produce no more revenue than the old.

The commission itself admits that the question of apportionment of property values is always a complex problem, and any method of apportionment is more or less arbitrary. When, therefore, such arbitrary methods are employed, and the results appear, sufficiently at least, to be widely out of expected keeping and proportion, justice demands clos-

er scrutiny than can be accorded at any summary hearing. It would manifestly be out of place here to disapprove the methods and standards adopted by the commission and its experts; but it may be pointed out that it appears upon the face of the report that great, if not undue, emphasis was laid upon the original cost of the property thus somewhat arbitrarily assigned to intrastate passenger traffic at a period greatly antedating that with which this investigation must deal; nor can we say that the present period of high prices is so temporary or abnormal that it may practically be disregarded in arriving at the value of complainant's properties. No one can say what degree of depression may ultimately come, but it is reasonably certain that the cost of the properties now under consideration will never again approximate figures prevailing in the years before the world war.

[2] It is before us that the Interstate Commerce Commission upon this same road deemed 2.6 cents per mile a reasonable rate, and that the Kansas Public Utilities Commission, after hearing, fixed 2.5 cents per mile as a rate reasonable for Kansas intrastate business. It implies no disrespect for the Public Service Commission of Missouri when we say that the findings of these first-named commissions, upon properties so similarly situated, are at least persuasive and entitled to much consideration at a hearing of this nature. The Circuit Court of Appeals for this circuit has repeatedly announced the rule which should govern us in a situation such as is here presented:

"A preliminary injunction, maintaining the status quo, may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted." *Allison v. Corson*, 88 Fed. 581, 32 C. C. A. 12; *City of Newton v. Levis*, 79 Fed. 715, 25 C. C. A. 161.

It is our judgment that a temporary injunction should be granted upon condition that complainant, until further order herein, does not charge in excess of 2.5 cents per mile in its Missouri intrastate passenger business outside of incorporated cities, which rate accords with the original application of complainant, and also with the judgment of the Kansas Public Utilities Commission within its jurisdiction, and upon the further condition that complainant shall issue to each passenger, so paying fare fixed in such schedule, a receipt reciting the fact that said passenger so paying such fare is, conditioned upon final order herein, entitled to receive from complainant the difference between the rates heretofore in effect and those being charged by virtue of the order entered hereunder. Complainant will further be required to keep intact, under separate deposit in the Commerce Trust Company of Kansas City, Mo., all such excess so collected, to await the final order of the court herein; such funds shall be under the exclusive control of this court, and in case the final order herein shall be in favor of the defendants, the same shall be distributed to all claimants entitled to participation therein, under the exclusive direction and orders of this court, for which jurisdiction shall at all times be retained. Thus the

loss or inconvenience to patrons, if any, will be comparatively small, insignificant, and susceptible of substantial compensation; whereas, should this writ be denied, and final decree be rendered for complainant, its loss would be great and irreparable.

It is further our judgment that this case should be prosecuted to final hearing or adjustment without unnecessary delay, and the resident judge, before whom further proceedings will be had, will, upon application, make further appropriate orders to that end.

In re WEISSMAN.

(District Court, D. Connecticut. September 9, 1920.)

No. 4910.

1. Bankruptcy ⚡484—Fees of receiver limited by Bankruptcy Act.

Although, because a receiver was in constant attendance at hearings before the commissioner, no objection was made by attorneys representing nearly all the creditors to an allowance to the receiver in excess of the commissions fixed by Bankruptcy Act, §§ 48d, 72 (Comp. St. §§ 9632, 9656), yet, in view of the express limitation by statute, the court could not allow more to the receiver, even by way of special compensation.

2. Bankruptcy ⚡272—Bill for accountant's services held reasonable.

Accounting corporation's bill for services, of \$3,071 for 812¼ "billing hours," held reasonable, and ordered paid.

3. Courts ⚡57(2)—Stenographer's rate for copies of testimony in bankruptcy proceeding fixed by court order.

In bankruptcy proceeding, stenographer's bill for services and expenses held properly ordered paid, on condition of furnishing any person copies of testimony at a rate per folio not exceeding the rate per folio paid in the Southern district of New York, copies to be furnished the commissioner without expense to him, in case of copies ordered by any one other than by the commissioner, and, if ordered only by the commissioner, the expense to be borne by the estate.

4. Bankruptcy ⚡247—Advances by attorney to court stenographer not settled in trustee's proceeding for instructions.

A dispute between the attorney for the creditors' committee and the stenographer employed, as to an amount advanced the stenographer by the attorney, will not be settled in a proceeding on petition of trustees respecting the payment of bills presented for services rendered prior to their election.

5. Bankruptcy ⚡482(3)—Elements determining allowance to attorneys for petitioning creditors stated.

The elements to be taken into consideration in making an allowance to attorneys for petitioning creditors are the time properly required to be spent on the controversy, the intricacy of the questions involved, the amount involved, the strenuousness of the opposition encountered, the results achieved therein, and the policy of the bankrupt act toward economy in administration.

6. Bankruptcy ⚡272—Expenses of receivership separate from expenses of trusteeship.

Expenses pending receivership, and prior to election and qualification of trustees, for investigations and in subpoenaing witnesses, are separate from expenses thereafter incurred, and should be filed separately.

7. Bankruptcy  **482(3)—Fee to attorneys for bankrupt divided between them.**

In view of Bankruptcy Act, § 64b, subd. 3 (Comp. St. § 9648), one fee of \$2,500 held allowable to two attorneys for bankrupt, from which \$500 received by one attorney from friends of the bankrupt would be deducted, leaving the balance of \$2,000 to be equally divided between the attorneys; there being no allegation in their petition showing any greater amount of work performed by one than by the other.

In Bankruptcy. In the matter of Joseph Weissman, bankrupt. On petition of trustees respecting payment of certain bills. Payment ordered according to opinion.

Benjamin Slade, of New Haven, Conn., for bankrupt.
David Strouss, of New Haven, Conn., for trustee.

THOMAS, District Judge. The petition signed by the trustees represents that an involuntary petition was filed against the bankrupt on November 21, 1919, and that upon the same day, upon the petition of Archibald Palmer, Esq., representing creditors of the bankrupt, a special commissioner was appointed for the purpose of taking testimony under section 21a of the Bankruptcy Act (Comp. St. § 9605). Under the orders issued it appears that various hearings were had under section 21a, and in connection therewith certain expenses were incurred prior to the qualification of the trustees, and that certain bills, 13 in number, have been presented to the trustees for payment, upon which this court is asked to pass.

At the first hearing all were ordered paid except the following: (1) David Strouse, receiver, \$7,500; (2) Federal Accounting Corporation, \$4,207.39; (3) Alexander Reissman, stenographer, \$1,646. Further notice was ordered with reference to the three bills above mentioned, and pursuant thereto, and subsequently, further hearing was had respecting their payment. At said hearing attorneys representing nearly all creditors in number and amount were present and consented to the further presentation of two bills, duly verified, as follows: (4) Philip Pond, attorney for bankrupt, \$2,500, less \$500 received from friends of the bankrupt. (5) Benjamin Slade, attorney for the bankrupt, \$2,500. These five bills will be discussed in their order.

1. So far as the bill of the receiver is concerned, his fees are fixed by section 48d of the Bankruptcy Act (Comp. St. § 9632), which, so far as is here pertinent, provides:

"Receivers * * * appointed pursuant to section 2, subdivision 3, of this act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, * * * by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars."

A limitation on the fees of receivers is fixed by section 72 of the act (Comp. St. § 9656), so that a receiver cannot be paid more than is allowed under section 48, as section 72 provides:

"That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act."

As the court has no definite figures upon which to compute the commissions as provided for in section 48d, this claim is referred back to the special commissioner, with instructions to calculate forthwith the commissions due in accordance with the provisions of section 48d, and when thus computed the amount thus found due is ordered paid forthwith to the receiver by the trustees. While no objection was made by the attorneys representing nearly all the creditors to an allowance to the receiver in excess of the statutory commissions, because of the fact that the receiver was in constant attendance at the hearings before the commissioner, in view of the express limitation imposed by the statute I am unable to allow more to the receiver, even by way of special compensation.

[2] 2 and 3. The bills presented by the Federal Accounting Corporation and Alexander Reissman, the stenographer, present certain difficulties for the court, due to the fact that counsel for creditors who employed them had no definite contract with them, specifying the price to be paid. Under such circumstances the law allows them, as it does in all cases where nothing definite is fixed by the contract of employment, a reasonable price. Their respective bills are high. No evidence was offered at the hearing respecting the reasonableness of the charges, except the testimony of the respective claimants, each of whom stated that the charges were the usual charges made by them in such matters, and that the charges were reasonable. I am not prepared to say that, even though they are high, they are unreasonable.

In the case of the Federal Accounting Corporation, the bill presented amounts to \$4,207.39. Of this amount the expenses incurred were \$1,136.39, so that the net bill rendered for services is \$3,071. The total number of "billing hours" was 812¼, thus showing an average charge of about \$3.75 per hour, or \$26 per day, for those who were acting as expert accountants. If due allowance is made for the corporation for overhead and expenses of maintenance, etc., the net amount charged will be somewhat reduced. While the per diem may seem high, it appears from the statements of Mr. Miller that the corporation's employes are not continuously at work for the corporation, bringing in a continuous revenue, yet they have to be kept constantly on the pay roll of the corporation in order to preserve the organization. In view of all the circumstances, the bill as presented is ordered paid.

[3] 3. Reissman is an expert court stenographer. He is in the same unfortunate position as the Federal Accounting Corporation—under a contract of employment, with no price agreed upon. It appears that Reissman was taken out of his regular employment in New York by Mr. Palmer, the attorney for the creditors' committee, and induced by

representation of big pay to leave his court work in New York. His travel was from New York to New Haven, to Boston, to New Haven, to New York, and his travel back and forth between these cities was at the request of the agent of the creditors' committee, for the purpose of taking testimony before the different referees and commissioners before whom different hearings were scheduled, pursuant to section 21a. His expense account for travel and hotels covered a period of three weeks and amounted to \$276. This is rather high, but there is no evidence before me that it was not actually incurred, nor am I permitted to infer that it was not incurred, as the positive evidence is that it was expended. Hence it must be allowed.

It was indeed unfortunate for him that he did not heed the suggestion of the commissioner and return to New York the first day he arrived; but his justification for staying is that the attorney for the creditors' committee insisted upon his giving his services, upon call, for the benefit of the creditors, as requested by the attorney who employed him. Whether he exercised good or bad judgment is not for me to decide. That he lost his time, that he rendered services, and that the committee availed itself, through its attorney, of his services, is clear, and because of this he must be paid what is reasonable. The bill presented for services, as amended, is \$1,150. Some controversy has arisen respecting copies of testimony to be furnished. No copies of testimony have been made. Whether or not they will be needed does not appear; but, if they are, such person as desires a copy, and who is willing to pay for the same, may make a financial arrangement with Reissman for such folios as are requested, at a rate not to exceed the rate paid per folio in the Southern district of New York, and, if such copies are ordered by any one other than the commissioner, then a copy must be furnished the commissioner without expense to him; but, if ordered only by the commissioner, then such expense shall be borne by the estate. Upon the receipt, by the commissioner, of a letter from Mr. Reissman stating that he assents to such an arrangement, the bill for services rendered and time spent is ordered paid to the amount of \$900, together with disbursements of \$276, making a total of \$1,176.

[4] Some dispute was had at the hearing respecting some amount advanced to Reissman by Palmer. This proceeding is not the place to settle that dispute. It is a matter for personal adjustment between Reissman and Palmer.

[5] 4. Archibald Palmer, Esq., as attorney for the creditors' committee, presents a bill for \$7,500 for services rendered between November 20, 1919, and January 6, 1920. According to his petition, Attorneys Palmer, Shaine, and Memhard represent the committee, but Palmer "had been designated to act on behalf of the creditors." It was at Palmer's instigation that the proceedings were instituted and a receiver appointed. He prepared the petition for the appointment of the commissioner and for the examination under section 21a. He, as his petition duly verified shows, was exceedingly active in the preparation of the case, and conducted the inquiry before the commissioner, and gave practically all of his time, early and late, from November

20, 1919, to January 6, 1920, to the various phases of the different proceedings then pending before the court and the commissioner.

Whether or not Palmer is under a retainer from the committee he represents does not appear. Nor is it material. The allowance is not only customary, but it is a matter of right, under section 64b, subd. 3 (Comp. St. § 9648), but the amount to be allowed is not wholly a matter of discretion; it must be reasonably determined, upon evidence of the services performed, and of the value of such service. In *re Curtis et al.*, 100 Fed. 785, 41 C. C. A. 59; *Smith v. Cooper*, 120 Fed. 230, 56 C. C. A. 578. As stated by Collier (page 937, 11th Edition):

"The elements to be taken into consideration in making an allowance to attorneys for petitioning creditors are (1) The time properly required to be spent on the controversy. (2) The intricacy of the questions involved. (3) The amount involved. (4) The strenuousness of the opposition encountered. (5) The results achieved therein. (6) The policy of the bankruptcy act toward economy in administration."

Discussing these in their order, is it conclusively shown (1) that Palmer spent all of his time from November 20th to January 6th, a period of 47 days; and that (2) the matter in hand was intricate. As to (3) the amount involved was theoretically large, and the receiver had on hand and turned over to the trustees about \$85,000. It is fair to say that (4) the opposition and difficulties encountered were strenuous; at least the work performed by Palmer was. The results accomplished (5) are as yet uncertain. (6) The money thus far received was largely from the sale of the stock on hand, so that it cannot yet be said that the results achieved have resulted, so far as the receipt of actual cash is concerned, in anything substantial by way of increasing the assets of the estate.

It is alleged in paragraph 32 of the petition, *inter alia* :

"That at the present time your petitioner should be allowed on account of services rendered to the receiver compensation which your petitioner may afterward apply to this court for an increase, and that your petitioner may have further compensation for services rendered in accordance with the amount of assets that may hereafter be recovered to the estate through his services rendered during this period."

From this allegation it is quite apparent that the petitioner was unmindful of the elements to be taken into consideration in fixing an allowance, and in effect agrees that he has, as yet, not brought himself within the fifth and sixth elements as stated *supra*. Therefore, and without prejudice to his right to again bring the matter to the attention of the court at such time as the petitioner believes that he has brought himself within the elements (5) and (6), an allowance on account at this time will be made of \$2,500, which is ordered paid by the trustees.

[6] Paragraph 33 of the petition says:

"Your petitioner believes that the expenditures incurred during this period for these investigations and in subpoenaing witnesses should be hereafter considered at the time that an application will be made for an allowance as attorney for the trustees, so that all disbursements may be paid for at one time."

Even in view of the above concession by the petitioner, it is suggested and therefore ordered, that an itemized account be filed of expenses from November 20, 1919, to January 6, 1920, as such expenses are properly a charge against the estate pending the receivership and are separate and distinct from the expenses incurred since the trustees were elected and qualified, and when so filed, as ordered, and if, upon notice and hearing had, they are correct and just, they will be ordered paid.

[7] 5. The only remaining question is the amount of compensation to be allowed the attorneys for the bankrupt. Two claims have been presented—one by Benjamin Slade, Esq., for \$2,500; and one by Philip Bond, Esq., for \$2,500, he alleging in his petition that he has received \$500 on account from friends of the bankrupt.

The Bankruptcy Act permits the court to allow only one fee for the attorneys for the bankrupt. Section 64b, subd. 3, provides, so far as is here pertinent, as follows:

"The debts to have priority * * * and to be paid in full out of bankrupt estates, and the order of payment shall be (1) * * * (2) * * * (3) * * * and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, * * * to the bankrupt in involuntary cases while performing the duties herein prescribed."

It is very clear that this does not mean that only one attorney may be paid out of the funds of the estate, but it is very clear that the allowance to be made to the attorneys for the bankrupt, just as to the attorneys for the petitioning creditors shall be paid and can be only one fee. In this instance, just as in the case of the attorney for petitioning creditors, certain elements must be taken into consideration in making such an allowance. From both petitions it appears that various proceedings were instituted by creditors and among them were:

"Turn over proceedings, seeking the recovery of assets alleged to belong to the bankrupt estate, proceedings in the nature of re-exeat, and examinations under § 21a of the Bankruptcy Act," and that "numerous hearings were had from time to time between the 21st day of November, 1919, * * * and January 6, 1920," and that both petitioners acted as attorney for the bankrupt in most of said proceedings, and, among other services rendered to said bankrupt, appeared before the judge then sitting in this district at Hartford on several occasions, and also appeared before the judge then holding the term for the District of Connecticut at Brooklyn, N. Y., and at New Haven, Conn., and your petitioner drafted various orders, motions, and briefs in connection with said proceedings, and devoted a great deal of time in connection with all of said proceedings."

The sum of the two bills presented is \$5,000. This is altogether too large and entirely out of proportion to the services rendered, in view of the rulings of the courts wherever this matter has been under discussion. The affidavits should have been more specific.

The best considered opinion I have been able to find on this subject is by Judge Adams in *In re Rosenthal & Lehman* (D. C.) 120 Fed. 848. In that case the court said (page 850):

"The test, in my opinion, is whether the employment is necessarily made, and the services necessarily rendered in good faith, for the real purpose of so

administering the act in a given case as to accomplish the purposes of its enactment. If the employment is reasonably necessary to aid either in the discovery of assets, or securing the bankrupt's discharge, or protecting the bankrupt from unjust charges or imputations of wrong, such as would subject him to the penalties of the act, a reasonable allowance should be made therefor."

Here there is nothing to show but what the employment was necessary, nor is there anything to show but what the services were rendered in good faith and for the real purpose of administering the act as to accomplish its purposes; and if it be urged, or claimed even, that the employment was to protect the bankrupt from imputations of wrong, it is apparent that such service, if made in good faith, is necessary, and that for it reasonable compensation should be allowed. In fact, such evidence as is before me is affirmative of the elements necessary and upon which reasonable compensation should be predicated. It is also very apparent that the bankrupt required the services of competent counsel, when the whole record is considered, and of this record the court may take judicial notice.

Therefore I conclude that one attorney's fee may be fixed at \$2,500. As one of the petitioners has already received \$500 from friends of the bankrupt, this sum should be deducted from the total amount allowed, thus leaving a balance of \$2,000 to be paid by the trustees. Upon the facts set forth in the two petitions there is nothing therein alleged which shows any greater amount of work performed by one than by the other of the two petitioners. The gross amount allowed, therefore, may be equally divided between the petitioners; and it is so ordered.

Hereafter, in the case of the employment of expert accountants, or expert stenographers, or others of similar kind, and in order to avoid a similar situation as we have here, whenever an application is made, either to the court or master, for the employment of such persons, let a copy of a proposal fixing price for services, etc., be attached to the application, to the end that the court or master may know in advance with what the estate is to be charged, so that in the future such situations as are here presented may be avoided.

The five bills above discussed may be paid in accordance with the tenor of this memorandum, and without formal orders. Order accordingly.

UNITED STATES v. ACHEN.

SAME v. WEISS.

(District Court, E. D. New York. March 31, 1920.)

No. 21873.

1. **Indictment and information** ⇐3—**Offense not infamous may be prosecuted by information.**

A proceeding against a defendant not charged with an infamous offense may be instituted by information.

2. **Indictment and information** ⇐41(1)—**Finding by commissioner of probable cause not prerequisite to information.**

Probable cause of guilt, sufficient to sustain the filing of an information, may be established by affidavit, so that such information may be filed without a finding of probable cause by commissioner, even though hearings before a commissioner are then pending, and he thereafter found want of probable cause.

3. **Indictment and information** ⇐3—**National Prohibition Act does not require prosecution thereunder by indictment alone.**

National Prohibition Act does not require prosecutions for violation thereof, which are misdemeanors not infamous, to be prosecuted by indictment alone, though title 2, § 2, of the act authorizes the Commissioner of Internal Revenue to conduct the prosecution at the committing trial to have the offenders held for the action of a grand jury.

4. **Indictment and information** ⇐133(5)—**Information regular in form cannot be quashed on motion.**

An information regular in form cannot be quashed on motion; the remedy of accused to have determined the question whether there was sufficient cause for filing the information being by plea in abatement or by motion to vacate the order granting leave to file.

Separate informations were filed against Louis Achen and David Weiss, charging them with violation of the National Prohibition Act. On motions by each defendant to quash the information. Motions denied.

Leroy W. Ross, of Brooklyn, N. Y. (Charles J. Buchner, of Brooklyn, N. Y., of counsel), U. S. Atty., for the United States.

Bick, Godnick & Freedman, of Brooklyn, N. Y. (Louis R. Bick, of Brooklyn, N. Y., of counsel), for defendants.

GARVIN, District Judge. A separate information was filed against each of the defendants, and each has moved to quash. The same questions are raised by each motion.

[1] The defendants were arrested, and, upon being admitted to bail, appeared before a United States commissioner for examination. Adjournments were had, and during the pendency of the proceedings, the United States attorney caused an information to be filed against each defendant. It is claimed that this was improper.

In this district at least the practice of proceeding against a defendant, not charged with an infamous offense, by information, has been frequently followed. It is supported by ample authority. *United States v. Maxwell*, Fed. Cas. No. 15,750; *United States v. Tureaud* (C. C.)

20 Fed. 621; *United States v. Shepard*, Fed. Cas. No. 16,273; *Rider v. United States*, 149 Fed. 164, 79 C. C. A. 112; *United States v. Wells* (D. C.) 225 Fed. 320; *Compiled Statutes*, § 1686.

[2] The defendants urge that they have a right to an examination and a finding by the commissioner that probable cause exists, and they rely upon the following excerpt from the opinion in the *Shepard Case*, *supra*:

"The other consideration concerns the necessary preliminary steps before the right to file a criminal information can be asserted. We incline to the opinion, and hold, that there must first be a complaint, supported by oath or affirmation showing probable cause, followed by an arrest and examination, agreeably to section 33 of the act of September 24, 1789. If the accused is held to bail or committed, the district attorney on filing the magistrate's or commissioner's return, with the proofs, will have leave to file a criminal information. This course would seem as nearly adapted to the method of procedure in these courts, and to our laws, as anything which suggests itself. It would certainly be quite foreign to any known practice in the United States courts to pursue the English practice of requiring a rule for the accused to show cause before the court, and there contest the question whether the evidence justified placing him upon trial. The right of the accused to contest the probable cause shown by the prosecution is secured to him on his examination before the commissioner or magistrate, under the complaint on which he was arrested."

To the same effect is the case of *United States v. Baugh* (C. C.) 1 Fed. 784. The opinion in the *Shepard Case* was rendered by a judge sitting in the District Court, and that in the *Baugh Case* by a judge sitting in the then Circuit Court. With respect to the former, Judge Benedict held (*United States v. Ronzone*, Fed. Cas. No. 16,192):

"The case of the *U. S. v. Shepard*, Fed. Cas. No. 16,273, was cited in support of the motion. That case is no authority for holding that an order to show cause and a hearing thereon is a necessary preliminary to a proceeding upon information."

The *Maxwell Case*, *supra*, was decided by the Circuit Court, two judges concurring. The opinion was written by that eminent jurist, Judge Dillon, and the conditions to which he adverts make his observations peculiarly appropriate at the present time:

"We are of the opinion, therefore, that offenses not capital or infamous may, in the discretion of the court, be prosecuted by information. We cannot recognize the right of the district attorney to proceed on his own motion, and shall require probable cause of guilt to appear by the oath of some credible person before we will allow an information to be filed and a warrant of arrest to issue. But with these safeguards there is no more reason to fear an oppressive use of information than there is reason to fear an abuse of the powers of a grand jury. Where the accusation is a grave one, or where the charge seems to be doubtful, the court will refuse leave to file an information and compel the district attorney to lay it before a grand jury. But it is well known that the internal revenue laws have created a large number of minor offenses, many of them involving no moral turpitude, and that the cost of proceeding by a grand jury and the delay are burdensome and inconvenient both to the government and the defendant. In this class of cases, most of which are not defended, great and unnecessary expense will be saved by proceeding by information, and we not only think the practice legal, but one which, in cases of this kind, should, with the restrictions above mentioned, be adopted, and encouraged rather than condemned." *U. S. v. Maxwell*, Fed. Cas. No. 15,750.

It seems to me that these conclusions should control. If I am correct, inasmuch as it appears that in each of the cases at bar the government made a showing by affidavit of probable cause, the objection that leave to file the information was properly granted cannot be upheld. In each of the cases before the court, a hearing was in progress before the commissioner when the information was filed, upon the conclusion of which the commissioner determined that there was not sufficient before him to justify holding the respective defendants. However that may be, the proof by affidavit submitted to the court in each case amply justified a holding that probable cause had been shown.

It is urged in behalf of the defendants that, once a proceeding is begun before a commissioner, the government can take no other action until a determination has been made by the commissioner, and the defendant either held to bail or discharged. If that were the law, a commissioner's illness, absence, inadvertence, inability to reach a conclusion, or reluctance or arbitrary refusal to render a decision, would result in prosecutions being unreasonably and unnecessarily delayed. If a commissioner holds that there is a lack of probable cause, the United States attorney may nevertheless submit a charge to a grand jury, and no reason appears why under like circumstances (when the charge is a misdemeanor) he may not ask leave to file an information. If the court finds probable cause to exist, every requirement has been met.

[3] The defendants assert, also, that a prosecution for the offenses here involved—i. e. violations of the National Prohibition Act (41 Stat. 305)—must be by indictment. It is true that section 2 of title 2 of the act provides:

"The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of this act. Officers mentioned in said section 1014 are authorized to issue search warrants under the limitations provided in title XI of the act approved June 15, 1917 (Fortieth Statutes at Large, page 217 et seq.)."

A violation of the act is a misdemeanor, and in the absence of any intent on the part of Congress to require all prosecutions under the act to be by indictment, except as such intent may appear in the foregoing section, it does not seem to me that there is justification for holding that Congress has shown a purpose to abolish the long established practice of proceeding by information against a defendant not charged with an infamous offense. This section seems to me to be merely intended to secure the enforcement of the law by providing that the investigation of violations shall be under the direction of the Commis-

sioner of Internal Revenue and prosecutions therefor conducted by the several United States attorneys.

[4] In any event the motions now before the court cannot be granted, for, where an information is regular in form, it cannot be quashed on motion. If a defendant contends that there was in fact no sufficient preliminary examination, and no sufficient cause existed for filing the information without a preliminary examination, his remedy is either by a plea in abatement (*State v. Finley*, 6 Kan. 366), or by a motion to vacate the order granting leave to file the information (*U. S. v. Reilly* [C. C.] 20 Fed. 46).

Each motion is denied.

THE ARIZONA.

(District Court, E. D. New York. June 23, 1920.)

Shipping ⚓3½, New, vol. 8A Key-No. Series—Federal control, unless proximate cause of claim for salvage service, is no bar to proceedings in rem.

Transportation Act Feb. 28, 1920, by sections 205, 206, providing for direct suits against the United States on claims arising out of government control of carriers, and by section 206(g) that no execution or process shall be levied on property of any carrier where the cause of action grew out of the possession, use, control, or operation of any system of transportation while under federal control, *held* to apply only to claims which have as a proximate cause possession and use by the government, and not to bar a suit in rem against a vessel for salvage, brought after government control ceased, where, while the services were rendered during federal control, the vessel was under charter and no claim of liability is made against the United States.

In Admiralty. Suit by Benjamin J. Eldred and others against the derrick lighter *Arizona* and cargo. On objection to issuance of process. Overruled.

Alexander & Ash, of New York City, for libelants.

Burlingham, Veeder, Masten & Fearey, of New York City, for Southern Pacific Co.

CHATFIELD, District Judge. The lighter *Arizona* was the property of the Southern Pacific Company, and taken over by the Director General of Railroads prior to January 27, 1920. On that day the *Arizona* was under an oral charter to the Sunset Lighterage Corporation at an agreed rate per day. The master of the lighter was an employé of the Director General of Railroads. It appears that the Sunset Lighterage Corporation had in turn subchartered the *Arizona* to the East Jersey Railroad & Terminal Company, or to the Tidewater Oil Company, for the carrying of oil, and on a voyage for the East Jersey Railroad & Terminal Company salvage services were rendered it while loaded with a cargo of oil. The salvage services are alleged to have been rendered during an oil fire, by the master and crew of the steam lighter *C. Blaine Warner*, who with the *Warner* claim that they removed the *Arizona* to a place of safety. Libel was filed in this district on March

26, 1920, and issuance of process has been withheld, pending determination of this motion by proctors for the Southern Pacific Company, who stand ready to appear, so as to make the actual service of process unnecessary, but who on a special appearance object to the issuance of process because of the provisions of section 206 of the law of February 28, 1920, which provides as follows:

"(g) No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under federal control."

The matter has been argued, and counsel for both parties have attempted to draw such conclusion as to the meaning of the words "possession, use, control, or operation" as may be inferred from the adjudicated cases on the subject of boats chartered under such circumstances as to be a demise. *Monk v. Cornell Steamboat Co.*, 198 Fed. 472, 117 C. C. A. 232; *Hastorf v. F. R. Long-W. G. Broadhurst Co.*, 239 Fed. 852, 152 C. C. A. 638; *The Carroll*, 248 Fed. 475, 160 C. C. A. 485; *Bartley v. Borough Development Co.* (D. C.) 214 Fed. 296.

But the section in question must be interpreted independently of those cases. For instance (whether the taking over by the railroad and the subsequent charters were demises or not), if section 206 is taken broadly, then certainly everything which happened to the boat was the consequence of her having been taken into the possession of the government. But if section 206 is to be taken to mean that the claim must have as a proximate cause possession and use by the government, then this action is maintainable, and the claim need not be settled by the President and disposed of in a suit against the agent designated for that purpose, with the subsequent petitions and answers under rule 59 (29 Sup. Ct. xlv), in order to bring in the parties who should be made to answer for the damage.

If the only issue be the legal consequence of a charter like a demise, the statute in question would be available (if the libellant is so advised), starting with the government taking of the boat as the beginning of the chain of responsibility. Then the present action would not be maintainable. But if the issue is that of responsibility, and the libellant sees fit to sue the boat on the theory that the owner may bring in the actual party responsible and leave out the government as an intermediate party in possession, then section 206 should not be held to have been intended by Congress to cover such a case.

To put it another way: If the libellant, by suing the boat, will start a claim which under rule 59 must be disposed of by bringing in the government, then the action should be brought directly against the government under sections 205 and 206. In that case the present action should be dismissed. But if, by suing the boat, the real issue can be tried with the government left out, then every one will be the gainer.

It does not seem to the court, in the absence of proof to the contrary, that Congress intended, or that the language of the statute (section 206) means, that all cases must be defended by the government and must proceed under the procedure of sections 205 and 206. On the

contrary, the intent seems to have been that only where the claim is that the government is responsible shall the procedure be by way of claim against the Government. In all cases the libellant and the owner of the boat must choose whether the government shall be brought in, and unless the choice is made the action need not be halted, and can proceed without prosecuting a claim under sections 205 and 206, *supra*.

This motion seemingly presents an attempt to secure an interpretation of section 206, subd. (g), from the standpoint of such natural interference with government activities as would be occasioned by the seizure, under process, of a vessel which the government might be using or might wish to use. But this apparent situation is fallacious. The government has already turned back the property in question. In fact substantially all the property to which the statute of February 28, 1920, is applicable has been returned by the government, and the statute was intended to provide for the settlement of proper claims against the government, or such claims as arose directly from the government's acts. The statute was not intended to provide that every claim with relation to the property which had previously been in the government's possession must be brought against the United States, nor did the statute intend that the government should thus indirectly become liable for anything more than those acts for which the government should be properly responsible.

In the case at bar the owner has his boat; the libel is directed against the boat, and unless the government can properly be expected to pay the claim in question, there is no reason why Congress should provide that the action must be defended by the government. On the other hand, if the claim should be paid by the government, then, undoubtedly, the government may be brought in under the other sections of the statute, and, if the government is compelled to take the position of claimant, no bond could be required, nor would physical seizure of the vessel be allowed.

But a situation like that shown in the present case would seem to present no difficulty in this regard, and the statute does not seem to require such an interpretation which compels a suit against the government or restricts the libellant to an action in personam.

The motion will be denied.

Petition of BRIESE.

(District Court, E. D. New York. July 12, 1920.)

1. Aliens ☞67—Naturalization laws must be strictly complied with.

The provisions of the naturalization law must be strictly and literally complied with in order to confer jurisdiction.

2. Aliens' ☞67—Naturalization jurisdiction of Supreme Court of New York limited to residents of county.

Under Naturalization Act, § 3 (Comp. St. § 4351), providing that "the naturalization jurisdiction of all courts * * * shall extend only to aliens resident within the respective judicial districts of such courts."

Supreme Court of New York *held* to have jurisdiction over the naturalization of such aliens only as reside within the county where the application is made.

3. Aliens ~~68~~—Declaration filed in wrong jurisdiction not effective.

A declaration of intention of an alien, filed in a state court, which correctly gave the street number of his residence, but erroneously stated that it was within the county, whereas it was beyond the county line in another county, where residence within the county was jurisdictional, *held* ineffective as a basis for a petition for naturalization.

In the matter of the petition of Julius Briese for naturalization. Petition denied.

Louis J. Castellano, of Brooklyn, N. Y., for petitioner.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y., opposed.

CHATFIELD, District Judge. The applicant has been in the United States since 1891. He is 53 years old, and has four children born in the United States. He filed his first papers on March 28, 1917, in the Supreme Court of the state of New York, in the county of Kings. At that time he was living in Middle Village, Queens county, at No. 1487 Metropolitan avenue. This street begins in Brooklyn, and runs for a considerable distance through Kings county, before getting into the county of Queens. The clerk of Kings county, acting as clerk of the Supreme Court, allowed Briese to file his declaration of intention, stating that he lived at No. 1487 Metropolitan avenue. Apparently the clerk assumed that this was in Kings county, and Briese either did not know the difference or was ignorant of the requirement of the statute.

The law provides that any court of record of a state, "having a seal, a clerk, and jurisdiction in actions at law or equity, * * * in which the amount in controversy is unlimited," shall have jurisdiction to naturalize aliens. The law then provides "that the naturalization jurisdiction of all courts herein specified, state, territorial, and federal, shall extend only to aliens resident within the respective judicial districts of such courts." Comp. St. § 4351. Under section 4, par. "First," an alien must "declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides." Comp. St. § 4352.

[1] The provisions of the Naturalization Law must be strictly and literally complied with in order to confer jurisdiction. *Johannessen v. United States*, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066; *United States v. Ginsberg*, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853; *United States v. Ness*, 245 U. S. 319, 38 Sup. Ct. 118, 62 L. Ed. 321.

[2] The declaration must state "the present place of residence in the United States of said alien." This declaration has to remain on file at least two years. The declaration of the petitioner gave his residence as 1487 Metropolitan avenue. This was correct, but it added, "Brooklyn, N. Y.," which was incorrect. Nevertheless the petitioner did nothing for over two years and has now filed his application based upon this incorrect declaration. It has been held in the case of *United States v.*

Stoller (D. C.) 180 Fed. 910, that a petition filed in a district consisting of two counties in the state of Washington was valid in either county. The court there limited jurisdiction to the judicial district of that particular court.

The Supreme Court of the state of New York is an institution which has jurisdiction throughout the entire state, but this court is divided into departments and districts. The judges are elected from these districts. In each district there are several counties. The Supreme Court is held for each county, and the county clerk of that county acts as clerk of the Supreme Court for that county. The seal of the county clerk is the seal of the court for that county.

We have therefore a requirement that the jurisdiction to naturalize extends to the judicial district only of such court as has a seal, a clerk, and a certain kind of jurisdiction. If we hold the word "district" to include all the territory which the jurisdiction of the court may cover, it would include the whole state of New York. If we hold the district of the court to be only that territory included within the boundaries for which the seal and the clerk are established, it would be the county of Kings. If we take the arbitrary word "district" in the sense in which that is used under the laws of the state of New York, we would have a geographical subdivision differing both from the general jurisdiction of the court and from the Supreme Court in and for the county of Kings.

Justices of the Supreme Court have jurisdiction to consider a matter anywhere throughout the state of New York which is pending before the Supreme Court in any part of the state, but any order made thereon must be sent to and filed in the county where the action is pending, and the county clerk of no other county can keep or record papers in that proceeding.

[3] Under these circumstances, the court feels compelled to hold that the paper in question was a mistake, and a mere nullity so far as conferring jurisdiction under the naturalization statute is concerned. The applicant should have discovered his mistake and corrected it, and the fact that he did not do so for two years is unfortunate, but does not relieve him from the effects of the mistake. This court in the case of *United States v. Smith* (D. C.) 247 Fed. 131, allowed an applicant to use a first paper which had been taken out and filed in a county other than the one where the applicant actually lived; but in that case the applicant gave an address within the county where the paper was filed, and the circumstances were such that the constructive residence was held to be sufficient.

That is entirely different from the present case. Here the man cannot claim even a constructive residence, because the address given in the declaration itself does not exist. If a man should file a declaration in Brooklyn, giving as his residence Montauk Point, Brooklyn, it would be apparent to every one that his residence was not in Kings county, and both the applicant and the clerk would be at fault in the original verification of such a paper. A mistake like this can be corrected, but cannot be overlooked or treated as a proper record in compliance with the naturalization statute.

The petition must be denied.

UNITED STATES v. PITOTTO.

SAME v. BATTAGLIA.

(District Court, D. Oregon. September 13, 1920.)

No. 8688.

1. Internal revenue Ⓒ42—Affidavit of belief not sufficient showing of cause for valid search warrant.

An affidavit that affiant has reason to believe and does believe that a revenue fraud is being committed on described premises which complies with the requirements of Rev. St. § 3462 (Comp. St. § 6364), is not sufficient under Const. Amend. 4, providing that no warrants shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized, under which the facts from which the magistrate may determine the existence of probable cause must be stated.

2. Internal revenue Ⓒ43—Valid search warrant prerequisite to conviction for resisting search by revenue officers.

If the search warrant under which revenue officers were acting was void, there can be no conviction under Penal Code, § 65 (Comp. St. § 10233), for using a deadly weapon in resisting a person authorized to make searches or seizures in the execution of his duty.

John Pitotto and one Battaglia were separately indicted for resisting a revenue officer in the execution of a search warrant, and he demurs to the indictment. Demurrer sustained.

Lester W. Humphreys, U. S. Atty., of Portland, Or.

Albert B. Ferrera and Manning & Beckman, all of Portland, Or., for defendant.

WOLVERTON, District Judge. The defendant is here under an indictment charging that he did unlawfully and feloniously use a deadly weapon in resisting persons authorized to make search and seizure, to wit, Delazon C. Smith and Harold M. Charlton, they being officers of the Internal Revenue Department of the United States, in the execution of their duty, namely, in executing a search warrant "duly and regularly issued" by the commissioner of the District Court of the United States for the District of Oregon, with intent to commit bodily injury upon them, and to deter and prevent them from discharging their duty as aforesaid. The indictment is drawn under section 65 of the Penal Code (Comp. St. § 10233), which declares that—

"Whoever shall use any deadly or dangerous weapon in resisting any person authorized to make searches or seizures, in the execution of his duty, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duty," shall be guilty of an offense.

The defendant interposed a demurrer to the indictment, assigning, among other reasons, that the search warrant mentioned in the indictment is not valid, and that the officers named were not authorized by law to serve the same.

Counsel for the respective parties have stipulated as to the basis upon which the search warrant was predicated. It consists of an affidavit preferred by Harold M. Charlton, who deposes:

"That he has good reason to believe, and does verily believe, that a fraud upon the revenue of the United States has been and is being committed upon and by use of a certain dwelling house, being the premises of John Doe Battaglia, and being situate in 410 Tenth street, of Portland and state of Oregon, and within the district above named, and that if search of said premises is made certain apparatus used for illicit manufacture of spirits will be found, in violation of section 3281, Revised Statutes of the United States [Comp. St. § 6021]."

The question presented by the demurrer is whether a revenue officer, unless armed with a valid search warrant, is authorized to make search and seizure.

[1] Section 3462, Revised Statutes (Comp. St. § 6364), provides that such warrant may issue, authorizing any internal revenue officer to search designated premises, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of said premises. The affidavit of Charlton complies in language with this statute, but it is obviously insufficient to meet the requirements of the Fourth Amendment to the Constitution, which provides that—

"No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In a word, the requirements of section 3462 relating to the showing to be made as a basis for issuing the warrant do not meet the mandatory provisions of the Constitution. In the language of Attorney General Knox, the section "does not state all of that which must be stated in the application" for the search warrant. 24 Op. Attys. Gen. 685, 688. In other words, the constitutional provision is paramount. The showing under oath essential upon which to predicate the issuance of the warrant should state pertinent facts from which the magistrate may determine the existence of probable cause, or there should be a hearing by him with that purpose in view. Probable cause is a legal conclusion, which is for the magistrate to deduce from the facts stated, and the mere assertion under oath that the affiant believed and does believe that a fraud upon the revenue has been or is being committed is entirely insufficient upon which to predicate the finding of probable cause. *United States v. Tureaud* (C. C.) 20 Fed. 621, 624; *Ripper v. United States*, 178 Fed. 24, 26, 101 C. C. A. 152; *Veeder v. United States*, 252 Fed. 414, 420, 164 C. C. A. 338.

[2] With such insufficient showing, it follows that the warrant issued by the commissioner was void, and did not authorize the revenue officers to make the search and seizure contemplated. It is only when the officer resisted is authorized by valid warrant to make search and seizure that the statute under which the indictment is preferred may be invoked. The indictment, therefore, read in view of the stipulation of the parties, is insufficient, and the demurrer will be sustained.

The same order will be made in *United States v. Battaglia*.

It should be remembered that this case turns upon the sufficiency of the indictment under the particular statute, not upon whether the void warrant may be used defensively to justify defendant's assault upon the revenue officers. That question must be determined when it arises.

ROBERTSON, State Revenue Agent, v. HINES et al

(District Court, S. D. Mississippi, S. D. October 23, 1919.)

1. Logs and logging ☞3(10)—Size restriction in timber conveyance generally refers to date of conveyance.

Generally, a provision as to the size of timber conveyed will be held to refer to the size at the date of the conveyance, rather than to some time in the future, in the absence of anything showing a contrary intention.

2. Logs and logging ☞3(10)—Conveyance held to include timber becoming merchantable during lease for cutting.

Where a lease of timber lands for 15 years was given, and shortly thereafter the merchantable timber thereon was conveyed to the lessee, with right to cut the timber at any time during the term of the lease, the purchaser can cut timber which becomes merchantable at any time during the lease.

In Equity. Two suits by Stokes V. Robertson, as State Revenue Agent, against Edward Hines, the Wolf River Lumber Company, and others. On motions to strike certain parts of the answers. Motions denied.

F. C. Hathorn, of Hattiesburg, Miss., for plaintiff.

Griffith & Wallace and White & Ford, all of Gulfport, Miss., for defendants.

HOLMES, District Judge. This matter is before the court on the motion of the plaintiff to strike from the answer of the defendant certain parts thereof set up therein as an affirmative defense to the bill of complaint. There are two motions, one in each of the above causes, which are consolidated, and under an agreement of counsel the court is requested to pass upon two questions of law, which it is agreed are presented by the records in both of the above cases, and which questions, it is agreed, also arise in causes Nos. 156, 157, 159, 160, and 161 of the equity docket.

The questions of law presented under this agreement are as follows: First. Did the defendant have a right, as a matter of law, to cut any timber from the sixteenth sections of land involved in these suits? Second. If the defendant had such right, was his right confined to the merchantable timber on the land at the time the deed was executed, or did it extend to the timber that had become merchantable between the date of the deed and the time that the timber was cut? It is also agreed that any documents proper to be used as exhibits to the pleadings of either side may be adduced on this hearing. The defendant was lessee of the sixteenth sections of land for a period of time, to wit, 15 years,

and later became vendee of all the merchantable pine timber on said sections 16, with the right to cut and remove said timber during the life of the lease of said land.

[1, 2]. I do not doubt the general rule is that a provision as to the size of timber conveyed will generally be held to refer to the date of the conveyance rather than to some time in the future, in the absence of anything showing a contrary intention; but in this case, under the instruments as drawn, and the facts as I am able to gather them from the record, it seems clear to me that it was the intention of the parties for the lessee and vendee to acquire the right to cut and remove the merchantable pine timber which became such during the life of the lease. I do not see how it is possible to draw a distinction between the case under consideration and the case of *Nelson v. Americus Manufacturing Co.*, 186 Fed. 489, 108 C. C. A. 467. The syllabus to that case, which is supported by the record, says:

"A lease of land, giving the lessee the right to cut all the timber on the land suitable for sawmill purposes during the term of 20 years, entitles him to cut, not only the timber suitable at the date of the lease, but all that becomes suitable during the term."

In the principal case here under consideration there was a lease of the land for 15 years, and shortly after the execution of the lease by separate instrument there was a conveyance of all the merchantable timber on said land, with the right to cut and remove said timber at any time during the life of said lease. I will therefore overrule the motion to strike out certain parts of the answer, and will hold, on the records before me, that:

First. The defendant had a right, as a matter of law, to cut and remove timber from the said sixteenth sections of land.

Second. Such right to cut was not confined to the merchantable timber on the land at the date of the execution of the deed, but the lessee and vendee had the right to cut and remove any timber that became merchantable between the date of the deed and the expiration of the lease.

In re BENTZ.

(District Court, E. D. Louisiana, New Orleans Division. July 27, 1920.)

No. 2367.

Bankruptcy ⚙️188(2)—Although conditional sale contract void, seller had lien for purchase money.

A contract, denominated a lease, under which bankrupt obtained possession of a display counter, on agreement to pay \$125 rental in installments, with an option to purchase for \$10, after such payments, *held* in fact a contract of conditional sale, and void, under the law of Louisiana; but the seller *held* entitled to a lien on the property for unpaid purchase money.

In Bankruptcy. In the matter of Henry C. Bentz, bankrupt. On petition of the Sherer-Gillett Company for review of order of referee. Amended and affirmed.

⚙️For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

W. J. Suthon, of New Orleans, La., for petitioner.
St. Clair Adams, of New Orleans, La., for trustee.

FOSTER, District Judge. This is a petition to review an order of the referee denying the petition of the Sherer-Gillett Company, an Illinois corporation, to be declared the owner of a display counter which was in the possession of the bankrupt and was sold by the trustee as part of the assets.

It appears the said fixture was delivered to the bankrupt under an agreement, in the form of a lease, by which the bankrupt agreed to pay \$125—\$5 cash; balance represented by one note for \$120, payable in 20 monthly installments of \$6. The agreement contained an option to the bankrupt to purchase the fixture for \$10, after complying with all other conditions; also clauses maturing the note and giving the Sherer Company the right to void the lease and retake the property on default of the payment of any installment. The referee treated the contract as one of conditional sale, held it to be void under the law of Louisiana, and also denied the Sherer Company a lien on the property.

It is well settled that a contract of conditional sale is void under the law of Louisiana, and as pointed out in *Barber Asphalt Paving Co. v. St. Louis Cypress Co., Ltd.*, 121 La. 152, 46 South. 193, and authorities cited, the form of the contract is immaterial, if the parties really intended a conditional sale. When the contract takes the form of a lease, the jurisprudence of Louisiana is not altogether harmonious. The petitioner in this case relies upon the decisions in *Stevens v. Older & Chandler*, 26 La. Ann. 634, and *Doullut v. Rush*, 142 La. 443, 77 South. 110, dealing with contracts in the form of a lease.

Without attempting to analyze and reconcile these decisions with the facts in the instant case, I think they can be distinguished and are not in point. The option to purchase would not vitiate the contract as a lease, but an option to buy for \$10 a piece of property that has a rental value of \$6 a month would hardly conform to the spirit and intent of the law of Louisiana regarding sales. See *C. C. La. 2464*. I think it was the intention of the parties to create a contract of conditional sale, cleverly disguised as a lease.

However, I think that the petitioner is equitably entitled to a lien on the proceeds of the property. It was separately sold; the amount is certain, and can be separated from the other assets. In *re New Orleans Milling Co. (D. C.)* 263 Fed. 254; *Whipple v. Hertzberger*, 11 La. Ann. 475; *Succession of Bienvenu*, 106 La. 595, 31 South. 193. To that extent the order of the referee will be amended.

Amended and affirmed.

THE CASTOR.

(District Court, E. D. New York. July 19, 1920.)

Maritime Lien ⚓25—**Lien for coal furnished on order of master.**

A libelant *held* entitled to a lien on a tug, under Act June 23, 1910, § 1 (Comp. St. § 7783), for coal supplied on order of the master.

In Admiralty. Suit by the North River Coal & Wharf Company against the Steamtug *Castor*. Decree for libelant.

William Matthews, of New York City, for libelant.
Foley & Martin, of New York City, for claimant.

CHATFIELD, District Judge. This is a claim for coal furnished to a tug upon orders by the master. Bills were made out and rendered to the tug, and sent by mail to the company which had chartered the tug from the owner. The books of the libelant show the account carried in the name of this charterer, and the testimony shows that one Ross was doing business under the name of the corporation, but that incorporation had not been completed. He chartered the boat under this name, and neither he nor the so-called corporation had any assets. He had some conversation with the president of the libelant, in which it was intimated that this charterer would like to do towing around the harbor for the libelant and thus pay for what coal might be needed. No definite arrangement as to this was ever entered into. The coal was apparently furnished in the usual way to the tug, and under the present statute this creates a lien against the boat, which can be enforced (Act June 23, 1910, c. 373, 36 Stat. 604 [Comp. St. §§ 7783-7787]), unless the person supplying necessities has knowledge that he is dealing with a charterer or an agreed purchaser in possession. In such case he is put upon inquiry as to the terms of the charter or contract. *The Oceana* (D. C.) 233 Fed. 139, affirmed 244 Fed. 80, 156 C. C. A. 508.

In the case at bar it is impossible to credit the testimony of the witness Ross as to any intimation by him that he had these boats under charter, or that he was operating in the name of a corporation which did not exist, after hearing his testimony and that of the president of the libelant. The case of *The Hatteras*, 255 Fed. 518, 166 C. C. A. 586, cited by the claimant, seems to have no bearing upon the present action, as that case deals with a claim of maritime lien for towage service, not given by the lien statute above referred to nor by the general admiralty law.

Libelant may have a decree.

⚓ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

CUNNINGHAM v. RODGERS et al.

(Court of Appeals of District of Columbia. Submitted November 3, 1919.
Decided March 1, 1920.)

No. 3185.

1. Common law ⇨11—Prevails in District of Columbia.

The common law prevails in the District of Columbia.

2. Descent and distribution ⇨76—No title to personalty vests in next of kin immediately on death.

Real estate descends to the heirs on the death of the ancestor, and personalty to the administrator, and no title to personalty vests in the next of kin on the death of the ancestor; but it remains in abeyance until the appointment of an administrator, in whom it then vests.

3. Descent and distribution ⇨91(1)—Only personal representative can sue at law for recovery of personalty.

Since title to personalty of an intestate is in the administrator, he alone can bring an action at law for its recovery, or to collect debts due his intestate, and he alone can sue for any injury to the personal property of his intestate after the decedent's death and before the final disposition to the parties entitled.

4. Descent and distribution ⇨91(1)—Administrator alone may sue on bond of consul failing to perform duties as to personalty of estate.

Under Rev. St. §§ 1697, 1709 (Comp. St. §§ 3149, 3162), next of kin, as owner of a distributive share in an estate of an intestate dying in a foreign country, cannot sue on the bond of a consul failing to perform the duties imposed by the latter section concerning personalty, as the administrator of the intestate would be the legal claimant, and he alone would be entitled to receive the fund from the treasury of the United States after transmission there by the consul.

5. Descent and distribution ⇨89—Next of kin cannot sue one as executor de son tort.

Next of kin cannot maintain an action to charge one as an executor de son tort.

Appeal from the Supreme Court of the District of Columbia.

Action by Edward R. Cunningham against James Linn Rodgers and others. From an order sustaining a demurrer, and dismissing the action, plaintiff appeals. Affirmed.

Clinton Robb, Geo. F. Curtis, and L. J. Mather, all of Washington, D. C., for appellant.

W. C. Carpenter, of Washington, D. C., for appellees.

BAILEY, Associate Justice (sitting in place of Associate Justice Robb). Appellant, Edward R. Cunningham, plaintiff below, brought his action at law against the defendants, who are the principals and sureties on a consular bond, to recover the penalty of such bond, \$8,000. The defendant Rodgers, the principal on the bond, alone was served with process. Plaintiff's declaration sounds in debt, and is in three counts. To this a demurrer was interposed by the defendant Rodgers, which was sustained by the lower court, and from the order sustaining the demurrer, and dismissing the action, the plaintiff has appealed.

The defendant was the consul general of the United States at Shanghai, China. On June 10, 1905, one Henry H. Cunningham died in Shanghai, leaving no wife, and no heirs or next of kin in China, but leaving a brother, the plaintiff, a resident of the District of Columbia, and another brother and two sisters, residing in Maine, where, the declaration avers, the deceased was legally domiciled at the time of his death. A paper writing purporting to be the will of the deceased was produced before the defendant consul by the person nominated as executor therein, one Dunning, and this paper the consul admitted to probate, and issued letters testamentary to Dunning. Thereupon, under the direction of the defendant, the estate was administered, and the property, including the real estate, distributed according to the terms of the alleged will. The declaration avers that this will was not valid under the laws of Maine, the testator's domicile, having only two witnesses, while the laws of that state require three witnesses; that the defendant consul had no jurisdiction to admit the will to probate nor to administer on the estate, but that it was his duty, immediately after the death of Henry H. Cunningham, for the information of the representatives of the deceased, to notify his death in one of the gazettes published in the consulate, and also to the Secretary of State, and to send to the Secretary of State an inventory of the deceased's effects, and to transmit the decedent's estate to the treasury of the United States, after payment of debts (which was not done), unless the legal representative of the deceased, duly qualified before a court of proper and competent jurisdiction in the United States, had appeared and proven his right to have the estate turned over to him, but that Dunning had never so qualified. The plaintiff received no part of the estate, although he claims that the deceased died intestate, and that he, as one of the next of kin, was entitled to a one-fourth distributive share, the same amounting to more than \$8,000, the penalty of the consular bond.

The plaintiff relies for his relief upon section 1709 of the Revised Statutes (Comp. St. § 3162). This section is as follows:

"It shall be the duty of consuls and vice consuls, where the laws of the country permit:

"First. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

"Second. To inventory the same with the assistance of two merchants of the United States, or, for want of them, of any others at their choice.

"Third. To collect the debts due the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted.

"Fourth. To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

"Fifth. To transmit the balance of the estate to the treasury of the United States, to be holden in trust for the legal claimant, except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands they shall deliver them up, being paid their fees, and shall cease their proceedings."

The first question presented is whether the plaintiff has any right of action on this bond, or whether such right is in the personal representative of the deceased alone. It is true that section 1697 of the

Revised Statutes (Comp. St. § 3149) provides that in case of the breach of an official bond, such as the one sued on here, "any person thereby injured may institute, in his own name and for his sole use, a suit on such bond"; but this merely obviates the necessity of bringing suit in the name of the United States for the use of the person injured, and has no bearing on this question.

[1, 2] At the common law (which prevails in the District of Columbia) real estate descends to the heir upon the death of the ancestor, and personalty to the administrator. No title to personalty vests in the next of kin upon the death of the ancestor, but it remains in abeyance until the appointment of an administrator, in whom it then vests. 1 Woerner on Adm. §§ 185, 187, 199, 202.

[3] The title to the personalty, therefore, being in the administrator, he alone can bring an action at law for its recovery, or to collect debts due his intestate, and he alone can sue for any injury to the personal property of his intestate after the decedent's death and before the final disposition to the parties entitled. *Id.* §§ 303, 293; *Holbrook v. White*, 13 Wend. (N. Y.) 591; *Hutchins v. Adams*, 3 Me. (3 Greenl.) 174; *McBride v. Vance*, 73 Ohio St. 258, 76 N. E. 938, 112 Am. St. Rep. 723, and notes 4 Ann. Cas. 191.

[4] This is an action at law, and it results, therefore, that it cannot be maintained by the plaintiff as owner of a distributive share in the estate, nor for any injury to or conversion of such interest.

Under paragraph fifth of R. S. § 1709 (Comp. St. § 3162), it is provided that it is the duty of the consul "to transmit the balance of the estate to the treasury of the United States, to be holden in trust for the legal claimant," etc. The legal claimant is clearly the personal representative and such has been the construction placed upon this section by the Treasury Department. 11 Comptroller's Dec. 713; 12 Comptroller's Dec. 439.

If, therefore, the consul had performed the duties which the plaintiff claims it was incumbent upon him to perform, the administrator would be the legal claimant, and he alone would have been entitled "to receive the fund from the treasury."

[5] The declaration is not framed so as to charge the defendant as an executor de son tort, nor could such an action be maintained by the next of kin. 2 Woerner on Adm. § 193; *Lee v. Wright*, 1 Rawle (Pa.) 149; *Muir v. Watts Orphan House*, 3 Barb. Ch. (N. Y.) 477; *Leach v. Pillsbury*, 15 N. H. 137.

As to the disposition of the real estate, it is sufficient to say that no action of the defendant can prevent the plaintiff from establishing his just rights in the proper forum, as the land cannot have been dissipated by the defendant.

In no aspect of the case, therefore, can the plaintiff maintain this action. The action of the Supreme Court of the District of Columbia in sustaining the demurrer and dismissing the suit was correct, and the judgment of said court will be affirmed, with costs.

Associate Justice BAILEY, of the Supreme Court of the District of Columbia, sat in the place of Associate Justice ROBB, who took no part in the consideration or decision of this case.

CHANOCK v. UNITED STATES.

(Court of Appeals of District of Columbia. Submitted March 2, 1920
Decided April 5, 1920.)

No. 3326.

1. Larceny \Leftrightarrow 15 (1)—Embezzlement \Leftrightarrow 13—Hotel clerk not an "innkeeper," "agent," "attorney," "clerk," or "servant," and taking guest's money was larceny, and not embezzlement.

A bookkeeper and clerk in a hotel, who was given two envelopes containing money to be placed in hotel safe, and who during the night opened the safe, took the money, and absconded, was not an "agent," "attorney," "clerk," or "servant," under Code of Law 1901, § 834, or an "innkeeper" as defined by section 837, relating to embezzlement by innkeepers, etc., and was guilty of larceny.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Agent; Attorney; Clerk; Innkeeper; Servant.]

2. Indictment and information \Leftrightarrow 125 (45)—Taking property of several persons at one time one offense, chargeable in one count.

The taking of property at the same time and from the same place constituted a single offense, chargeable in one count of indictment, although the property taken belonged to several different persons.

Appeal from Supreme Court of the District of Columbia, acting as a Criminal Court.

Sidney Chanock, alias Sidney Jordan, alias S. J. Colby, alias George Lewison, was convicted of larceny and appeals. Affirmed.

M. E. O'Brien and W. J. Lambert, both of Washington, D. C., for appellant.

J. E. Laskey, U. S. Atty., and Morgan H. Beach, Asst. U. S. Atty., both of Washington, D. C.

VAN ORSDEL, Associate Justice. This appeal is from a judgment based upon a verdict finding the appellant guilty of the crime of larceny.

It appears that defendant was bookkeeper and clerk in the Dewey Hotel, in this city. One Arnold, with his wife and daughter, registered at the hotel as guests. Arnold gave defendant two envelopes, containing securities and money, to be placed in the hotel safe. During the following night defendant opened the safe, took the securities and all of the money but \$10 from the envelopes, and absconded. When arrested, the property was found in his possession.

[1] The judgment is challenged chiefly upon the ground that the indictment charged larceny, while the proof established embezzlement. Section 837 of the District Code provides:

"Any person intrusted with anything of value, to be carried for hire, or being an innkeeper and intrusted by his guest with anything of value for safe-keeping, who fraudulently converts the same to his own use, shall be deemed guilty of embezzlement and punished as provided in section eight hundred and thirty-four."

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Section 834 relates to "embezzlement by agent, attorney, clerk, or servant." Defendant occupied none of these relations to Arnold, nor was he an innkeeper, as defined in section 837. He was a mere employé of the hotel. The securities and money were committed to the custody of defendant for a specific purpose, namely, to be placed in the safe for safe-keeping until called for by the owner. The power of defendant over the property extended to placing it in the safe and returning it, when requested by the owner. In *People v. Montaral*, 120 Cal. 691, 695, 53 Pac. 355, where one of two roommates intrusted the other with his money for safe-keeping, and the latter placed it in his trunk, subject to the former's call, the taking by the custodian was held to be larceny. On this point the court, referring to and affirming a former decision (*People v. Johnson*, 91 Cal. 265, 27 Pac. 663) said:

"Where the owner puts his property into the hands of another, to do some act in relation to it in his presence, he does not part with the possession of it, and the conversion of it *animo furandi* is larceny, and not embezzlement."

The bare custody with which defendant was vested did not change the possession of the property. It constructively remained in the owners. In *Clark & Marshall on the Law of Crimes*, 454, 455, it is said:

"There is a well-settled distinction in law between the possession of goods and the mere charge or custody, and this distinction plays an important part in the law of larceny. The owner of goods may deliver them to another in such a manner, or under such circumstances, as to give the other the bare custody, without changing the possession in the eye of the law. The possession in such a case remains constructively in the owner, and, if the person having the custody converts the goods to his own use with felonious intent, he takes them from the constructive possession of the owner, and commits a trespass and larceny; and it can make no difference, in such a case, when the felonious intent was first formed."

[2] Nor is the position of defendant tenable that he was charged with three separate and distinct felonies in a single count. Part of the property stolen is alleged to be owned by Arnold, part by his wife, and part by the daughter; but it clearly appears that the articles were taken at the same time and from the same place, and constituted a single offense.

"It is a rule of criminal pleading that, where several articles of property are stolen at the same time and place, the stealing constitutes but one offense, and should be so charged in the indictment or information. It is regarded as a single act, and the result of one intention." *Holles v. United States*, 3 MacArthur (10 D. C.) 370, 36 Am. Rep. 103; *Henry v. United States*, 49 App. D. C. 207, 263 Fed. 459.

The judgment is affirmed.
Affirmed.

HIRSH v. BLOCK.

(Court of Appeals of District of Columbia. Submitted May 4, 1920. Decided June 2, 1920.)

No. 3372.

1. **Constitutional law** ⚡46(3)—Pursuance of remedy before commission created by unconstitutional act unnecessary.

A landlord may bring an action for possession at the termination of a lease, and assert the unconstitutionality of the remedy prescribed in Act Oct. 22, 1919, known as the "Ball Rent Law," as a reason for not proceeding thereunder and taking an appeal from the commissioners, if unsuccessful before them.

2. **Constitutional law** ⚡43(2)—Proceeding under unconstitutional statute estops one from claiming unconstitutionality.

If a landlord invoked the aid of the "Ball Rent Law," and suffered defeat before the rent commission, he would estop himself to seek further relief on the ground of the unconstitutionality of the act.

3. **Landlord and tenant** ⚡94(2)—No notice required for removal at expiration of lease.

At the expiration of a time lease, no notice is required on the part of the landlord to acquire possession.

4. **Statutes** ⚡63—Unconstitutional act a nullity.

An unconstitutional act is not a law, confers no right, affords no protection, creates no office, and is, in legal contemplation, as inoperative as though it had never been passed.

5. **Constitutional law** ⚡251—Constitutional guaranties as to property rights in operation in District of Columbia.

The Constitution, guaranteeing life, liberty, and property, is uniform in operation throughout the United States, and includes the District of Columbia.

6. **Constitutional law** ⚡278(1)—Landlord and tenant ⚡180½ New, vol. 11A Key-No. Series—Ball Rent Law unconstitutional, as depriving landlord of property without due process of law.

The Ball Rent Law, giving tenants the right to occupy premises after the termination of a lease, rental to be fixed by a rent commission, permits the taking of property without due process of law, and is within the inhibition of Const. Amend. 5; the right of reversion being a property right, of which the landlord cannot be divested, except by due process of law, and the landlord being powerless to have a review of the facts on which the action of the commission is based.

7. **Eminent domain** ⚡2(1)—Ball Rent Law does not provide for taking of property for public use.

The Ball Rent Law, providing that a tenant may remain in possession after expiration of his lease, rent commission to fix rents, does not provide for the taking of private property for public use, but for the taking of the property of one citizen for another.

8. **Landlord and tenant** ⚡182—No legislative power to fix rental rates as between private persons.

The power to fix rental rates between private individuals is not analogous to or controlled by the decisions which have upheld the power of the Legislature to fix rates for service where the owner has devoted the business affected to a public use.

9. **Constitutional law** ⚡81—Renting of property to government employé private business.

The renting of property in the District of Columbia is a private business, whether the tenant be an employé of the government or not.

10. Constitutional law ⇨81—Private business cannot be made public merely by legislative fiat.

A private business cannot be made public, or be impressed with a public interest, merely by legislative fiat.

11. Constitutional law ⇨81—Property cannot be divested by arbitrary exercise of police power.

Property rights cannot be divested by an arbitrary exercise of the police power.

12. Constitutional law ⇨45—Judiciary may restrain law-making power within constitutional limitations.

The power resides in the judiciary to restrain the law-making power within constitutional limitations.

13. Jury ⇨31 (1)—Ball Rent Law invalid, as deprivation of right to trial by jury.

Ball Rent Law, providing that a tenant in the District of Columbia may remain in possession after the termination of his lease, rent to be fixed by the rent commission, is invalid, because it deprives the parties of right of trial by jury, since a finding of fact by the commission is binding and conclusive on the court and the parties, thus foreclosing the intervention of a jury.

14. Eminent domain ⇨1—War ⇨4—Constitution as to taking private property not superseded by declaration of war; Ball Rent Law unconstitutional, though Congress declared it necessary by reason of war.

Ball Rent Law, giving tenants right to possession after termination of lease, and by section 122 declaring that the provisions of the act were made necessary by emergencies growing out of the war with Germany, etc., amounted merely to a statement of the inducement or reason for the enactment, and could not render the act valid; the Constitution not being superseded by a declaration of war, the only exception to the rule that, in the case of "war emergency," private property must be taken under the power of eminent domain, being where private property may be impressed into the public service, or seized for a public use, by a military officer in the field, either to prevent it from falling into the hands of the public enemy, or for the use of the army to meet an immediate and pressing necessity, in which case the government is bound to make full compensation.

15. Constitutional law ⇨70 (3)—Wisdom of act providing for taking property by eminent domain matter for Legislature.

In the exercise of the power of eminent domain, Congress has the power to designate the public use for which private property may be taken, and, if found by the court to be in fact a public use, the courts are then powerless to question the wisdom of the legislative decision.

16. Eminent domain ⇨67—Courts not estopped by legislative declaration from inquiring into nature of use of property to be taken.

Courts are not estopped by any legislative declaration from inquiring into the nature of the use, to determine whether the purpose for which property is taken is in fact public or private.

Smyth, Chief Justice, dissenting.

Appeal from the Supreme Court of the District of Columbia.

Landlord and tenant proceeding by Louis Hirsh against Julius Block, carrying on business under the name and style of White's. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

Certiorari denied 254 U. S. —, 41 Sup. Ct. 13, 65 L. Ed. —.

Myer Cohen, R. D. Daniels, and W. G. Johnson, all of Washington, D. C., for appellant.

Julius I. Peyser, Geo. E. Edelin, Theo. D. Peyser, and J. C. Adkins, all of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This is a landlord and tenant proceeding brought by appellant, Hirsh, plaintiff below, in the municipal court of the District of Columbia, to recover possession of certain premises held by defendant, Block, under a three year lease, which terminated on the 31st day of December, 1919.

It appears that on November 12, 1919, the owners of the reversion, Mary A. Cushing and Isabella Varney, conveyed the property in question by deed to one Sylvan J. Luchs, who, on the same day, conveyed it in fee simple to plaintiff, Hirsh. The lease was duly assigned to plaintiff. Plaintiff authorized his agents to collect from the defendant the rent accruing to the termination of the lease, the 31st day of December, 1919, which rent was paid. On December 15, 1919, plaintiff notified defendant that he had purchased the property and would require possession at the expiration of the lease.

Defendant refused to vacate; hence this proceeding. From a judgment in favor of defendant in the municipal court, plaintiff appealed to the Supreme Court of the District of Columbia, where he filed an affidavit of merit under rule 19, in which he set forth, among other things:

"That he is a bona fide purchaser of the said real property for his own occupancy and requires and intends to occupy and to use the same himself for the conduct therein of the business of retail selling of men's furnishings and similar merchandise."

An affidavit of defense was filed by defendant, in which he denied plaintiff's right to possession of the premises by reason of the termination of the lease, claiming that under the Ball Rent Law the lease is continued in force and he is entitled to remain in possession of the premises, notwithstanding the expiration of the term fixed by the lease, and alleged that plaintiff purchased the premises and took conveyance thereof subject to the rights of the defendant under the act. It is further averred that plaintiff is required by the act to give a 30-day notice in writing, served in the manner provided by section 1223 of the District Code, which notice has not been served, though it is made mandatory under the provisions of the act. On hearing, the court denied the motion of plaintiff for judgment, and entered judgment in favor of defendant, from which this appeal is prosecuted.

This case involves the constitutionality of the act of Congress of October 22, 1919 (41 Stat. 298), known as the "Ball Rent Law." The act provides for the appointment of a rent commission, consisting of three persons, who are vested with absolute jurisdiction over landlords and tenants, the fixing of rents, and the continuing and making of leases within the District of Columbia for a period of two years, unless the act is sooner repealed by Congress. The only check upon the power of the commission is a restricted right of appeal to the Court of Appeals of the District of Columbia, in which "the commission's determination

shall not be modified or set aside by the court, except for error of law." The act provides that the appeal shall in no manner operate as a supersedeas or stay to postpone the enforcement of the determination of the commission appealed from, and, if any finding of the commission is modified as the result of the appeal, or set aside, the difference between the amount of rent pending appeal and the amount which should have been paid under the final judgment in the case may be recovered by suit in the municipal court of the District of Columbia.

The act declares rental property, hotels and apartments, "affected with a public interest, and that all rents * * * shall be fair and reasonable; and any unreasonable or unfair provision of a lease * * * is hereby declared to be contrary to public policy." The commission, on complaint of either the landlord or tenant, or on its own motion, is empowered to inquire into and determine whether the terms and conditions of any lease are fair and reasonable: Provided, however, that the landlord cannot make complaint when the tenant is in possession under an unexpired lease. On hearing, if the commission finds that the rent or terms of the lease are unreasonable or unfair, it shall determine and fix a—

"fair and reasonable rent or charge therefor, and fair and reasonable service, terms, and conditions of use or occupancy. In any suit in any court of the United States or the District of Columbia involving any question arising out of the relation of landlord and tenant with respect to any rental property, apartment, or hotel, except on appeal from the commission's determination as provided in this title, such court shall determine the rights and duties of the parties in accordance with the determination and regulations of the commission relevant thereto."

The act also provides that—

"The right of a tenant to the use or occupancy of any rental property, hotel or apartment, existing at the time this act takes effect, or thereafter acquired, under any lease or other contract for such use or occupancy or under any extension thereof by operation of law, shall, notwithstanding the expiration of the term fixed by such lease or contract, continue at the option of the tenant, subject, however, to any determination or regulation of the commission relevant thereto; and such tenant shall not be evicted or dispossessed so long as he pays the rent and performs the other terms and conditions of the tenancy as fixed by such lease or contract, or in case such lease or contract is modified by any determination or regulation of the commission, then as fixed by such modified lease or contract. All remedies of the owner at law or equity, based on any provision of any such lease or contract to the effect that such lease or contract shall be determined or forfeited if the premises are sold, are hereby suspended so long as this title is in force. Every purchaser shall take conveyance of any rental property, hotel, or apartment subject to the rights of tenants as provided in this title." (Section 109.)

The act then provides that the bona fide owner of rental property shall have the right of possession for his own use and occupancy upon giving 30 days' notice, as provided in section 1223 of the District Code, which notice shall contain a statement of the facts upon which it is based. In case there is a dispute between the landlord and tenant as to the accuracy or sufficiency of the statement, the matters in dispute shall, upon complaint, be determined by the commission.

The act vests the commission with power to subpoena and compel the

attendance of witnesses and the production of records, to fix rental rates retroactively to take effect from the date of filing the complaint, to prescribe the procedure to be followed in all proceedings under its jurisdiction, and to prescribe standard forms of leases and contracts to be used in renting property, with the provision that any lease or contract made after the form has been prescribed, regardless of its provisions, shall be interpreted, applied, and enforced by the commission, or any court of the United States or the District of Columbia, "in the same manner as if it were in the form and contained the stipulations of such standard form."

Heavy penalties are prescribed for the collection of rent in excess of the amount fixed by the commission, or for the collection of any bonus or other consideration in addition to the fixed rental, and the assignment of leases or subletting of leased premises at a greater rental than that paid under the lease is forbidden, except by permission of the commission.

[1-4] The right of plaintiff to question the constitutionality of the act in this proceeding is assailed. It is urged that he should have pursued the remedy prescribed in the act, and, if unsuccessful, appeal. But plaintiff would be in poor position to question the jurisdiction which he had himself invoked, merely because of an adverse decision. If he should invoke the aid of the statute, and suffer defeat before the commission, he would estop himself to seek further relief on the ground of the unconstitutionality of the act. He would not be permitted to thus experiment with the law. *Electric Co. v. Dow*, 166 U. S. 489, 17 Sup. Ct. 645, 41 L. Ed. 1088; *Wight v. Davidson*, 181 U. S. 371, 21 Sup. Ct. 616, 45 L. Ed. 900; *Shepard v. Barron*, 194 U. S. 553, 24 Sup. Ct. 737, 48 L. Ed. 1115; *Daniels v. Tearney*, 102 U. S. 415, 26 L. Ed. 187; *Grand Rapids, etc., Ry. Co. v. Osborn*, 193 U. S. 17, 24 Sup. Ct. 310, 48 L. Ed. 598. The sole defense interposed is the present act. If it is valid, the defense is complete, since the 30-day notice required by the act was not given, and the proceedings could only be had before the commission. If the act is void, it furnishes no defense; since, under existing law, at the expiration of a time lease, no notice is required, and the proceedings to acquire possession must be brought, as in this case, in the municipal court of the District.

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U. S. 425, 442, 6 Sup. Ct. 1121, 1125 (30 L. Ed. 178).

[5] Coming to the validity of the act, we have held in the recent case of *Willson v. McDonnell*, 49 App. D. C. 280, 265 Fed. 432, considering an act of Congress similar to the one before us, that the provisions of the Constitution which protect persons and property are uniform in their operation throughout the United States. In this respect, there is no distinction between the District of Columbia and the states of the Union.

"There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life,

liberty, and property." *Callan v. Wilson*, 127 U. S. 540, 550, 8 Sup. Ct. 1301, 1304 (32 L. Ed. 223).

[6] But what are the rights of which plaintiff has been divested, if the present act is held to constitute a valid defense to his action for possession? Plaintiff had a vested estate and reversion in fee in the property in question to come into possession on January 1, 1920. Defendant's right of possession terminated on December 31, 1919, by the express terms of his lease, a contract valid and existing when this act was passed. This right of reversion is a property right, of which plaintiff cannot be divested, except by due process of law. The act gives defendant the option of retaining possession of the property at the rental fixed in the lease, which is continued in force; or, if dissatisfied, he may apply to the commission for a reduction of the rent. If reduced by the commission, plaintiff is powerless to have a review of the facts upon which the action of the commission is based. Not only is plaintiff denied any remedy for this continued detention of his property, but he is forbidden to sell his property, except subject to and burdened by the option of the tenant. It would seem, therefore, that if the property clauses of the Constitution are longer to have any restraining power over Congress, the case here presented is one within the inhibition of the Fifth Amendment.

[7] Nor does this amount to the taking of private property for public use. Plaintiff and defendant are private citizens, engaged in private business. If the government needed the use of this property for the better conduct of the war, it had a remedy, plain and adequate, by the exercise of the power of eminent domain. But, as was said by Mr. Justice Story, speaking for the court in *Wilkinson v. Leland*, 2 Pet. 627, 658 (7 L. Ed. 542):

"We know of no case, in which a legislative act to transfer the property of A. to B., without his consent, has ever been held a constitutional exercise of legislative power, in any state in the Union. On the contrary, it has been constantly resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced."

[8] The power to fix rental rates between private individuals is not analogous to nor controlled by the decisions which have upheld the power of the Legislature to fix rates for service where the owner has devoted the business affected to a public use. In *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, the owner of the grain elevator had for years devoted it to a public use in handling grain for the public generally. The court, upholding the power of the Legislature of Illinois to fix rates for the service thus rendered the public, announced the rule authorizing this exercise of legislative power, as follows:

"To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one."

The same principle runs through the *Railroad Rate Cases*, the *Insurance Case* (*German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189), the *Bank Guaranty Decision* (*Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186,

55 L. Ed. 112, 32 L. R. A. [N. S.] 1062, Ann. Cas. 1912A, 487), the Irrigation Cases (Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171, and Strickley v. Highland Boy Mining Co., 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174), the Wharf Case (Weems Steamboat Co. v. People's Steamboat Co., 214 U. S. 345, 29 Sup. Ct. 661, 53 L. Ed. 1024, 16 Ann. Cas. 1222) and the Pipe Line Case (Producers' Transp. Co. v. Railroad Commission, 251 U. S. 228, 40 Sup. Ct. 131, 64 L. Ed. —).

In no case where the legislative power to regulate and fix rates has been upheld has the power to continue existing contracts in force after the time fixed by the parties for their termination, or to require the owner of the property to continue the business, been sustained. In the Noble Bank Case, *supra*, the court held, on petition for rehearing (219 U. S. 575, 31 Sup. Ct. 299, 55 L. Ed. 341), that, if the law was obnoxious to any one engaged in the banking business, "the payment can be avoided by going out of the banking business, and is required only as a condition of keeping on, from corporations created by the state." But in the present case the landlord is not only prevented from going out of the renting business, but is required to continue it upon the terms fixed by the act.

[9-12] The renting of property in the District of Columbia is a private business, whether the tenant be an employé of the government or not. A private business cannot be made public, or impressed with a public interest, merely by legislative fiat. A public interest cannot be thus created, or property rights be divested, by an arbitrary exercise of the police power. In both instances, the power resides in the judiciary to restrain the law-making power within constitutional limitations. In the Producers' Transportation Case, Mr. Justice Van Devanter, speaking for the court, said:

"It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use—that is, to carrying for the public—the state could not, by mere legislative fiat or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment."

[13] More potent still, as affecting the constitutionality of the present act, is the fact that landlords and tenants in the District of Columbia are, by its express terms, deprived of the right of trial by jury in cases involving the right to possession of real estate. Though a writ undoubtedly may be obtained in the municipal court upon the determination of the rent commission that the owner is entitled to possession, the finding of fact by the commission is binding and conclusive upon the court and the parties, which, of course, forecloses the intervention of a jury. In *Whitehead v. Shattuck*, 138 U. S. 146, 151, 11 Sup. Ct. 276, 277, 34 L. Ed. 873, the court, holding that the action for the recovery of possession of real estate is at law, and not by suit in equity, said:

"The Seventh Amendment of the Constitution of the United States declares that 'in suits at common law, where the value in controversy shall exceed

twenty dollars, the right of trial by jury shall be preserved.' * * * The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

[14] Section 122 of the act provides as follows:

"It is hereby declared that the provisions of this title are made necessary by emergencies growing out of the war with the Imperial German government, resulting in rental conditions in the District of Columbia dangerous to the public health and burdensome to public officers and employes whose duties require them to reside within the District and other persons whose activities are essential to the maintenance and comfort of such officers and employes, and thereby embarrassing the federal government in the transaction of public business. It is also declared that this title shall be considered temporary legislation, and that it shall terminate on the expiration of two years from the date of the passage of this act, unless sooner repealed."

A similar statement was contained in the Saulsbury Resolution (40 Stat. 593). In the Willson Case, holding the resolution void, we said:

"The Constitution is not superseded by a declaration of war, and experience has demonstrated that ample provision may be made for 'the national security and defense' without overstepping its limitations."

And Mr. Justice Brandeis, in the recent case of *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. —, said:

"The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations."

The declaration here amounts merely to a statement of the inducement or reason for the enactment of the statute. It affects no change in the method of acquiring private property for public use. It adds nothing to the constitutional power of Congress. The only exception to the rule that, in the case of "war emergency," private property must be taken under the power of eminent domain, is where private property may be impressed into the public service, or seized for a public use, by a military officer in the field, either to prevent it from falling into the hands of the public enemy, or for the use of the army to meet an immediate and pressing necessity. But this is taking for public use, and not for private use. Such action, however, is only justified where the emergency is too great to admit of delay to await the sanction of the civil authorities. In all such cases, the government is bound to make full compensation. *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

[15] Nor can Congress, by a mere legislative declaration, convert a private use into a public use; nor, by such a declaration, create an arbitrary exercise of the police power, or make an act constitutional which otherwise would be unconstitutional. Undoubtedly, in the exercise of the power of eminent domain, Congress has the power to designate the public use for which private property may be taken, and, if found by the courts to be, in fact, a public use, the courts are then powerless to question the wisdom of the legislative decision.

"The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is

authorized by the Legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made." *Shoemaker v. United States*, 147 U. S. 282, 298, 13 Sup. Ct. 361, 390 (37 L. Ed. 170).

[16] And the courts are not estopped by any legislative declaration from inquiring into the nature of the use to determine whether it is, in fact, public or private.

"The nature of the use for which land is to be taken necessarily appears on the face of the proceeding; and, if it is not a public one, the condemnation cannot be sustained, no matter what the Legislature may have declared." *Coe v. Aiken* (C. C.) 61 Fed. 24, 32.

In *Palairot's Appeal*, 67 Pa. 479, 5 Am. Rep. 450, the court considered an act of the Legislature of Pennsylvania in which it was attempted to extinguish irredeemable rents. The act provided for just compensation to be fixed by a jury, and, as here, contained a declaration of public use as a matter of public policy. Mr. Justice Sharswood, in an able opinion, declaring the act unconstitutional, said:

"No doubt the right of eminent domain, being for the safety and advantage of the public, overrides all rights of private property. But for what public use has this estate of the appellants been taken and applied? It has been contended, as the preamble of the act declares, that 'the policy of this commonwealth has always been to encourage the free transmission of real estate, and to remove restrictions on alienation, so that it is, and is hereby declared to be, necessary for the public use to provide a method of extinguishing such irredeemable rents, having a due regard for private rights.' But if this is the kind of public use for which a man's property can be taken, there is practically no limit * * * to the legislative power. It would result that, whenever the Legislature deem it expedient to transfer one man's property to another upon a valuation, they can effect their object."

In other words, whatever power Congress may possess to take private property for a public use upon just compensation, it has no power, under any circumstances, to take private property for a private use, as is attempted under the present act. Here, however, the individual litigant invokes the aid of the statute, not for the public use, but for his own private benefit. Though Congress may have had power, in the exercise of the right of eminent domain, as a war emergency, to take over rental property in the District of Columbia, to devote it to the public use of accommodating its employes and officials, it has not power to take the private property of one individual and turn it over to the use of another private individual. As we said in the *Willson Case*:

"In the present case, for example, by the exercise of the power of eminent domain, the government might have checked and thwarted any tendency on the part of landlords toward extortion, and, at the same time, have satisfied the due process clause of the Constitution."

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

SMYTH, Chief Justice (dissenting). Being unable to unite with my Associates in the conclusion which they have reached in this case, I think it proper to state as briefly as may be the reasons for my position:

First. Block's lease of the property expired December 31, 1919. Hirsh became the owner of the property November 12, 1919; therefore in ample time to give Block 30 days' notice, as prescribed by the Ball Act, before his term expired. Hirsh brought his action for possession in the municipal court, saying, in the words of the record:

"That he is a bona fide purchaser of the said real property for his own occupancy and requires and intends to occupy and to use the same himself."

Judgment went against him. He appealed to the Supreme Court of the District, and in his affidavit of merit repeated the allegation just quoted. Under rule 19 of that court he filed a motion for judgment on the ground that the affidavit of defense filed by Block was insufficient. The motion was overruled and judgment given for the defendant.

The Ball Act provides:

"The rights of the tenant under this title shall be subject to the limitation that the bona fide owner of any rental property, apartment, or hotel shall have the right to possession thereof for actual and bona fide occupancy by himself, or his wife, children, or dependents, * * * upon giving thirty days' notice in writing, served in the manner provided by section 1223 of the Act entitled 'An act to establish a Code of Laws for the District of Columbia,' approved May 3, 1901, as amended, which notice shall contain a full and correct statement of the facts and circumstances upon which the same is based," etc.

Therefore, if Hirsh's allegation with respect to being a bona fide purchaser of the property for his own use is true, he would be awarded possession under the act by the commission, for we must assume that it would correctly decide the case. *Shreveport v. Cole*, 129 U. S. 36, 42, 9 Sup. Ct. 210, 32 L. Ed. 589; *Strother v. Lucas*, 12 Pet. 410, 9 L. Ed. 1137; *Boley v. Griswold*, 20 Wall. 486, 488, 22 L. Ed. 375; *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822. Should the tenant refuse to yield possession, Hirsh could apply to the municipal court for the proper writ, and the commission's determination under section 106 of the act would be conclusive of the "rights and duties" of the tenant, and a writ for possession would necessarily follow. Therefore, if he had pursued the course outlined in the act, he would have received complete relief, provided he gave the required 30 days' notice. According to the law existing prior to the approval of the act, he would not have been required to give such notice. Does this render the act unconstitutional?

The requirement with respect to the notice affects the remedy only. It does not touch the contractual rights of the parties. There is a wide difference between the obligation of a contract and the remedy for its enforcement. This has been the law at least since *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529. In that case Chief Justice Marshall said:

"The distinction between the obligation of a contract, and the remedy given by the Legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."

In a later case the same court said:

"But it is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if an adequate and efficacious remedy is left." *Antoni v. Greenhow*, 107 U. S. 769, 774, 2 Sup. Ct. 91, 95 (27 L. Ed. 468).

To the same effect are *Tennessee v. Sneed*, 96 U. S. 69, 74, 24 L. Ed. 610; *Wilson v. Standefer*, 184 U. S. 399, 416, 22 Sup. Ct. 384, 46 L. Ed. 612; *Waggoner v. Flack*, 188 U. S. 595, 604, 23 Sup. Ct. 345, 47 L. Ed. 609; and *Aikins v. Kingsbury*, 247 U. S. 484, 488, 38 Sup. Ct. 558, 62 L. Ed. 1226.

According to the judgment of Congress the remedy in the case before us was modified; but that was legitimate, and did not make the act invalid.

It is asserted by *Hirsh*, and in effect repeated in the majority opinion, that the law insured him the unrestricted right of alienation of his property, the right to confer upon his alienee the right of possession without any claim or charge upon it, the right to relet the property to another tenant upon such terms as may be agreeable to him, without let or hindrance from Block, and that the act deprives him of these rights. The ready answer to these contentions is that he does not seek by his pleading the right to sell or relet his property. He asks only that he be given possession of it for his own occupancy, and, as I have just pointed out, the act furnishes him a direct and effective means by which to get it. It will be time enough to adjudicate the other rights when they properly arise. Of a situation quite similar to the one we are considering, the Supreme Court of the United States said:

"This is an effort to test the constitutionality of the law, without showing that the plaintiff had been injured by its application, and in this particular the case falls within our ruling in *Tyler v. Judges of Registration*, 179 U. S. 405, wherein we held that the plaintiff was bound to show he had personally suffered an injury before he could institute a bill for relief. In short, the case made by the plaintiff is purely academic." *Rurpin v. Lemon*, 187 U. S. 51, 60, 23 Sup. Ct. 20, 24 (47 L. Ed. 70.)

In a more recent case (*Hatch v. Reardon*, 204 U. S. 152, 160, 27 Sup. Ct. 188, 190, 51 L. Ed. 415, 9 Ann. Cas. 736), the same court said:

"But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a state on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all."

In another case one *Collins*, an osteopath, was arrested for violating a law of Texas prohibiting a person from practicing medicine for

money without having first procured a license under the statute. He sued out a writ of habeas corpus. It appeared he made no application to the State Medical Board for permission to register, assuming that he would be denied the right, and on this assumption attacked the constitutionality of the law. The Supreme Court, after pointing out his failure to seek the license, and the probability that he might have obtained it, if he had applied, said:

"On these facts we are of opinion that the plaintiff in error fails to show that the statute inflicts any wrong upon him contrary to the Fourteenth Amendment of the Constitution of the United States. If he has not suffered we are not called upon to speculate upon other cases, or to decide whether the followers of Christian Science * * * might * * * have cause to complain" *Collins v. Texas*, 223 U. S. 288, 295, 32 Sup. Ct. 286, 288 (56 L. Ed. 439).

So I may say here we are not called upon to decide whether, if Hirsh desired to sell or relet his property, the act would interfere with his doing so. My Associates say that the act deprives Hirsh of his right to a trial by jury, in disregard of the Seventh Amendment to the Constitution. But he did not ask for a jury trial. On the contrary, he moved the court under rule 19, as I have shown, for a judgment without the intervention of a jury. Why should they raise a question not presented by the record in order that they may assail an act of Congress, especially in view of the rule, universally held, that it is the duty of all courts to sustain a statute if it can be done.

"Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without injury. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Sinking-Fund Cases*, 99 U. S. 700, 718 (25 L. Ed. 496); *Hooper v. California*, 155 U. S. 648, 657, 15 Sup. Ct. 207, 39 L. Ed. 297; *Presser v. Illinois*, 116 U. S. 252, 269, 6 Sup. Ct. 580, 29 L. Ed. 615; *Grenada County v. Brogden*, 112 U. S. 261, 266, 5 Sup. Ct. 125, 28 L. Ed. 704.

The doctrine of the foregoing cases, which is binding on us, when applied to Hirsh's contentions demonstrates that the latter have no basis in the law. Outside the matter of notice, which I have disposed of, the wrongs of which he complains are imaginary. The questions he raises are purely academic, and not properly before the court for adjudication.

Second. It is urged by Hirsh that the regulation of the use of rental property and of the charges to be made therefor in the District is not within the scope of the police power of Congress, and therefore the act is void. For reasons already given, appellant has no right to raise this question. So far as the act applies to him in the present action it is valid.

Suppose, however, it is open to him to assail the act. Will it stand the test? Congress possesses all the police power within this District that a state Legislature has within its state. *Washington Terminal Co. v. District of Columbia*, 36 App. D. C. 186, 191; *District of Columbia v. Brooke*, 214 U. S. 147, 149, 29 Sup. Ct. 560, 53 L. Ed. 941. This is not denied. The police power is a development of the law. It comprehends much more now than it did 60 years ago. Albeit a part

of the common law, it was not known to it under that name. The thirteenth edition of Bouvier's Law Dictionary, published in 1867, did not have it. Chief Justice Marshall seems to be the first to introduce it into the nomenclature of our law when he used it in *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678. Under this power Congress has the right "to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction." *Chi., B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 568, 31 Sup. Ct. 259, 262 (55 L. Ed. 328). "There is," says Mr. Justice Hughes in the same case, "no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." A like doctrine is set forth in *Crowley v. Christensen*, 137 U. S. 86, 89, 11 Sup. Ct. 13, 34 L. Ed. 620, *Jacobson v. Mass.*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765, and *Frisbie v. United States*, 157 U. S. 160, 165, 15 Sup. Ct. 586, 39 L. Ed. 657.

Congress, however, may not exercise this power except with respect to business or property clothed with a public interest. But who is to decide when property is so clothed? Manifestly this must be done in the first instance by Congress. "The Legislature," said the Supreme Court of the United States in *McLean v. Arkansas*, 211 U. S. 547, 548, 29 Sup. Ct. 206, 208 (53 L. Ed. 315) "being familiar with local conditions is, primarily, the judge of the necessity of such enactments." In *Clark v. Nash*, 198 U. S. 361, 369, 25 Sup. Ct. 676, 678, 49 L. Ed. 1085, 4 Ann. Cas. 1171, it was ruled "that what is a public use may frequently and largely depend upon the facts surrounding the subject." After examining many cases, both federal and state, the Supreme Court said:

"They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation." *German Alliance Ins. Co. v. Kans.*, 233 U. S. 389, 411, 34 Sup. Ct. 612, 618 (58 L. Ed. 1011, L. R. A. 1915C, 1189). See, also, *Chi., B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 569, 31 Sup. Ct. 259, 55 L. Ed. 328; *Erie Railroad Co. v. Williams*, 233 U. S. 699, 34 Sup. Ct. 761, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097.

Congress, in section 122 of the act before us, found that it was—"made necessary by emergencies growing out of the war with the Imperial German government, resulting in rental conditions in the District of Columbia dangerous to the public health and burdensome to public officers and employes whose duties require them to reside within the District, and other persons whose activities are essential to the maintenance and comfort of such officers and employes, and thereby embarrassing the federal government in the transaction of the public business."

We must assume that this declaration was made in good faith and represents the deliberate judgment of the Congress. The Supreme Court has asserted—

"many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public." *Erie Railroad Co. v. Williams*, supra, 233 U. S. 699, 34 Sup. Ct. 761, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097.

The determination, therefore, by the Congress, presumably after a careful survey of all the pertinent facts, for we must assume that Congress discharged its full duty (*Shreveport v. Cole*, 129 U. S. 36, 42, 9 Sup. Ct. 210, 32 L. Ed. 589; *Strother v. Lucas*, 12 Pet. 410, 9 L. Ed. 1137; *Boley v. Griswold*, 20 Wall. 486, 488, 22 L. Ed. 375; *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822), that rental property in this District, for the reasons set forth in section 122, was clothed with a public interest when the Ball Act was passed, is entitled to great respect by the courts, and should not be brushed aside, except upon very conclusive proof that it has no basis on which to rest. But we were told at the bar that it had no effect, and should be treated by the court as negligible. Counsel frankly admitted that he did not have any authority for this assertion, and my studies have not revealed any.

In *Antoni v. Greenhow*, 107 U. S. 769, 775, 2 Sup. Ct. 91, 96 (27 L. Ed. 468), the Supreme Court declared:

"We ought never to overrule the decision of the legislative department of the government, unless a palpable error has been committed"

What, then, is the test by which the court is to ascertain whether this determination by Congress is sound? The Supreme Court furnishes it. In *Munn v. Illinois*, 94 U. S. 113, 132 (24 L. Ed. 77), it said:

"For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did."

Could there be anything plainer or more direct? In oral argument it was urged that this statement was merely obiter. In *Antoni v. Greenhow*, supra, after the *Munn* Case had been under the searching scrutiny of the bench and bar for more than six years, the court, citing the *Munn* Case, said:

"If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account."

The *Munn* decision has been cited numerous times by the Supreme Court as an authority in actions such as the one before us. *Ga. Banking Co. v. Smith*, 128 U. S. 174, 180, 9 Sup. Ct. 47, 32 L. Ed. 377; *Budd v. New York*, 143 U. S. 517, 543, 12 Sup. Ct. 468, 36 L. Ed. 247; *German Alliance Ins. Co. v. Kansas*, supra, 233 U. S. 409, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; *Brooks Scanlon Co. v. Railroad Commission*, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. —, decided February 2, this year. In the *Kansas* Case I find this:

"*Munn v. Illinois* was approved in many state decisions, but it was brought to the review of this court in *Budd v. New York*, 143 U. S. 517, and this doc-

trine, after elaborate consideration, reaffirmed, and against the same arguments which are now urged against the Kansas statute.

Thus it is demonstrated that the doctrine of the Munn Case is firmly imbedded in our law.

The majority say with stress that the renting of property in the District is a private business, and because of this not affected with a public interest. The same argument was advanced in the Munn and Budd Cases, *supra*. In both the owners of the property concerned were private individuals, doing a private business without any privilege or monopoly granted to them by the state; yet it was held, as I have shown, that their property was affected with a public interest. Speaking of the dissenting opinion of Mr. Justice Brewer in the Budd Case, in which he urged the private character of the property there involved, the Supreme Court in the German Alliance Case, *supra*, said:

"Every consideration was adduced, based on the private character of the business regulated, and, for that reason, its constitutional immunity from regulation, with all the power of argument and illustration of which that great judge was a master. The considerations urged did not prevail. Against them the court opposed the ever existing police power in government and its necessary exercise for the public good, and declared its entire accommodation to the limitations of the Constitution. The court was not deterred by the charge, repeated in the case at bar, that its decision had the sweeping and dangerous comprehension of subjecting to legislative regulation all of the businesses and affairs of life and the prices of all commodities." 233 U. S. 409, 34 Sup. Ct. 618, 58 L. Ed. 1011, L. R. A. 1915C, 1189.

While in a sense contracts between landlords and tenants are private, their effects, under conditions like those enumerated by Congress in the act, go beyond the individuals to the contract, and "when this is so," says the Supreme Court in the German Alliance Case, "there are many examples of regulation."

The Supreme Court has approved a statute prohibiting the sale of intoxicating liquors (*Mugler v. Kans.*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205); limiting the hours of employment in mines and smelters (*Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780); forbidding the sale of cigarettes without license (*Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725); requiring the redemption in cash of store orders issued in payment of wages (*Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55); prohibiting contracts for options to sell or buy grain (*Booch v. Ill.*, 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623); prescribing the hours of labor for those employed by the state or its municipalities (*Atkins v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148); permitting an individual to condemn property for the purpose of obtaining water for his land (*Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171); forbidding the employment of women in laundries more than 10 hours a day (*Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957); making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal, instead of weight of the coal as originally produced in the mine (*McLean v. Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315); prohibiting contracts limiting liability for injuries, made in advance of

the injury received (Chicago, etc., *R. R. Co. v. McGuire*, supra, 549); and regulating the rates to be charged for fire insurance (*German Alliance Ins. Co. v. Kansas*, supra). In each of these cases the right of private contract was involved, just as much as it is between a landlord and tenant; yet that did not deter the court from holding that the business or property was affected with a public interest and subject to regulation by the Legislature. Courts may take cognizance of whatever is or ought to be generally known within the limits of their jurisdiction. *McNichols v. Pease*, 207 U. S. 100, 111, 28 Sup. Ct. 58, 52 L. Ed. 121; *Underhill v. Hernandez*, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456; 15 R. C. L. § 2, p. 1057. I believe the facts found by Congress in section 122 of the act are substantially correct. It would in truth be a bold act to deny their verity. A careful analysis of the facts in the *Munn*, *Budd*, *McGuire*, and *German Alliance Insurance Co. Cases*, supra, fails to reveal a reason more imperative for a regulatory act than that which existed when the Ball statute was enacted.

There is, then, not only the rule of the *Munn Case*, namely, that if the facts could exist they must be presumed to exist, but also the knowledge that they did exist, when the act was passed. The burden of establishing that they did not is on the person who attacks the act. *Erie Railroad Co. v. Williams*, supra. Not a thing has been produced to support this burden. None the less we are asked to find, and the majority have yielded to the request, that there is no truth in the congressional statement. To this I am totally unable to agree.

It seems that if the legislature, in pursuance of the police power, may regulate, as it did in the *Munn Case*, the charges to be made for grain, it may also regulate, in pursuance of the same power, charges to be made for housing human beings in the District of Columbia.

By the Constitution (article 1, § 8, cl. 17) the District of Columbia is made the seat of the government of the United States, and Congress is given exclusive jurisdiction over it, to the end that the government may not be embarrassed in the exercise of its functions. According to the findings of Congress in the act, a condition exists which is so dangerous to the public health and burdensome to officers and employés of the government as to interfere with them in the discharge of their duties. To say that in those circumstances Congress has not the power to ameliorate the condition is to attribute to our national government a weakness which, if it existed, would be, to say the least, unfortunate.

The decisions cited by the majority on this point either support my position or can be easily differentiated from the case before us; but I can analyze only one (*Weems Steamboat Co. v. People's Steamboat Co.*, 214 U. S. 345, 29 Sup. Ct. 661, 53 L. Ed. 1024, 16 Ann. Cas. 1222), without unreasonably extending this opinion. I take that case because appellant seems to place much reliance upon it. The complainant, a steamboat company, owned wharves on the Rappahannock river. The defendants, a steamboat company and its officers, demanded the right to use the wharves without the consent of the owner upon paying a reasonable compensation. The court held that the complainant was not obliged to yield to the demands of the defendants, and an injunction issued against the latter forbidding them to interfere with complainant in the use of its property. The complainant had not offered its property for rent. No statute was involved. It was an attempt by the defend-

ants to compel the complainant to grant them a right in its private property. Nothing of that nature is involved here. Therein lies the distinction between that case and this. Property owners are not obliged to devote their property to rental purposes, but when they do, under the conditions established here, it is subject to the regulatory power of Congress.

"Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.'" *Munn v. Illinois*, *supra*, 94 U. S. 126, 24 L. Ed. 77.

In the light of what has been said, I see no escape from the conclusion that the business of renting property in this District under the conditions mentioned is affected with a public interest.

Third. The fact that Congress has power to regulate does not establish by any means that it may disregard constitutional guaranties and deprive an owner of his property without due process or deny him a reasonable compensation for its use. The power is subject to constitutional limitations. As I have heretofore shown, the act under review does not impinge on any constitutional right which Hirsh is entitled to assert here. If in a proper action by him it should appear that the enforcement of any of the provisions of the act would deprive him of such a right, the courts will be open for his protection. Certain provisions may be void but that would not render the whole act illegal. Section 121 provides:

"If any clause, sentence, paragraph, or part of this title [act] shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operations to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered."

In a decision of the Supreme Court of the United States rendered March 22, this year, the constitutionality of certain statutes of Oklahoma was considered. The statutes prescribed that a commission should fix maximum rates for services performed by a laundry company. It was provided that disobedience to an order establishing rates would be a contempt of the commission and subject the recalcitrant company to a penalty not exceeding \$500 a day. No right of direct appeal to the courts from the action of the commission fixing the rates was permitted, but the company might appeal from a judgment finding it guilty of contempt for disobeying the commission's order. If, however, it failed on the appeal, it might be subjected to the penalty. The Supreme Court held that "a judicial review beset by such deterrents does not satisfy the constitutional requirements," and therefore that the provisions of the acts imposing a penalty pending an appeal were unconstitutional in certain aspects; but that did not, in the judgment of the court, render the other parts of the acts void. It was ruled that—

"If upon final hearing the maximum rates fixed should be found not to be confiscatory, a permanent injunction should nevertheless issue to restrain the enforcement of penalties accrued *pendente lite*, provided that it also be found that plaintiff had reasonable ground to contest them as being confiscatory." *Okla. Operating Co. v. J. E. Love et al.*, 252 U. S. 331, 40 Sup. Ct. 338, 64 L. Ed. 596.

So here, if any of the provisions of the act before us should be found to be offensive to the Constitution, they may fall without dragging down the remainder of the act.

For the reasons given, I think the judgment of the lower court should be affirmed.

BLOCK v. HIRSH.

(Court of Appeals of District of Columbia. Submitted November 15, 1920.
Decided November 15, 1920.) No. 3454.

Appeal from the Supreme Court of the District of Columbia.

Action between Julius Block, trading and carrying on business under the name and style of Whites, and Louis Hirsh. Judgment for the latter, and the former appeals. Affirmed.

J. I. Peyser, J. C. Adkins, and Geo. E. Edelin, all of Washington, D. C., for appellant.

Wm. G. Johnson, of Washington, D. C. (Myer Cohen and Richard D. Daniels, both of Washington, D. C., on the brief), for appellee.

PER CURIAM. For the reasons stated in our opinion in the case of Block v. Hirsh (No. 3372) 50 App. D. C. —, 267 Fed. 614, the judgment in this case is affirmed, with costs.

SMYTH, Chief Justice. I dissent, for the reasons expressed in my opinion when this case was here before, and adopt that opinion as my opinion in this case.

UNITED STATES ex rel. McCATHRAN v. DOYLE, Municipal Judge.

(Court of Appeals of District of Columbia. Submitted May 3, 1920. Decided June 2, 1920.) No. 3379.

Appeal from the Supreme Court of the District of Columbia.

Petition by the United States, on the relation of Sarah E. McCathran, for a writ of mandamus to compel Michael M. Doyle, as Judge of the Municipal Court of the District of Columbia, to proceed with a landlord and tenant case. Judgment for defendant, and relator appeals. Reversed and remanded.

Geo. E. Sullivan, of Washington, D. C., for appellant.

Geo. E. Edelin, Julius I. Peyser, and J. C. Adkins, all of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. Appellant, plaintiff below, filed a petition in the Supreme Court of the District of Columbia for a writ of mandamus to compel defendant, a judge of the municipal court of the District of Columbia, to proceed with a landlord and tenant case pending in that court, in which appellant, the landlord, was plaintiff, and one Annie C. McGee, the tenant, was defendant.

It appears that, when the action was filed in the municipal court, the court ordered proceedings suspended pending the "filing of proper papers by either side before rent commission within a reasonable time." In other words, it amounted to remanding the matter to the rent commission for determination. In accordance with the order, the tenant filed a complaint before the rent commission.

Appellant bases his right of action upon the invalidity of the Ball Rent Law (41 Stat. 298). It is contended, however, by defendant, that plaintiff is not in position to raise this question, since she should have proceeded before the rent commission in the manner provided by the act, and, if aggrieved by the decision of the commission, have appealed. It may be that plaintiff

could have appeared specially and pleaded to the jurisdiction of the commission, on the ground of the unconstitutionality of the act, and thus have reserved the question on appeal to this court. But, in view of our decision this day rendered in *Hirsh v. Block* (No. 3,372) 50 App. D. C. —, 267 Fed. 614, holding the act totally void, it would be an idle thing to remand the plaintiff to the rent commission, which we have held is without jurisdiction.

The judgment of the Supreme Court of the District of Columbia is therefore reversed, and the cause is remanded for further proceedings not inconsistent with this opinion. Reversed and remanded.

SMYTH, Chief Justice (dissenting). This case involves the same questions as *Hirsh v. Block*, 50 App. D. C. —, 267 Fed. 614, just decided, and for the reasons given by me in that case I dissent in this.

WASHINGTON RY. & ELECTRIC CO. v. STUART.*

(Court of Appeals of District of Columbia. Submitted February 6, 1920. Decided June 2, 1920. On Motion for rehearing, October 4, 1920.)

No. 3309.

1. Street railroads ⇨117(23)—Contributory negligence in failing to look and listen a question of fact.

Failure to look and listen before attempting to cross a street railway track is not generally negligence per se; but when the undisputed evidence establishes exceptional circumstances, which so conclusively indicate negligence that there can be no reasonable basis for drawing a different conclusion, the question is one of law for the court.

2. Street railroads ⇨112(3)—Railroad has burden of proving contributory negligence.

The burden of establishing contributory negligence on the part of the driver of an automobile, struck by a street car at a crossing, is on the street railway.

3. Appeal and error ⇨930(1)—Testimony construed in favor of successful party.

In reviewing a judgment on a verdict in favor of plaintiff, he must be given the benefit of the most favorable construction which the testimony will admit of.

4. Street railroads ⇨99(10)—Driver of automobile, seeing street car at considerable distance, need not stop and wait.

An automobile driver, seeing a street car coming a considerable distance away, is not bound to stop and wait for it to pass.

5. Street railroads ⇨99(9)—Automobile driver may assume that street car is going at lawful speed and under control.

An automobile driver about to go on a street railway track at a street intersection, has a right to assume that an approaching street car is moving at a lawful speed and that the motorman is on the lookout and will bring his car under control.

6. Evidence ⇨5(2)—Common knowledge that it is difficult to judge of speed of approaching vehicle.

It is a matter of common knowledge that it is very difficult to judge of the speed of a vehicle approaching directly toward one.

7. Street railroads ⇨117(29)—Automobile driver's contributory negligence at street intersection held a question for jury.

In an action for injuries in a collision on a street intersection between plaintiff's automobile going 2 miles an hour, and a street car, running 30 miles an hour, whether plaintiff was guilty of contributory negligence in failing to look and in proceeding across the double tracks, after having stopped to allow another car to pass, held a question for the jury.

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 63, 65 L. Ed. —.

8. Street railroads ⇨117(35)—Negligence under last clear chance doctrine held a question for jury.

In an action for injuries in a collision between plaintiff's automobile and a street car at a street intersection, evidence *held* to justify the submission of the case to the jury under the last clear chance doctrine.

Van Orsdel, Associate Justice, dissenting.

On Motion for Rehearing.

9. Appeal and error ⇨833(4)—On rehearing, matter claimed to have been determined on things *dehors* record should be definitely pointed out.

When counsel charges, in support of a motion for rehearing, that the court based its opinion on things *dehors* the record, he should point out definitely the matter referred to, or be prepared to have his claim put aside as inconsequential.

10. Appeal and error ⇨712—Court of Appeals is confined to facts disclosed in record.

The Court of Appeals confines itself scrupulously to the facts disclosed by the record and the inferences legitimately deducible therefrom.

Appeal from the Supreme Court of the District of Columbia.

Action by George C. Stuart against the Washington Railway & Electric Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. P. Hoover, of Washington, D. C., for appellant.

Henry E. Davis and Geo. H. Calvert, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. This is an action in tort. Stuart sued the street railway company for damages resulting to him from a collision on Connecticut avenue and N street, between one of the company's cars and his automobile, due, as he alleges, to the negligence of the company. From a judgment in his favor the defendant prosecutes an appeal.

There is testimony that at the time of the accident the car was running "at least 30 miles an hour." The company did not deny this, but at the completion of the plaintiff's testimony moved for a peremptory instruction to the jury to return a verdict in its favor, on the ground that the plaintiff's right to recover was barred as a matter of law by his contributory negligence. The motion was overruled. The company electing to stand on its motion, the court submitted the question of contributory negligence to the jury, and also advised it that if it found that plaintiff was guilty of such negligence he could still recover, if the motorman operating the car, after he had discovered, or by the exercise of reasonable care could have discovered, plaintiff's peril, might have prevented the accident by the exertion of reasonable care. The company asserts that there is nothing in the testimony to support either instruction, and assigns as error the giving of each. These are the only matters complained of.

[1] It is urged by the company that the evidence conclusively established that Stuart failed to look and listen before entering upon the street car track, and that because of this he is chargeable, as a matter of law, with negligence contributing to the accident. Many decisions are cited in support of the proposition. Most of them deal with the duty of a person about to cross the tracks of a steam railroad. The rule in

such a situation is quite different from that which applies in a case like the one before us. A railroad train or an interurban car is operated on the company's right of way. No one has a right to assume that, as it approaches a street or road crossing, it will be under control, with a view of stopping promptly if the safety of a pedestrian or other person crossing the track requires it. This distinction has been recognized and applied many times, not only by this court, but by the courts of other jurisdictions. Chief Justice Alvey, in *Capital Traction Co. v. Lusby*, 12 App. D. C. 295, 302, said:

"The principle of look and listen, of general application in cases of steam railroad crossings, can hardly be applied in its strict sense to the crossing of a street railroad, and therefore it could have no proper application to cases like the present."

This view was followed in *City & Suburban Ry. Co. v. Cooper*, 32 App. D. C. 550, 557, *Capital Traction Co. v. Apple*, 34 App. D. C. 559, 566, and *Capital Traction Co. v. Crump*, 35 App. D. C. 169, 180, and is the settled law of this court. It is also in harmony with the holdings in other jurisdictions. In *Detroit United Railway v. Nichols*, 165 Fed. 289, 296, 91 C. C. A. 257, which was a street car case, it was urged that, according to the decision of the Supreme Court of the United States in *Northern Pacific Ry. Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014 (a steam railroad case), the plaintiff was guilty of contributory negligence as a matter of law by failing to look and listen before crossing a street car track. Judge Lurton, afterwards Mr. Justice Lurton, speaking for the Circuit Court of Appeals for the Sixth Circuit, rejected the argument. He said:

"But there is a distinction between the care usually exercised by reasonably prudent persons in crossing the tracks of a commercial steam railway and that exercised in crossing a street railway track upon the streets of a city. Street railway tracks are necessarily to be crossed with great frequency by reason of their occupancy of public streets. * * * There are often times and places when passing cars succeed each other so closely that cars are always very near the stream of crossing travel. Again, the facility with which such cars are stopped and the frequency of their stopping makes the danger measurably less than that incurred at an ordinary railroad crossing. * * * There is no absolute standard of negligence applicable to all cases. * * * Conduct of a traveler crossing a street railway track might not be so imprudent as to constitute negligence, as a matter of law, which at a commercial railway crossing would be legal negligence."

In support of his holding the judge cited *Cincinnati Street Ry. v. Whitcomb*, 66 Fed. 915, 14 C. C. A. 183, *Tacoma Ry. Co. v. Hays*, 110 Fed. 496, 49 C. C. A. 115, *Marden v. Portsmouth R. R. Co.*, 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 476, *Ryan v. Railroad*, 123 Mich. 597, 82 N. W. 278, and *McQuisten v. Detroit Street Ry.*, 147 Mich. 67, 110 N. W. 118.

Thompson, in volume 8, the latest volume, of his work on Negligence, section 1443, says, as the result of his study of the cases:

"The general doctrine is that failure of a traveler to look and listen before attempting to cross a street railway track is not negligence per se; but, when the undisputed evidence establishes exceptional circumstances which so conclusively indicate negligence in failing to look and listen that there can be no reasonable basis for drawing a different conclusion, the question is one of law for the court. The duty to look and listen depends largely on the circumstances of each case."

This, we think, states the correct rule of law, and is in harmony with the great weight of authority. Any expressions to the contrary in previous decisions of this court are overruled. Applying this doctrine to the case at bar, was the plaintiff guilty of such negligence as required the giving of the peremptory instruction?

[2, 3] We must remember, in considering this, that the burden of establishing contributory negligence was on the street railway (*Atchison v. Wills*, 21 App. D. C. 548, 563; *Railroad Co. v. Gladmon*, 15 Wall. 401, 407, 21 L. Ed. 114), and that we must give to the plaintiff the benefit of the most favorable construction which the testimony will admit of (*Thomas R. Riley Lbr. Co. v. McHarg*, 47 App. D. C. 389, 390, and cases cited therein).

[4-7] First, does the evidence clearly and conclusively establish that Stuart did not look and listen before entering the zone of danger? He drove his automobile up Connecticut avenue to the south line of N street, intending to go to a point on that street west of the avenue. When he reached the south line of the street, he stopped to allow a north-bound car to pass. After it had done so, he looked to the south and saw another street car coming north, about a block away. Then he looked north, and saw that the car which had passed was a little more than a block from him. He then signaled with his hand his intention to cross the avenue. He started, running at the rate of 2 miles an hour. As he turned onto the north-bound track, he looked to the north again and saw no car approaching. When he was about halfway across the south-bound track he was struck. From the time he started until the collision he traveled about 40 feet. At one time he said that as he was "about to enter upon the south-bound track he still had an unobstructed view up Connecticut avenue and saw no car." From this it would appear that he looked then, but later, when asked directly at what point he was when he last looked north, he said that it was when he "was making the turn." When "he turned on the north-bound track he looked to the north, but did not see the street car." South-bound cars turn onto the avenue at Dupont Circle, 645 feet north from where he was, and he could not see a car until it had made the turn. Whether his failure to see a car when he entered upon the north-bound track was due to the obstruction of the north-bound car which had just passed, or to the fact that the south-bound car had not yet come around the curve at Dupont Circle, does not appear.

On the hypothesis that it was his duty to look before he entered the zone of danger, what were the limits of that zone? The moment he went upon the north-bound track he was menaced by the oncoming car from the south, and as he advanced he came within range of any car that might be approaching from the north. There is no evidence that he could have safely stopped between the tracks. After he got onto the north-bound track he was compelled to go forward or backward. It appears, then, that the zone of danger commenced about 2 feet east of the north-bound track and extended to a point the same distance west of the south-bound track. Before entering it he looked, and saw no car coming from the north. After he had entered it, looking either north or south would have availed him nothing. He was, as we have said, compelled to go forward or backward. Knowing that there was a car advancing from the south, and that none was coming from the north

when he entered the danger sphere, he proceeded. Whether in doing so he displayed proper caution for his own safety was a question to be disposed of by the jury, and not by the court.

Second. The company says that, if he had looked before entering the sphere of danger, he would have seen the car, and, since he did not see it, he did not look. Assuming that he did not look, he cannot be charged with knowledge of anything but what he would have discovered if he had looked. Where was the south-bound car at that time? We can determine this only by considering the speed at which he and the street car were traveling. Placing on the testimony the construction most favorable to the plaintiff, as we must do, he was going at the rate of 2 miles an hour, and the car at 30 miles an hour. Between the time he started and the time he was struck he traveled 40 feet. How far he went after he started, and before he made the turn onto the north-bound track, we do not know. If it is material to know, then the street car company has failed to furnish us with all the facts necessary to establish their proposition that he was guilty of contributory negligence. It must have been some distance; let us say it was 10 feet. Hence, from the time that he looked until he was struck, he traveled 30 feet, which required 10 seconds, going at the rate of 2 miles an hour, or 3 feet a second. The car was running at the rate of 30 miles an hour, or 44 feet a second. In 10 seconds, it would travel 440 feet. Therefore, as he turned upon the north-bound track, if he had looked he would have seen the car on the south-bound track approaching at a distance of 440 feet away. If, however, we do not deduct the 10 feet, but say that he traveled 40 feet from the time he entered the zone of danger, the street car was 572 feet away at that moment. Was he under those circumstances bound to stop and wait until the car passed?

"Surely, one seeing a car coming a considerable distance away is not bound to stop and wait for it to pass. If such were the rule one could rarely cross a street, without being guilty of negligence, where cars follow each other at short intervals." *Capital Traction Co. v. Apple*, 34 App. D. C. 559, 570.

But it is urged that, if he had looked, he would have discovered that the car was approaching at a furious rate of speed, and in those circumstances he was not justified in attempting to cross. He could not give all his attention to the south-bound car. He was also required to look out for the north-bound car, as well as look ahead, and he was required to give attention to the operation of the automobile. Besides, he had a right to assume that the street car was moving at a lawful rate of speed. *City & Suburban Ry. v. Cooper*, 32 App. D. C. 550, 557; *Capital Traction Co. v. Apple*, 34 App. D. C. 559, 572. If, however, he could have studied the speed of the street car as it approached him, he might have realized that it was running at a very high rate. He did not have this opportunity. He would have been looking almost directly into its face, and it is a matter of common knowledge that under such circumstances it is very difficult to judge of the speed of an approaching vehicle. But, in view of the other matters which claimed his attention, all he could have done was to glance at the car as it bore down upon him. Whether or not he could, under those circumstances, have appreciated its speed, was a fair question of fact.

Assuming, however, that he did appreciate that the car, 440 feet away, was going at the rate of 30 miles an hour, he had a right to act

upon the theory that the motorman was looking ahead, as his duty required, and would, in the performance of that duty, bring the car under control before reaching the crossing, so as to be able to stop it there if necessary. *Capital Traction Co. v. Apple*, supra, 34 App. D. C. 571, where many cases are cited. In that case it was said:

" * * * It is the duty of the operator to have his car under ready control, so that it may be readily stopped when the danger is found to be imminent."

See, also, *McDermott v. Severe*, 25 App. D. C. 276.

We are not prepared to say that a person about to cross a street car track in the city, who sees a car 440 feet away, more than an ordinary block, running toward him at a high rate of speed, is bound to stop and let it pass, or subject himself to the charge of contributory negligence, in the event of an accident resulting in his injury, if he does not do so. Whether or not, under all the circumstances, Stuart was guilty of lack of proper care for his own safety, was a question for the jury.

[8] We now come to a consideration of the appellant's other contention, namely, that there was no evidence justifying the application of the doctrine of "last clear chance" or "discovered peril." It is pointed out that no witness testified that the car could be stopped in time to avoid the accident after the motorman discovered, or should have discovered, the dangerous situation of the plaintiff. This is true, and in consequence the case is very weak in that respect. But none the less there are, in our opinion, circumstances in the record sufficient to justify the inference that the car could have been stopped, if proper precaution had been taken, before the collision took place. The testimony tended to show that just prior to the collision the motorman was in conversation with a person standing beside him on the front platform, that the car was running at the rate of 30 miles an hour, that no gong was sounded, and that there was no appreciable change in the speed immediately prior to the accident. This indicates that the motorman did not see Stuart until he struck him, and that he made no effort whatever to reduce the speed of the car before the collision. In fact, the testimony is conclusive upon the point that the speed of the car was not reduced before the automobile was hit.

As we have indicated, when Stuart entered the place of danger, the car was 440 feet away. If the motorman had been looking, he would have discovered him at this point, and would have seen that if Stuart stopped he might be struck by the north-bound car, and that if he advanced he might be struck by his car unless it was stopped. He had 440 feet in which to bring the car under control and stop it. According to the uncontradicted testimony, the car was stopped within 45 feet after the impact. It is true the weight of the automobile must have contributed something towards retarding the speed of the car. How much we cannot say definitely, but considering the distance the car was away when Stuart's peril was, or should have been, discovered, and the distance within which it was stopped after it struck, we think it was a fair question for the jury to say whether or not the motorman, if he had endeavored to do so, could have brought the car to a standstill

before the accident took place. To withdraw that question from the consideration of the triers of fact would have been improper.

The judgment is affirmed, with costs.

Affirmed.

Justice SIDDONS of the Supreme Court of the District sat in place of Associate Justice ROBB, who took no part in the consideration or decision of this case.

VAN ORSDEL, Associate Justice (dissenting). Since the majority opinion is based almost wholly upon a statement of facts not supported by the record, I deem it appropriate to quote at some length from the testimony as set forth in the record. Plaintiff testified that—

"When he stopped on the south line of N street, his automobile was headed north on Connecticut avenue, with the front of it even with the south curb line on N street, and when he started from that point the north-bound car, which he had allowed to pass, was over half way to Dupont Circle. Witness was asked why he waited so long before he started, and answered that before he started he looked down Connecticut avenue to see that he had time to pass before another car coming north would get to N street. When he looked south, he saw another north-bound car; but it was a block away, and he then started up. At the time he started up he was looking directly up Connecticut avenue, and had an unobstructed view of the street as far as Dupont Circle. At the time he started up, he saw no car south on Connecticut avenue at any point between Dupont Circle and N street, and he then made the left-hand turn to go across the car tracks.

"After he started his car from the standing position, and while he was in the act of making the turn to go west on N street, he still had an unobstructed view up Connecticut avenue, and could see up as far as Dupont Circle, but saw no car coming. From the time he started until he was struck by the street car, he supposed his automobile was going about 2 miles an hour. He had his automobile in second gear. From the time he started until he got on the track and was struck he traveled about 40 feet. Just as he was about to enter upon the south-bound track, he still had an unobstructed view up Connecticut avenue and saw no car then; continued to drive, and was struck. Witness was asked what was there to prevent him from seeing the car if he had looked, and he answered there was nothing.

"The accident happened in daylight; the witness' eyesight is good, and his hearing is good. This was a large street car which struck him; he does not know what kind of a car it was. Witness has seen cars run on that line, and knows that the wheels of the cars make a rumbling noise, but that he did not hear that noise as he approached the track. Witness was asked if, before he entered upon the south-bound track, he again looked up Connecticut avenue, and answered: 'Why, I looked up just before that, and I was looking in front of me then.' Witness was asked at what point his automobile was when he last looked to the north, and answered, when he was making the turn, he was not on the south-bound track; he last looked to the north at the time he turned on the north-bound track; at the time he turned on the north-bound track he looked to the north, but did not see the street car."

The only eyewitness, aside from plaintiff, who pretends to testify to the circumstances attending the accident, was a policeman who was standing at a point near the intersection of the two streets, where he had full view of the approaching car and of the movements of plaintiff. He testified as follows:

"Witness was looking west on N street, and did not know whether the automobile came up Connecticut avenue, or up Eighteenth street, or where it came

from. When he noticed the automobile, it was between the curb and Connecticut avenue and N street, going west on N street to get across the car track. Witness was standing there leisurely looking that way with no object in view at all, but saw the automobile right in front of him, and as the automobile was about to get on the south-bound track, the front end of it just about to get on there, he noticed the street car coming down Connecticut avenue at a fast rate of speed, and in a second or two, he saw it could not help being an accident, and he holloed to Ronayne, 'Look there! there is going to be an accident,' and Ronayne turned around. In less time than witness can say it, this car came down, and this man's automobile had gotten on the south-bound track, and the car came up and hit it, and knocked it down Connecticut avenue to right opposite the trash box below the south curb of N street. * * *

"The witness was then asked to state, when he first saw the street car coming down Connecticut avenue, how far north of N street it was, and he answered at the time of the accident he did not decide at all; but after he was summoned, a week or 10 days ago, he strided it off, and from where the street car struck the automobile to the point where it was when witness first saw it the distance was 40 yards. Witness did not measure it, but it was 40 strides, and he made strides good and strong, so he thought they were about a yard. Witness was a motorman for three years and thinks he has knowledge of the rate of street cars. He was then asked how fast the car was going when he saw it, and he answered that it was going anywhere from 20 to 30 miles an hour, he would say at least 30 miles an hour. * * * Witness stepped off the distance, and would say the automobile was knocked 15 yards by the street car. * * * Witness stepped off the distance from Dupont Circle to Connecticut avenue, and it is 215 steps or yards."

Under the foregoing facts the case is a simple one. The only eye-witness testified that, when plaintiff was about to enter upon the south-bound track, the street car, traveling at the rate of 30 miles an hour, was 120 feet from the point of collision. In this situation, plaintiff, moving his automobile across the tracks at the rate of 2 miles per hour, was deliberately inviting disaster. At that moment, the car, traveling at 44 feet per second, was $2\frac{1}{2}$ seconds from the point of the accident. Of course, upon the theory of the majority opinion, no inference of negligence can be drawn from the fact that plaintiff was moving his automobile at the rate of 2 miles per hour while crossing a double-track railway, with trains approaching on each track. They seem to proceed upon the hypothesis that the whole duty of care at railway crossings is imposed upon the street car company. But this is not the law. The duty is reciprocal. *Capital Traction Co. v. Divver*, 33 App. D. C. 332. The driver of an automobile is not performing his reciprocal duty to avoid accident when he loiters across the tracks in front of approaching trains at the rate of 2 miles per hour.

From the testimony of plaintiff we learn:

"That he is 44 years of age, and is engaged as business manager of the Episcopal High School, Alexandria, and has held that position for 20 years," that "the accident happened in daylight," and that his "eyesight is good and his hearing is good."

He had an unobstructed view from N street to Dupont Circle, a distance of 645 feet. It follows, therefore, that he either did not look when the law required him to, or else he looked so carelessly that he is in no better position than if he had not looked at all. The duty of

one attempting to cross railway tracks to look and listen is clearly stated by this court in *Glaria v. Washington Southern Ry. Co.*, 30 App. D. C. 559, 566, where the court said:

"It is true that, where the undoubted facts and circumstances in evidence clearly show that one about to cross a railway track must inevitably have seen a coming car or train, if he had actually looked in its direction, the testimony of the injured party that he looked and failed to see it coming may be rejected, and his contributory negligence declared as matter of law notwithstanding."

And in *Harten v. Brightwood R. Co.*, 18 App. D. C. 260, 263, the court said:

"The track was practically straight and wholly unobstructed for several hundred yards. One looking up the track for the coming car could not fail to see it, and it was not possible for the car to traverse the space along which it was clearly visible, between the time the plaintiff looked for it as she passed from one track to the other, and the moment when she stepped upon the rail and was struck by the fender attached to the front of the car."

Considerable discussion is indulged in the majority opinion as to the duty of a traveler to look and listen before attempting to cross a street railway track. I find no fault with the rule announced by Mr. Justice Lurton in *Detroit United Ry. v. Nichols*, 165 Fed. 289, 91 C. C. A. 257, which, in effect, holds that there may be exceptional cases when it is not contributory negligence as matter of law to enter upon a street railway track without looking and listening. The rule, however, announced in *Thompson on Negligence*, making contributory negligence as matter of law the exception, is not supported by the courts. Approving this rule, the opinion states that—

"Any expressions to the contrary in previous decisions of this court are overruled."

Not only has this court consistently held that, as a general rule, it will be contributory negligence to attempt to cross a street car track without looking and listening, but that, in a crowded street with cars and vehicles passing in rapid succession, with the view obstructed and the situation confused, so as to render impossible the exercise of the high degree of care imposed upon a traveler before entering upon railway tracks, the situation may be such as to compel an exception to the general rule. But that is not this case. The evidence discloses a clear street; no confusion whatever. The case is analogous to the situation disclosed in *Barrett v. Columbia R. Co.*, 20 App. D. C. 381, where the court said:

"The accident occurred in open daylight. The plaintiff was familiar with the location, and all its environments. We must suppose that he well understood the dangers of attempting to cross the double tracks of a street railroad on a bicycle, without first seeing that he could safely do so without coming in conflict with passing cars. In this case the whole scene was open to the plaintiff, and he was required to exercise not only his senses of sight and hearing, but his common sense as well."

The cases cited in the majority opinion have little or no bearing upon this case. In the *Crump Case*, 35 App. D. C. 169, the accident did not occur from an attempt to cross the tracks. The plaintiff was driving a

closed automobile along the tracks and was run down by a car approaching from the rear. The accident in the Apple Case, 34 App. D. C. 559, occurred at night, and the evidence disclosed that the injured party stopped and looked before attempting to cross the tracks. In the Cooper Case, 32 App. D. C. 550, the driver of the vehicle saw the car approaching, but was induced to believe that the car was going to stop before reaching the crossing. In the majority opinion, in discussing the rule that failure to look and listen before attempting to cross railway tracks is generally negligence as matter of law, it is said that—

"Many decisions are cited in support of the proposition. Most of them deal with the duty of a person about to cross the tracks of a steam railroad."

Of the 38 cases cited in brief of appellant, 2 are steam railway cases, and 36 are street railway cases. In one of the steam railway cases (*Glaria v. Southern Ry. Co.*, *supra*) the court, in support of its holding of contributory negligence as matter of law for failure to look and listen, quoted at length from the street railway decision in *Harten v. Brightwood R. Co.*, *supra*. In the other steam railway case (*Southern Ry. v. Gray*, 241 U. S. 333, 36 Sup. Ct. 558, 60 L. Ed. 1030), the accident occurred in the nighttime, and the court, reversing the judgment, held that the motion for a directed verdict in the court below should have been granted. Outside of this jurisdiction, barring a very few exceptional cases, the rule of look and listen is the same with respect to both steam and street railways. Eminent jurists, in support of the rule, cite both classes of cases indiscriminately. *Denver City Tramway Co. v. Cobb*, 164 Fed. 41, 90 C. C. A. 459.

Having disposed of the case made by the record, I will now consider the case made by the majority, as set forth in their opinion. Much is made of the conceded negligence of the railway company. Of course, it was negligent, or we would have no case to consider. Its negligence forms the basis of this action. But the law recognizes what is called concurring negligence, and when that occurs, as in this case, the law furnishes no relief, irrespective of how gross or deliberate the negligence of the railway company may have been. Much is also made of the failure of the railway company to offer proof of contributory negligence. The result would not be different. No stronger proof of plaintiff's negligence could have been adduced by defendant than that given by plaintiff and his witnesses.

An interesting mathematical theory is advanced in the opinion, which rests wholly upon a mistaken premise. I agree that, with the approach of the car from the south, the danger zone began at a point 2 feet east of the northbound track. But the writer of the opinion estimates the distance from the center of the south-bound track to the east limit of the danger zone at 30 feet. While this is entirely outside of the record, I may be permitted to answer the theories of the majority by facts. The distance, instead of being 30 feet, is by actual measurement 12 feet. Plaintiff, instead of traveling 10 seconds after "the time he turned on the north-bound track," in fact traveled 4 seconds, and the street car,

traveling at 44 feet per second, instead of being 440 feet away, was 176 feet away. This agrees with the testimony of the policeman.

Not satisfied with these figures, the writer of the opinion, in another of his numerous theories, extends the limits of the danger zone 40 feet from the center of the west track, and this fixes the car 572 feet from the point of collision when plaintiff entered the danger zone. Of course, the record supports no such presumption or inference. Any person familiar with local conditions knows that it is not 40 feet or 30 feet from the center of one railway track to the outside of the adjoining track, as double-track street railways are laid in the city of Washington. Such a finding would be amusing, were it not that in the last analysis the straphangers will pay the judgment.

We now come to the theory of confusion. It is sought to excuse the plaintiff by a statement that the north-bound car, which he stopped to let pass, may have obstructed his view toward Dupont Circle. But, again, my Associates have strayed from the record. Plaintiff testifies that he waited before starting until the car was more than half way to Dupont Circle, and that he had an unobstructed view up Connecticut avenue. This conclusively answers the theory of confusion, since, if plaintiff in fact looked, his statement as to what he observed must be accepted as true; while, if he did not look, he saw nothing, and could not, therefore, have been confused. On the other hand, if the car was more than half way to Dupont Circle before he started moving at the deliberate rate at which he proceeded, it could, moving at a lawful rate of speed, have reached the Circle before "he turned on the north-bound track," when, he testified, he looked and saw nothing. Hence the inference of confusion is wholly in conflict with the record.

But the majority, notwithstanding their finding that plaintiff was not guilty of contributory negligence, find defendant liable under last clear chance. Their conclusion is based upon the mathematical error already pointed out, and is inferred from the erroneous finding that the motorman "had 440 feet in which to bring the car under control and stop it," after plaintiff entered the danger zone. Returning again to the atmosphere of the record, we find that the whole issue on this point is whether the jury would have been justified in finding that the motorman could have stopped the car, running at 30 miles per hour, in 4 seconds. Referring to burden of proof, a subject vigorously called to our attention by the majority in their discussion of contributory negligence, it may not be amiss to suggest that the burden of establishing last clear chance is on the plaintiff, and no evidence was offered on the subject.

The majority seem to hold that plaintiff, though testifying that he did look, did not in fact look or listen for approaching cars; but they undertake to excuse his negligence by theorizing as to what he would have seen, if he had looked. In this the evidence of the policeman, plaintiff's witness, and by whose testimony plaintiff is bound, is totally ignored, and various presumptions and inferences substituted, which are drawn from a premise entirely outside of the record.

The affirmation of this judgment cannot be sustained upon any sound basis of law or justice, and should be reversed.

On Motion for Rehearing.

SMYTH, Chief Justice. The motion for rehearing in this case must be overruled, but, because of the apparent earnestness with which it is pressed, we notice briefly the grounds on which it rests. Epitomized, they are: Erroneous conclusions of the court (a) respecting contributory negligence, and (b) the doctrine of last clear chance.

Concerning the first ground, counsel repeats his contention, made in his original argument, to the effect that in cases of tort arising out of street car accidents the failure of the plaintiff to look and listen before entering upon the track is an act of negligence which bars recovery under all circumstances; and he asserts that our opinion "very drastically changes the rule of law which has been established in this jurisdiction for nearly 20 years." Serious fault is found by him with our action in adopting the principle embodied in the extract taken from Judge Thompson's work on Negligence.

He admits:

"That there is this distinction between cases arising in accidents on steam railroads and those happening on street railways: In the steam railroad case, the duty of stop, look, and listen applies. In the case of street railways, the duty to stop does not apply, but the duty to look and listen does."

If by this he means that a failure to look and listen may be negligence as matter of law in some street railway cases, he is in accord with our opinion; but if he means that failure to look and listen is negligence as matter of law in all street railway cases he is wrong.

We have re-examined with care the decisions of this court on the subject. Counsel seems to rely on *Harten v. Brightwood Railway Co.*, 18 App. D. C. 260, *Barrett v. Columbia Railway Co.*, 20 App. D. C. 381, and *Capital Traction Co. v. Snowden*, 48 App. D. C. 344. In the *Harten* and *Barrett* Cases it was held that, under the facts appearing, the plaintiff was guilty of contributory negligence barring his right to recover. In the *Snowden* Case, it was said that on the evidence—

*"it may be that, if defendant had interposed a motion for a directed verdict * * * on the ground that the evidence established contributory negligence as matter of law, it could have been sustained."* (Emphasis supplied.)

This is as far as those cases go. They do not say that in all cases the negligence which will defeat recovery necessarily results from a failure to look and listen. Nor do they conflict in any wise with what we held in the original opinion. We there said, as we have just indicated by the quotation from Thompson, that there may be cases in which the facts require the court to say that the failure to look and listen establishes contributory negligence, and this is all that can be fairly claimed for the decisions relied on by him.

But counsel overlooked or ignored the holding in *Capital Traction Co. v. Apple*, 34 App. D. C. 559, and *Capital Traction Co. v. Crump*, 35 App. D. C. 169. In the first case it was said:

"That plaintiff's intestate did not stop, look, and listen before crossing the track in a city street would *not* warrant the conclusion of contributory negligence as a matter of law"—citing cases.

This language was repeated and approved in the Crump Case, where it was said:

"While it is the duty of every one, under ordinary circumstances, to use his eyes and ears amid conditions of danger, the failure to look and listen before entering upon a street car track does not constitute negligence as a matter of law."

That the question was thoroughly considered is evidenced by the opinion of Mr. Chief Justice Sheperd, who spoke for the court, and the dissenting opinion of Mr. Justice Van Orsdel. The latter, though concurring in the judgment of the court, pointedly refused to lend his assent to the declaration we have quoted. There were then two sets of decisions on the subject; one declaring that in some instances failure to look and listen barred recovery as a matter of law, and the other that the duty to look and listen did not apply at all. Counsel does not say which set he referred to when he stated that we had drastically changed the law, but we assume he was thinking of the first. The two lines were irreconcilable. One had to be modified. We believed the learned Chief Justice had gone a little too far in the Apple and Crump Cases, and it was to those cases we referred when we stated, after giving the extract from Thompson, that "any expressions to the contrary in previous decisions of this court are overruled." Thus the rule of decision in this court upon the point was freed from uncertainty and put into harmony with what we conceived to be the sounder authorities in this District, as well as in other jurisdictions, both state and federal.

[9, 10] The second ground of the motion needs but little attention. Counsel says that our application of the last clear chance doctrine is contrary to the overwhelming weight of authority, and that we proceeded with respect thereto on a hypothesis inconsistent with the evidence. Neither decisions nor texts are cited to sustain this contention. Nor is any effort made to establish by specific reference to the record that any theory advanced by us is inconsistent with the evidence. When counsel charges, in support of a motion for rehearing, that the court based its opinion on things dehors the record, he should point out definitely the matter referred to. If he does not, he must be prepared to have his claim put aside as inconsequential. We were guided, in considering the record, by well-recognized canons of construction, and confined ourselves scrupulously to the facts disclosed and the inferences legitimately deducible therefrom.

Both grounds of the motion are rejected as devoid of merit.

STANDARD OIL CO. v. ALLEN.

(Court of Appeals of District of Columbia. Submitted May 5, 1920. Decided June 2, 1920.)

No. 3339.

1. Municipal corporations \S 706 (5)—Finding of violation of law of road, which was proximate cause of injury, justified by evidence.

In an action for personal injuries received in a collision at street intersections, evidence held sufficient to justify the jury in finding that a police regulation that vehicles should keep to the right-hand curb was violated, and that its violation was the proximate cause of the injury.

2. Negligence \S 136 (25)—Proximate cause question of fact.

What is the proximate cause of an injury is a question of fact, in view of the attending circumstances.

3. Appeal and error \S 232 (3)—Objection to instruction held not to raise question of application of police regulation.

In an action for injuries by one injured at a street intersection in a collision between an automobile and defendant's truck, an objection to an instruction, that there was no evidence that the violation of said regulation was the proximate cause of the accident, or had any relation whatever to the accident, did not raise the question of the applicability of the regulation, which required vehicles to keep to the right-hand curb, to the plaintiff.

4. Appeal and error \S 232 (1)—Statute as to technical errors does not entitle party to urge different objection than that made below.

Judicial Code, \S 269, as amended by Act Feb. 26, 1919 (Comp. St. Ann. Supp. 1919, \S 1246), providing that on hearing of an appeal the court may order judgment after an examination of the record, without regard to technical errors, does not afford ground for holding that a party who assigns one reason in the court below for his objection to an instruction may urge an entirely different one on appeal and have it considered.

Appeal from the Supreme Court of the District of Columbia.

Action by Mary E. Allen against the Standard Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. M. Lewin and A. L. Sinclair, both of Washington, D. C., for appellant.

W. J. Lambert, of Washington, D. C. (R. H. Yeatman, of Washington, D. C., on the brief), for appellee.

SMYTH, Chief Justice. Mary E. Allen, alleging that she sustained personal injuries through the negligence of one of the drivers of the Standard Oil Company, instituted an action against that company in the Supreme Court of the District. From a judgment in her favor, the company brings the case here for review.

There was testimony tending to show that in June, 1915, the plaintiff, with others, was riding in an automobile going in a northeasterly direction along New York avenue, Washington. As the automobile approached Sixth street, where it intersects the avenue, a heavy steel wagon with a capacity of 800 gallons, drawn by three large horses, belonging to the defendant company, was rapidly advancing from the north on the east or left-hand side of Sixth street toward the avenue.

When the automobile was about to enter Sixth street, the driver of the wagon reduced the speed of the horses and signaled to the driver of the automobile to proceed. He did so, increasing the speed of the automobile somewhat as he advanced. Just as he got in front of the horses, they suddenly rushed forward, and the tongue of the wagon struck the automobile, inflicting upon plaintiff the injuries for which she sued.

Without objection plaintiff introduced in evidence a police regulation, which reads:

"A vehicle shall keep over, as near as practicable, to the right-hand curb, so as to leave the center of the street free and open for overtaking traffic—the slower the speed the nearer the curb."

With respect to this regulation the court, at the request of the plaintiff, charged the jury as follows:

"The jury are instructed as a matter of law that if they find from a preponderance of the evidence that the driver of the defendant company violated the municipal regulation offered in evidence requiring vehicles to keep to the right of the street, and that such violation of the regulation was the proximate cause of the collision resulting in the injuries complained of by the plaintiff, then the defendant was guilty of negligence."

To the giving of this instruction the defendant company objected, "because," it said:

"There is no evidence in the case tending to show that violation of said regulation, if the regulation was in fact violated by the defendant, was the proximate cause of the accident, or had any relation whatever to the accident."

The objection was overruled, and this action of the court constitutes the sole assignment of error in the case.

[1, 2] Witnesses testified that the wagon was on the east side of Sixth street. If it had been on the west side, where the regulation required it to be, the accident would not have taken place. There was therefore sufficient evidence to justify the jury in finding that the regulation was violated, and that its violation was the proximate cause of the injury. What is the proximate cause of an injury—

"is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it." *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 474 (24 L. Ed. 256).

[3, 4] It was urged in argument that the regulation was not intended for the protection of persons traveling across the street, as the plaintiff was doing when the collision took place, but for the benefit of vehicles approaching other vehicles from the rear—"for overtaking traffic"; in other words, that the plaintiff was not within the class of persons for whose benefit the regulation was enacted. *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S. 243, 249, 35 Sup. Ct. 785, 59 L. Ed. 1290; *District of Columbia v. White*, 48 App. D. C. 44, 48; *Railroad Co. v. Feathers*, 78 Tenn. (10 Lea) 103. Even if this were true, it would be immaterial, because the trial court was not asked to reject the instruction on that ground. *McMahon v. Matthews*, 47 Wash. Law Rep. 37; *Lilly v. Hamilton Bank*, 178 Fed. 53, 59, 102 C. C. A. 1, 29

L. R. A. (N. S.) 558. The basis of the company's objection was, as appears above, that there was—

"no evidence * * * that the violation of said regulation * * * was the proximate cause of the accident, or had any relation whatever to the accident."

We have demonstrated that, if the regulation had been observed, the plaintiff would not have been injured. In this connection our attention is invited to section 269, 40 Stat. 1181 (Comp. St. Ann. Supp. 1919, § 1246), which provides that on the hearing of an appeal—

"the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

We do not think the section is pertinent here. It means that a judgment should not be reversed for any reason that does not affect the substantial rights of the parties, even though there be a technical ground for doing so. No warrant is afforded by it for holding that a party who assigns one reason in the court below for his objection to an instruction may urge an entirely different one in this court and have it considered.

Moreover, there is authority for ruling that a regulation similar to the one before us is for the benefit of persons crossing a street, as well as for one driving a vehicle behind another. An ordinance of Los Angeles provided that every person riding or driving a vehicle upon any street "shall travel on the right-hand side of such street and as near the right-hand curb thereof as possible." This ordinance did not expressly provide, as does the regulation here, that the driver of the vehicle should keep to the right-hand side of the street, so as to leave the center free and open for overtaking traffic; but that, of course, was its effect. It is therefore in substance the same as the regulation. A collision took place between an automobile and a bicycle. At the time of the accident the driver of the automobile was proceeding in a westerly direction on the south side of Fourth street in that city. The plaintiff, riding his bicycle, was traveling southerly on Clay street toward the intersection of Fourth, with the intention of turning east on the last-named street. He was going downgrade, and was unable to control his bicycle, because the brakes would not operate. As he was completing the turn on Fourth street he collided with the defendant's automobile, which, as we have said, was on the left-hand or wrong side of the street, and was thereby injured. A nonsuit was granted by the trial court, on the ground that there was no evidence indicating negligence on the part of the defendant; but the higher court reversed this ruling, holding that the violation of the ordinance by the defendant in traveling on the left-hand side of the street constituted negligence per se, and that it was for the jury to say whether or not the negligence was the proximate cause of the injury. *Baillargeon v. Myers*, 27 Cal. App. 187, 149 Pac. 378.

In *Johnson v. Heitman*, 88 Wash. 595, 153 Pac. 331, the ordinance considered required the driver to keep on the right-hand side of the street. There was a collision between a motorcycle and an automobile

at the intersection of two streets, resulting in the death of the person riding the motorcycle. The automobile was being driven on the left instead of the right-hand side of the street. The lower court instructed the jury that, because "the automobile and motorcycle were traveling on different streets which intersected at the point of collision," it was not "negligent for either * * * to be on the left side of the street on which it was traveling." The Supreme Court refused to approve this ruling, and held that the breach of the ordinance was in itself negligence, and that it was for the jury to say whether or not it was the proximate cause of the injury.

Applying the doctrine of these cases to the case at bar, it would appear that the driver of the wagon was guilty of negligence in disregarding the regulation, and that there was no error in asking the jury to say whether or not there was a causal connection between the negligence and the accident.

We are satisfied (a) that the applicability to the accident of the regulation in question was not raised in the lower court, and for this reason it should not be considered here, and (b) that the court did not err in passing upon the objection made to the instruction submitting the regulation for the consideration of the jury. In view of this it follows that the judgment must be affirmed, at the cost of the appellant.

Affirmed.

BOWMAN v. UNITED STATES.

(Court of Appeals of District of Columbia. Submitted May 6, 1920. Decided June 2, 1920.)

No. 3363.

1. Criminal law ⚡338(1)—Evidence inadmissible, unless directly tending to prove matter in issue.

In criminal trials, no evidence shall be introduced that does not directly tend to prove or disprove the matter in issue.

2. Criminal law ⚡351(10)—Threats and assault to intimidate witness admissible.

In a homicide case, where there was only one witness, evidence that defendant threatened the life of such witness and made assaults on her some months after the killing was admissible; there being testimony from which it reasonably could be inferred by the jury that there was a direct connection between the threats and assaults.

3. Criminal law ⚡516—Homicide ⚡156(2)—Remark of accused to effect that deceased was not first white man he killed admissible.

In a homicide case, remark of defendant at the time of the killing that deceased was not the first white man he had killed was in the nature of a confession that defendant was guilty of the particular homicide, and, following defendant's statement that, if witness would say she was sorry he had killed defendant, he would shoot her, indicated the state of defendant's mind at the time of the killing; that is, that the killing was done deliberately and maliciously.

4. Homicide ⚡253(1)—Verdict of first degree murder sustained by evidence.

In a prosecution for homicide, a verdict of guilty of murder in the first degree held sustained by the evidence.

Appeal from the Supreme Court of the District of Columbia, Sitting as Criminal Court.

Frank Bowman was convicted of murder in the first degree, and appeals. Affirmed.

Robert I. Miller, of Washington, D. C., for appellant.

J. F. Laskey, U. S. Atty., and Morgan H. Beach, Asst. U. S. Atty., both of Washington, D. C.

ROBB, Associate Justice. Appeal from a conviction in the Supreme Court of the District of murder in the first degree. The evidence for the government was substantially as follows:

On the morning of July 7, 1916, the body of Clarence Keefer was found in Lord's Woods, near Michigan avenue, in this city, lying across a little path or trail, about 15 feet from "a place where the grass was depressed, as if some one had been sitting" there. At the latter spot was found a hat pin, ring, and newspaper. Deceased's home was nearby, and a few minutes before he met his death he had started for a walk in his stocking feet, saying "he would be back in about five minutes."

Esther Brown had known the defendant for a short time prior to the homicide, and on that evening she met him, and the two, after purchasing refreshments, walked to the scene of the homicide and sat down on the grass. Witness heard a noise in the leaves, and defendant suggested it was—

"probably chickens scratching in the leaves; she then heard the noise again, and by this time 'Frank Bowman had gotten up and shot at the man, and the man fell, and by that time I jumped up and I seen the man.' 'By that time he [defendant] had gotten up and shot the man once, and I looked around and seen it was a man, and he [defendant] was loading his gun, and he shot him two more times, and I hollowed, 'Stop shooting the man!'" and he [defendant] run and grabbed me, and asked me, "Was I going to tell it?" I says, "I haven't anything to do with it;" and he said, "If I thought you would tell it, I would shoot you, and leave you here, too." I said, "No, don't shoot me." "

The noise was behind witness, and it was not until after the first shot that she discovered it was a man.

"Then the defendant loaded his revolver and walked over to the man, who was lying down, and shot twice again; that when he made the above remark to her, after shooting the man, he had hold of her arm and the gun in her face."

Witness later discovered the loss of her hat pin, and defendant the loss of his ring, and she identified the hat pin on the witness stand. On their return to the city, witness asked defendant if he thought he killed the man, and defendant answered, "Yes." Thereupon witness expressed regret, and defendant replied:

"If you say you are sorry I killed that man, that white man, I'll shoot you anyway."

Thereupon, over the objection and exception of the defendant, witness was permitted to testify to a remark made by defendant that deceased "was not the first white man I [he] ever killed." On the following Saturday, while witness was ill in bed, defendant came to

her room and declined to allow her to see a newspaper he had with him, saying:

"No; I'm afraid you would see something in here about that man I killed, and you will tell it."

Witness further testified that on the occasion last mentioned—"defendant had a gun with him, and when asked by witness why he had his gun, he said, 'I carry it all the time.' He taken his gun out and laid it on the table, and I asked him please, because I was scared of the gun, and he said I should not be scared of the gun. 'I'll probably use it on you some day.' He told me he always thought I would tell he shot the man."

Thereafter witness and defendant lived together for a time, and after witness left defendant went to see her several times. Finally, on November 19, 1918, as witness got off a street car, she observed defendant approaching with a knife in his hand, and sought and obtained the protection of soldiers who were near. The next morning, as witness was about to take a car to go to her work, the defendant—"walked across the street toward her, and caught hold of her arm, and told her to turn around and go back home; that the witness refused, saying she was going to work, and the defendant said, 'I'm going to shoot you this morning; I'm going to kill you;' that the defendant then pulled a gun and shot her five times."

The testimony concerning these two assaults was admitted over the objection and exception of the defendant. There also was testimony to the effect that after his arrest defendant had admitted the killing, but claimed it was done in self-defense.

The defendant, testifying in his own behalf, claimed that the deceased attacked him, "and they came to close quarters, and deceased grabbed his hand and tore the ring off," and defendant shot him in self-defense; that—

"he had difficulty with the Brown woman. She told him, 'That is all right; I am going to get even with you. I am going to fix you.'"

Later in his testimony witness stated that the Brown woman had said to him "that she intended to get me [him] out of the way."

In rebuttal the government introduced evidence, both lay and medical, tending to show:

That the deceased was crippled in both hands, and had been since the age of 12 or 14 years; "that his hands were curved like claws; * * * that he could not lace his shoes or button his clothes; the tips of the fingers and thumb were contracted toward the palm, which made it impossible for him to pick up anything."

[1] The rule is universal in criminal trials that no evidence shall be introduced that "does not directly tend to the proof or disproof of the matter in issue." *Com. v. Horton*, 2 Gray (Mass.) 354. In *Burge v. United States*, 26 App. D. C. 524, the rule was thus stated:

"The government cannot prove against the defendant any crime not alleged, in aid of the proof that he is guilty of a crime charged. Whatever tends directly to prove a defendant guilty of the crime charged, although guilty also of another, may be shown against him; but his cause cannot be prejudiced by the evidence disclosing irrelevant guilt. * * * This doctrine is not car-

ried so far as to exclude evidence which has a direct tendency to prove the particular crime for which the prisoner is indicted."

In that case it was held error to permit the introduction of evidence of another crime, because the record failed to show "such threats and declarations as might have made the later crime reflect light upon the intent of the appellant in committing the earlier crime." In *State v. Mace*, 118 N. C. 1244, 24 S. E. 798, evidence was held admissible to the effect that shortly after the homicide defendant had threatened to shoot a witness, when it was discovered that witness was on his way to inform the family of the deceased. In *Funk v. United States*, 16 App. D. C. 478, where the defendant was convicted of murder, the court sustained the right of the government to prove a contemplated assault by the defendant on a police officer for the purpose of effecting an escape. In *Bird v. United States*, 180 U. S. 356, 21 Sup. Ct. 403, 45 L. Ed. 570, the homicide had been committed in the presence of three witnesses. It was held error to permit one of those witnesses to testify that some months later the defendant was very disagreeable, and tried to "pick a fight" with another member of the party. The court said:

"The matters so testified to took place 6 months after the alleged murder, and would seem to have no bearing, direct or remote, upon the guilt of the accused, but still may have tended to persuade the jury that Bird was a dangerous man and likely to kill any one who excited his anger."

[2] The present case differs very materially in its facts from the *Burge* and *Bird* cases. The crime was committed in the presence of a single witness, and the testimony shows that the defendant, fully realizing the importance of intimidating that witness and preventing a disclosure of the crime by her, threatened her life. He repeated the threat on the way home, and, to make certain that his attitude was fully appreciated by the witness, he went to see her within a few days, while she was ill in bed, exhibited to her the same weapon with which he had committed the crime charged, and said to her, "I'll probably use it on you some day," at the same time giving expression to his fear that she "would tell he shot the man." Moreover, the defendant's testimony shows that he appreciated the danger of disclosure from this witness, for on the stand he stated that she said to him at different times:

"I've got it in for you;" "I'm going to get even with you;" that she "intended to get me [him] out of the way."

If the jury believed that defendant threatened the life of Esther Brown, as testified by her, the testimony of the assaults made in pursuance of those threats had a legitimate bearing upon the question at issue, the intent of defendant in committing the act charged, for there would have been no occasion for an innocent man to resort to such threats and assaults. The same conditions obtained when the assaults were made that obtained at the time of the murder. Esther Brown continued to be the only witness, and defendant's attitude toward her remained the same. Surely, if it is competent to introduce evidence of flight, concealment, and other attendant and incidental facts, such as attempts to bribe a jailer, assaults on or attempts to kill officers

arresting, attempts to break jail, and possession of concealed instruments for that purpose (*Funk v. U. S.*, 16 App. D. C. 494), evidence of attempted consummation of a threat to kill the only witness of a murder is admissible so long as there is testimony from which it reasonably may be inferred by the jury that there was a direct connection between the threats and assaults. That there was such evidence in the present case we think clear. In its charge the court carefully protected the rights of the defendant in this regard, and no fault is found with the charge.

[3] As to the contention that it was error to permit the witness Esther Brown to relate the alleged remark of the defendant to her to the effect that deceased was not the first white man he had killed, little need be said. This statement was in the nature of a confession that defendant was guilty of the particular homicide. Following, as it did, defendant's statement that, if witness would again say she was sorry he had killed "that white man," defendant would shoot her, it indicated clearly the state of defendant's mind at the time of the killing; in other words, that the shooting was done deliberately and maliciously.

[4] The defendant has been represented, both at the trial and here, by able counsel, who has carefully protected his rights throughout. He has been given a fair and impartial trial, the verdict is sustained by the evidence, and, there being no error in the record, the judgment must be affirmed.

Affirmed.

SANTA FÉ PAC. R. CO. v. PAYNE, Secretary of the Interior.

(Court of Appeals of District of Columbia. Submitted May 6, 1920. Decided June 2, 1920.)

No. 3340.

1. Evidence ⇨47—Judicial notice taken of Land Department decisions.
Judicial notice may be taken of decisions of the Land Department.
2. Public lands ⇨82—Withholding approval to selection of lands not reviewable, unless arbitrary.
Withholding of approval by the Secretary of the Interior from a selection made by a successor in interest to the Atlantic & Pacific Railroad under Act April 28, 1904, in exchange for lands relinquished, cannot be reviewed by the court, unless such withholding of approval is so unreasonable as to amount to arbitrary action.
3. Public lands ⇨82—Withholding of approval of selection of lands in exchange for lands relinquished held not arbitrary.
Withholding by the Secretary of the Interior of his approval from a selection made by a successor to the Atlantic & Pacific Railroad Company under Act April 28, 1904, in exchange for lands relinquished, held not arbitrary or capricious; the land selected being worth more per acre than that relinquished, although the lands relinquished and the lands selected had been classified by the department as coal land, and the minimum price fixed as \$20 per acre.
4. Public lands ⇨82—Selection of lands held subject to investigation until approval by Secretary of Interior.
A selection of land by a successor to the Atlantic & Pacific Railroad Company under Act April 28, 1904, in exchange for lands relinquished, was open to investigation by the department as to its value and nature until final action by the Secretary of the Interior, whose approval of the selection was necessary, and it was immaterial what the records at the time of the selection showed as to the classification of the lands selected and their value.

Appeal from the Supreme Court of the District of Columbia.

Bill by the Santa Fé Pacific Railroad Company against Franklin K. Lane, Secretary of the Interior, and continued against John Barton Payne, his successor in office, to enjoin the canceling of a selection made in exchange for lands relinquished. From a decree dismissing the bill, the plaintiff appeals. Affirmed.

Alexander Britton and F. W. Clements, both of Washington, D. C. (Britton & Gray, of Washington, D. C., on the brief), for appellant.

C. E. Wright and C. D. Mahaffie, both of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a decree in the Supreme Court of the District, dismissing appellant's bill to have the Secretary of the Interior enjoined from canceling a selection made by appellant under the Act of April 28, 1904 (33 Stat. 556), in exchange for lands relinquished.

A grant was made by the Act of July 27, 1866 (14 Stat. 292), in aid of the construction of the Atlantic & Pacific Railroad, and in that act it was provided that the word "mineral," as used therein, should not

be held to include iron or coal. Appellant is the successor in interest to all the rights of the Atlantic & Pacific Company. See Act of March 3, 1897, 29 Stat. 622. The Act of April 28, 1904, in part provided:

"That the Atlantic & Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the territory of New Mexico the title to which was derived by said railroad company through the act of Congress of July twenty-seventh, eighteen hundred and sixty-six in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said territory as may be agreed upon with the Secretary of the Interior."

At the request of the Secretary of the Interior appellant relinquished its title to certain lands in the then territory of New Mexico earned under the grant of 1866, and those lands have been patented to claimants entitled under the provisions of the act of 1904. On May 1, 1911, subsequent to the relinquishment of its base lands, appellant selected an equal amount of land in the territory of New Mexico. The lands relinquished and the lands selected had been classified by the department as coal lands, and the minimum price fixed at \$20 per acre. On May 2, 1912, an inspector of the department filed a report to the effect that the coal contents of the selected lands were of greater value than those of the relinquished or base lands. Thereupon, on May 12, 1913, the Commissioner of the General Land Office rejected the selection, but on April 30, 1914, an Assistant Secretary of the Interior reversed this ruling. Within 30 days thereafter, and before the decision of the Assistant Secretary became final, that decision was recalled and held for further consideration. Upon further consideration the department, on October 26, 1916, found in effect that the base lands were worth \$20 per acre and the selected lands from \$62 to \$83 per acre. Accordingly, the department declined to approve the selection and vacated the former decision. On the same day appellant filed an elaborate motion for a rehearing, and this motion was the subject of an additional opinion by an Assistant Secretary, under date of February 13, 1917, denying the motion.

[1] Counsel for appellee have invited our attention to a departmental decision of March 18, 1919 (of which we may take judicial notice—*Knight v. Land Ass'n*, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; *United States v. Brewer-Elliott Oil & Gas Co.* [D. C.] 249 Fed. 619), from which it appears that even after suit had been filed appellant sought and obtained a further hearing in the department, and that the case received further consideration on the question of fact. In the departmental decision it was found:

"The additional evidence and showings made in support of the petition were submitted to the Director of the Geological Survey, who made report February 1, 1919, from which it appeared that the previous classification and values fixed by him were correct, and the additional showings made rather

tended to show that the values theretofore placed upon a portion of the selected lands were too low."

[2, 3] The real question for determination is whether, under the act of 1904, the Secretary of the Interior, in determining whether base lands and selected lands are "of equal quality," may take into consideration the element of value. Appellant contends that the selected lands, having been given the same classification as the base lands, were of equal quality, within the meaning of the act. The act expressly provides that the selection made thereunder shall be subject to the approval of the Secretary, and, unless it may be said that the withholding of his approval is so unreasonable as to amount to arbitrary action, it is beyond our control.

"So at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed. * * * Ness v. Fisher, 223 U. S. 683, 32 Sup. Ct. 356, 56 L. Ed. 610.

In *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324, 23 Sup. Ct. 698, 702 (47 L. Ed. 1074), the court, in speaking of the action of the Secretary, said:

"Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction."

We think those decisions, in each of which it of course was recognized that arbitrary or merely ministerial acts may be controlled, are binding in this case. The Secretary, in the discharge of his duty, was required to interpret the act, and we are unable to say that there is no real foundation for the conclusion reached. Quality being a relative term, it would be going far to rule that the act did not authorize the Secretary to consider at all the question of value. Had the act stopped with the words "and to have patented other sections of vacant public land of equal quality in said territory," there would have been more room for appellant's contention. The additional words, "as may be agreed upon with the Secretary of the Interior," lend themselves to the view that Congress intended to authorize the Secretary to pass upon the question of the relative values of the relinquished and selected lands. Had the value of the base or relinquished lands in this case been \$50 per acre, and the value of the lands tendered by the Secretary been of the value of only \$20 per acre, could it have been contended that the railroad company was under obligation to accept the exchange, because both tracts were classified as coal lands? We think not. The provision was for the mutual protection of the parties, and we are of the view that the conclusion reached by the Secretary was not arbitrary or capricious.

[4] As to the contention of appellant "that the determination [by the Secretary] must be with regard to the condition known to exist, and as evidenced by the records at the time the selection in exchange is

filed," little need be said. In *Cameron v. United States*, 252 U. S. 450, 40 Sup. Ct. 410, 64 L. Ed. 659, decided by the Supreme Court of the United States on April 19, 1920, the court ruled that—

"A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws."

In other words, until final action by the Secretary, the selection in the present case was open to investigation by the department. The coal deposits in the lands covered by that selection were in the same condition when investigated as when the selection was made, and it was open to the department, before final action, to determine the extent and value of those deposits. *Washburn v. Lane*, 49 App. D. C. 52, 258 Fed. 524.

The decree is affirmed, with costs.

Affirmed.

SANTA FE PAC. R. CO. v. PAYNE, Secretary of the Interior.

(Court of Appeals of District of Columbia. Submitted May 6, 1920. Decided June 2, 1920.)

No. 3341.

Appeal from the Supreme Court of the District of Columbia.

Suit by the Santa Fe Pacific Railroad Company against Franklin K. Lane, Secretary of the Interior, and continued against John Barton Payne, his successor in office. Decree for defendant, and plaintiff appeals. Affirmed.

Alexander Britton and F. W. Clements, both of Washington, D. C., for appellant.

C. E. Wright and C. D. Mahaffie, both of Washington, D. C., for appellee.


ROBB, Associate Justice. The facts in this case do not differ materially from those in the preceding case, No. 3340, between the same parties. 50 App. D. C. —, 267 Fed. 653. Our decision here, therefore, must be the same as in that case, and accordingly the decree appealed from is affirmed, with costs.

Affirmed.

UNION PAC. R. CO. v. PERRINE.

(Circuit Court of Appeals, Eighth Circuit. July 15, 1920.)

No. 5515.

Evidence  323 (4)—Testimony of value based on unauthenticated market record incompetent as hearsay.

In an action for the value of hay alleged to have been negligently destroyed by fire by defendant railroad company, where there was testimony that the value of hay where destroyed was governed by the Kansas City market, testimony as to the market value of such hay in Kansas City on the day of the fire, based in one case on a bulletin and in the other on records, *held* hearsay and incompetent, where neither the bulletin nor record was authenticated or produced, and it was not shown by whom they were made.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Action at law by E. Leon Perrine against the Union Pacific Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

C. A. Magaw, of Omaha, Neb. (N. H. Loomis, Edson Rich, and T. W. Bockes, all of Omaha, Neb., on the brief), for plaintiff in error.

Thomas M. Morrow, of Scotts Bluff, Neb. (William Morrow, of Scotts Bluff, Neb., on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

SANBORN, Circuit Judge. The Union Pacific Railroad Company complains of alleged errors in the trial of this action, which E. Leon Perrine brought against it for alleged negligence in the construction, maintenance, and operation of one of its locomotives over its railroad, whereby, as he alleged, sparks from which were permitted and caused to escape and set fires, which on April 9, 1917, burned up 1,000 tons of alfalfa hay, a stack cover, and a hay carrier, which he owned and which lay alongside the north line of the right of way of the company at Elm Creek, in Nebraska, to his damage in the sum of \$24,148.29. The company denied the negligence. There was a trial, a verdict, and a judgment against the company for \$14,758.74.

One of the principal issues at the trial was the value at the time of the fire of the alfalfa hay burned, and the company insists that there was prejudicial error in the admission of the testimony of Perrine and Reeves as to the market price and market value of hay at Kansas City at that time. There was substantial evidence at the trial that Elm Creek is in a country which produced large quantities of alfalfa hay in excess of the amounts there consumed; that the plaintiff was engaged in grinding this hay into alfalfa meal, and for that purpose had placed his mill and accumulated and stacked a large amount of this hay along the north side of the company's right of way; that this hay had been purchased by him under contracts with the producers made during the

preceding nine months; that the cost of this hay to Mr. Perrine was about \$10.25 per ton; that when it had been burned in the spring of 1917 surplus alfalfa hay was not abundant in the country in the immediate vicinity of Elm Creek; that there was no established open market for it there; that the nearest open market was at Kansas City; that the freight rate between Kansas City and Elm Creek was \$3 per ton, the cost of baling \$1.75 to \$2.25 per ton, and the cost of loading 50 to 70 cents per ton.

Mr. Reeves, a witness for Mr. Perrine, testified that he believed he bought for Mr. Perrine all the hay that was burned; that this hay, which was in stack at Elm Creek, which was burned, cost around \$10.25 per ton; that hay to replace it could not be bought in the vicinity of Elm Creek; that the hay burned was reasonably worth \$24 per ton at Elm Creek on April 9, 1917, when the hay was destroyed; that the market price of No. 1 alfalfa hay at Kansas City on that day was \$24. On cross-examination he was asked when he was in Kansas City, and he answered that he was there in the fall before the fire. Asked how he knew then, or who told him, what the market price of hay was in Kansas City, and other similar questions, he testified that he got his information from the weighing scales office in Kansas City, when he went in there the other day. He was testifying on June 15 or 16, 1919, so that "the other day" was probably more than two years after the fire. Asked specifically who told him that hay was worth \$24 per ton at Kansas City on April 9, 1917, he answered that he saw it without being told there in the office of the weighing scales. Asked, "All you know about the market price of hay is what you saw on some bulletin at some scales; is that right?" He replied, "That is apparently right." Thereupon counsel for the defendant moved to strike out the testimony of this witness in regard to the market price of hay as being hearsay and not the best evidence. The court overruled the motion, the defendant excepted, and the witness on his redirect examination went on to testify that Kansas City or St. Louis set the market price for hay.

Mr. Perrine testified that the Kansas City market on No. 1 alfalfa, shown by actual sales on April 9, 1917, was \$24 per ton. Asked how he knew what the market price was there on that day, this colloquy followed:

"A. Because I looked up the records, the original records, on that.

"Q. Because you looked at some records, and what somebody told you about it? A. The record is the best evidence in the world.

"Q. Well, just answer my question. A. I looked at the records and know from that.

"Mr. Magaw: We now move to strike out the testimony of the witness as to value in Kansas City, for the reason that it is based on hearsay and is not the best evidence.

"The Court: Objection overruled. My understanding of the law is that one who examines the record may testify as to its contents.

"Mr. Magaw: We renew the objection on the ground that it is not the best evidence. We are certainly entitled to have that record and an opportunity to cross-examine on it.

"The Court: Objection overruled.

"(Exception allowed.)"

What the fugitive bulletin Reeves saw or the records Perrine looked up were, who made them, whether those who saw and heard the making of the sales at Kansas City on April 9, 1917, or others to whom the eyewitnesses told or wrote what they saw or heard, and whether those who made the bulletin or those who made the records correctly made or printed therein what they saw or heard, or what was told or written to them concerning the sales of alfalfa hay on the open market at Kansas City on April 9, 1917, no one came to testify, and on this subject the record contains no evidence.

This is an action at law between Mr. Perrine and the Union Pacific Company. The fugitive bulletin Reeves saw more than two years after April 9, 1917, and the nameless records Perrine looked up, were not made by the company or by any one in privity with it, and it never admitted their correctness. Written hearsay is not more competent than spoken hearsay. The enforcement of the rule that hearsay is incompetent evidence is essential to the preservation of the liberty of the person and the rights to property. Its enforcement is not discretionary with the courts, and its violation is fatal error. Whoever may have made the bulletin or the nameless records, they were made by strangers to the parties to this suit, they were mere narratives of past transactions, and the rule against hearsay sternly forbids the reception as evidence of the repetition of the unverified narratives of strangers, whether oral or written, to determine the issues between litigants, and requires that only under the solemnity of an oath or affirmation of the strangers whose statements are offered, and then only after due notice and an opportunity to hear their testimony and to cross-examine them, shall their story become evidence against a litigant.

Neither the bulletin which Reeves saw nor the records which Perrine looked up were competent evidence of the market price of alfalfa hay in Kansas City on April 9, 1917, because the strangers who made them had not testified in the presence and subject to the cross-examination of the defendant that they contained true narratives of the sale of alfalfa hay or of the market price thereof at Kansas City on April 9, 1917. *Board of Commissioners v. Keene Five-Cent Savings Bank*, 108 Fed. 505, 510, 47 C. C. A. 464 and cases there cited; *Edwards v. Bates County*, 99 Fed. 905, 906, 40 C. C. A. 161, 162; *Thomas v. United States*, 156 Fed. 897, 914, 915, 84 C. C. A. 477, 494, 495, 17 L. R. A. (N. S.) 720; *Heath v. Waters*, 40 Mich. 457, 471; *Sperry v. Moore's Estate*, 42 Mich. 353, 361, 4 N. W. 13. Nor, if they had been thus verified, would the testimony of Reeves or Perrine to their contents have been competent, in the absence of proof that the bulletin and the records had been lost, or that it was impracticable to produce them or legally authenticated copies of them in evidence, because they were better evidence of their contents than the testimony of those who saw them.

Counsel for Mr. Perrine attempts to meet the objections to the admission of this hearsay testimony by the argument that Reeves, the buyer, and Perrine, the owner, of the hay that was burned, were competent to testify to the value of this hay at Elm Creek, on account of their relation to it and their experience in buying and dealing in it in

Nebraska. Let their competency so to testify be conceded. That is not the question presented here. The motions were not to strike out their testimony to the value of the hay at Elm Creek. They were to strike out their testimony to the market price and market value of alfalfa hay at Kansas City. They had testified to the market price and market value of hay at no other point, and their only means of knowledge of the market price and value at that city were the bulletin and the records. It was clear error to refuse to grant the motion to strike out their testimony on that subject.

Counsel for Mr. Perrine also contends that the judgment should not be reversed on account of these errors, because after the court had permitted the introduction of the incompetent evidence presented by the plaintiff, which has been considered, the defendant introduced an incompetent clipping from an Omaha newspaper purporting to disclose the sales of alfalfa hay at Omaha for \$21 or \$22 per ton on April 3 or 4, 1917, and because, if those prices should be taken as the value of the hay burned, the judgment was less than it should have been; but that clipping was not the only or the most persuasive evidence for the company. There was the testimony of Reeves that the burned hay cost Mr. Perrine about \$10.25 per ton, and the testimony of several witnesses for the defendant that its value at Elm Creek when it was burned was from \$10.50 to \$14 per ton. An examination of the evidence has satisfied that the evidence on this subject of value is too conflicting to justify a court in drawing from it any basis for a computation that would indicate that the testimony erroneously received was not injurious to the company. On the other hand, the witnesses for Mr. Perrine testified that there was no market for alfalfa hay at Elm Creek at the time of the fire, that the nearest market was at Kansas City, and that the Kansas City market set the price at Elm Creek, subject to proper allowances for freight, baling, and loading. The value of this hay was one of the most important issues in this case, and the record leaves no doubt that the reception of the incompetent hearsay testimony of Perrine and Reeves must have been prejudicial to the defendant, and that on account of it a new trial should be directed.

Other alleged errors in the trial of this case have been discussed by counsel, but they are conditioned by the state of the evidence, which will undoubtedly be very different at the next trial, and for that reason a discussion of them is omitted.

Let the judgment below be reversed, and let a new trial be directed.

WARNER et al. v. CITIZENS' NAT. BANK et al.

(Circuit Court of Appeals, Eighth Circuit. July 7, 1920.)

No. 5364.

1. Banks and banking ⇨250(3)—Judgment against national bank fixes stockholders' liability.

Rendition of a judgment against a national bank, which has gone into voluntary liquidation, and the return of an execution thereon unsatisfied, fixes the liability of the stockholders for its payment, and a cause of action against them accrues from the date of such return.

2. Courts ⇨375—Limitations of state statute usually followed in equity.

While state statutes of limitation do not apply to suits in equity in the federal courts, they are usually followed by analogy, where there is no showing on either side that to follow or not to follow the statute would be inequitable.

3. Limitation of actions ⇨130(7)—Right to extension because of dismissal of prior suit.

In view of Act June 30, 1876, c. 156, § 2 (Comp. St. § 9807), providing for enforcement of the liability of stockholders of a national bank by bill in equity in a federal court, the bringing of an action therefor in a state court *held* so manifestly unauthorized that the complainant was not entitled to the benefit of Rev. Laws Okl. 1910, § 4662, permitting the bringing of a new action on a cause of action barred by limitation, where a prior action has been dismissed otherwise than on the merits.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit in equity by Fred W. Warner and J. A. Jackson, copartners as Warner & Jackson, against the Citizens' National Bank and others. Decree for defendants, and complainants appeal. Affirmed.

Albert C. Fordham, of Chicago, Ill., W. F. Wilson and John Tomerlin, both of Oklahoma City, Okl., and Thomas Francis Howe, of Chicago, Ill., for appellants.

J. G. Ralls, J. M. Humphreys, and J. H. Gernert, all of Atoka, Okl., for appellees.

Before HOOK and CARLAND, Circuit Judges, and TRIEBER, District Judge.

CARLAND, Circuit Judge. The appellants commenced this action against appellees February 27, 1917, as judgment creditors of the Citizens' National Bank, one of the appellees, for the purpose of enforcing the stock liability of the other appellees as shareholders of said bank. Section 5220, R. S. U. S. (Comp. St. § 9806), and section 2, Act Cong. June 30, 1876, 19 Stat. 63 (Comp. St. § 9807). The bank, according to the allegations of the complaint, had gone into voluntary liquidation on or about July 22, 1906, paying all its creditors in full, except appellants, who had, before the shareholders voted to go into voluntary liquidation, commenced an action against it, in which, on December 8, 1908, they recovered a judgment in the sum of \$7,619.40. The bank appealed from said judgment to the Supreme Court of Oklahoma, where the

same was affirmed (33 Okl. 692, 127 Pac. 388), the mandate of said court having been filed in the trial court May 12, 1913. No superseas was granted on the appeal, and on July 26, 1909, appellants caused an execution to issue which was returned unsatisfied in whole or in part. After the affirmance of the judgment, and some time in 1913, an alias execution was issued, which was also returned unsatisfied in whole or in part. Subsequently, on September 9, 1914, appellants commenced an action in the district court of Atoka county, Okl., against appellees, asking for the same relief as prayed for in the present action, which action was by the court dismissed without prejudice on November 27, 1916. The court below dismissed the complaint in this action on motion of appellees other than the bank, for the reason that appellants had been guilty of laches. Section 2 of the Act of June 30, 1876, above referred to, provides that the liability of shareholders declared by section 5151, R. S. U. S., may be enforced by any creditor by bill in equity in the nature of a creditors' bill, "in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established." Section 4657, Rev. Laws of Oklahoma of 1910, provides:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: * * * (2) Within three years: An action upon a contract express or implied, not in writing; an action upon a liability created by statute, other than a forfeiture or penalty."

It is admitted by counsel for appellees that the liability of the shareholders is a liability created by statute; therefore, in the absence of any statute of limitations prescribed by the United States, section 4657 above mentioned is to be considered by analogy in determining the question of laches. Laying aside the provisions of section 5251, Rev. Laws of Oklahoma of 1910, for the present, it plainly appears that the statute of limitations prescribed by the laws of Oklahoma in actions at law where the liability is created by statute had run before this action was commenced.

[1] We are of the opinion that appellants' cause of action against the shareholders accrued as of the date of the return of either the first or alias executions unsatisfied, it being immaterial which date is selected. In either event the time prescribed by the statute of limitations of Oklahoma in actions at law had expired. The return of the executions unsatisfied showed that the bank had no assets from which the judgment could be satisfied; therefore the liability of the shareholders in a sufficient amount to pay the judgment became absolutely fixed not later than the return of the executions unsatisfied. The judgment was an order of a court of competent jurisdiction and took the place of an assessment by the Comptroller of the Currency in cases where the affairs of an insolvent bank are being liquidated. *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. 867, 34 L. Ed. 262; *Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. Ed. 790; *McDonald v. Thompson*, 184 U. S. 71, 22 Sup. Ct. 297, 46 L. Ed. 437; *Studebaker v. Perry*, 184 U. S. 258, 22 Sup. Ct. 463,

46 L. Ed. 528; McClaine v. Rankin, 197 U. S. 154, 25 Sup. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500; Rankin v. Barton, 199 U. S. 228, 26 Sup. Ct. 29, 50 L. Ed. 163; Deweese v. Smith, 106 Fed. 438, 45 C. C. A. 408, 66 L. R. A. 971; Rankin v. Miller (D. C.) 207 Fed. 602.

[2] The amount of each shareholder's liability could only be determined after trial, but liability in some amount became fixed when it appeared the bank had no assets. The statute of limitations prescribed by the state of Oklahoma, of course, does not apply to suits in equity in the federal courts; but such statutes are generally followed by analogy in cases in equity, where there is no showing on either side that to follow or not to follow the statute would be inequitable. The true rule in such cases was stated by this court in Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14, as follows:

"When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show * * * that extraordinary circumstances exist which require the application of the doctrine of laches; and, when the suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case."

The same doctrine is approved in the following cases: Wagner v. Baird, 7 How. 234, 12 L. Ed. 681; Godden v. Kimmell, 99 U. S. 201, 25 L. Ed. 431; Wood v. Carpenter, 101 U. S. 135, 139, 25 L. Ed. 807; Rugan v. Sabin, 53 Fed. 415, 420, 3 C. C. A. 578; Woodlaw R. & D. Co. v. Hawkins, 186 Ala. 234, 65 South. 183, 186; Fowler v. Ala. Iron & Steel Co., 164 Ala. 414, 51 South. 393; Southern States Fire Ins. Co. v. Kelley, 186 Ala. 259, 65 South. 328, 329.

There is no showing whatever by the appellants in their complaint that it would be inequitable to apply the doctrine of laches in their case. If appellants had any valid reason or excuse for not bringing their action within the statutory time, they should have set these facts forth in their complaint, as the burden was upon them. As was said by this court in Boynton v. Haggart, 120 Fed. 830, 57 C. C. A. 312:

"When a suit is brought after the time fixed by the analogous statute, the burden is on the complainant to plead and prove that it would be inequitable to apply it to his case, and when a suit is brought within the statutory time for the analogous action at law, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist, which require the immediate application of the doctrine of laches."

[3] Appellants, however, claim the benefit of section 4662, c. 60, Rev. Laws of Oklahoma, which reads as follows:

"Limitation of New Action.—If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die, and the cause of action survive, his representatives, may commence a new action within one year after the reversal or failure."

It is insisted that the commencement of the action in the Atoka county district court and the dismissal thereof without prejudice on November 27, 1916, gave appellants the benefit of the section quoted, and that under its provisions the present action was commenced be-

fore the bar of the state statute of limitations arose. In view of the requirements of the federal statute that an action to enforce the liability of shareholders shall be commenced in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established, we are of the opinion that the commencement of the action by appellants in the Atoka county district court did not give them the benefit of section 4662 above quoted. In *Smith v. McNeal*, 109 U. S. 426, 3 Sup. Ct. 319, 27 L. Ed. 986, the Supreme Court said:

"Cases might be supposed perhaps, where the want of jurisdiction in the court was so clear that the bringing of a suit therein would show such gross negligence and indifference as to cut the party off from the benefit of the saving statute, as if an action of ejectment should be brought in a court of admiralty, or a bill in equity should be filed before a justice of the peace."

The want of jurisdiction in the state court was so manifest that the bringing of the action in that court must be held to have been gross negligence or indifference. The case of *United States, for the Use of the Gibson Lumber Co. v. L. E. Boomer et al.*, 183 Fed. 726, 106 C. C. A. 164, was an action to recover upon a bond given by principal and sureties to the United States in order to secure the faithful performance of a contract, made between the United States and L. E. and E. R. Boomer, for furnishing labor and materials for the construction and completion of additions to officer's quarters at the New Ft. Lyon, Colo., Naval Hospital grounds. The statute giving the right of action was Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. § 6923). This statute authorized the bringing of a suit in the name of the United States in the Circuit Court of the United States in the district in which the contract to secure the performance of which the bond was given was to be performed and executed. One of the grounds of demurrer to the complaint filed was that it appeared therefrom that the action had not been commenced within one year after the performance and final settlement of the contract, as the law provided. It did appear from the complaint that the action was not commenced within one year after the performance and final settlement of the contract between L. E. and E. R. Boomer and the United States, and therefore not within the time fixed by law. It also appeared, however, that a similar action had been commenced in the district court of Colorado in and for the county of Bent within the time provided by law. The action in the state court was dismissed. Under this state of facts the appellants claimed the benefit of section 4644, vol. 2, Mills' Ann. St. Colo., which, generally speaking, and so far as the point now under consideration is concerned, was similar to the Oklahoma statute; but it was decided by this court that the action commenced in the state court of Bent county was so clearly and plainly unauthorized that it could not be held to be the commencement of an action within the meaning of the statute.

The bank did not join in the motion to dismiss, but judgment was prayed against it in the amount of the state court judgment. The judgment of dismissal should be limited to the appellees who joined in the motion to dismiss, and, as thus modified, affirmed; and it is so ordered.

SMITH v. UNITED STATES (two cases).

THOMPSON v. SAME.

(Circuit Court of Appeals, Eighth Circuit. June 28, 1920.)

Nos. 5245, 5246, 5380.

1. Criminal law ⚡1048—Exceptions necessary for appeal.

While under rule 11 of the Circuit Court of Appeals (188 Fed. ix, 109 C. C. A. ix) the court may notice a plain error not assigned nor excepted to, it is only in a clear case, to prevent a miscarriage of justice, that it will consider an alleged error not called to the attention of and not passed on by the trial court, and if it appears from the entire record that the accused is clearly guilty, errors not excepted to will afford no ground for reversal.

2. Post office ⚡48(4)—Indictment for using mails to defraud need not charge that scheme was intended to be so effected.

Under Criminal Code, § 215 (Comp. St. § 10385), an indictment for using the mails to defraud need not charge that the scheme to defraud devised by defendants was intended to be effected by the use of the mails; but it is sufficient to allege that they were used for the purpose of executing such scheme.

3. Criminal law ⚡427(3)—Order of proof as to conspirator's acts discretionary.

On trial of numerous defendants for conspiracy to use the mails to defraud, tentative admission of evidence of overt acts by some of the defendants in advance of proof connecting them with the conspiracy held within the discretion of the court.

4. Conspiracy ⚡45—Wide latitude allowed in introduction of evidence.

In prosecutions for conspiracy, great latitude is allowed in the introduction of circumstantial evidence.

5. Conspiracy ⚡32—To use mails to defraud held established.

A conviction of conspiracy to use the mails to defraud held sustained by evidence showing that defendants organized a corporation to raise and deal in live stock, purporting to have a capital of \$200,000, but of which little or none was paid in by them, that they freely used the mails in advertising the ownership by such corporation of a large number of horses running on the range in Arizona, and sold and gave bills of sale for over 17,000 head, falsely representing them to be valuable animals and easy to capture, whereas they never owned to exceed 500 horses, which were small, wild broncos, of little value.

6. Criminal law ⚡1186(4)—Conviction warranted on whole case reversed only for substantial error.

Where the guilt of a defendant is clearly established on the whole case, errors in the admission or exclusion of evidence must be substantial and clearly prejudicial, to warrant a reversal therefor.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Criminal prosecution by the United States against J. Sidney Smith, Charles M. Thompson, and C. A. Smith. Judgment of conviction, and defendants bring error. Affirmed.

John Lee Webster, of Omaha, Neb., for plaintiffs in error.

Howard Saxton, Sp. Asst. U. S. Atty., of Omaha, Neb. (T. S.

Allen, U. S. Atty., of Lincoln, Neb., on the brief), for the United States.

Before HOOK and CARLAND, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. The plaintiffs in error, referred to hereinafter as the defendants, prosecute these writs of error to secure a reversal of the conviction and sentences for violating section 37 of the Penal Code (Comp. St. § 10201), conspiring to violate section 215 of the Penal Code (section 10385). There were a large number of other persons charged as defendants in the indictment; some were dismissed, and a number of others were tried with the defendants and found guilty; but these three plaintiffs in error are the only defendants prosecuting writs of error. While a separate writ of error was secured by each of them, they were submitted on one record and argued as one cause; the evidence against all being practically the same.

The indictment contains only one count, and charges the defendants with conspiring in the county of Douglas, in the Omaha division of the district of Nebraska to violate section 215 of the Penal Code, in devising and intending to devise a scheme and artifice to defraud all such persons who could or might be induced by means of the fraudulent and false device, representations, pretenses, and promises, hereinafter mentioned, to become purchasers of horses from the U. S. Live Stock Company, a corporation organized under the laws of the state of Nebraska; that for the purpose of carrying the fraudulent scheme into effect they placed and caused to be placed in the post office of the United States at Omaha, Neb., and in divers other post offices of the United States, to be sent and delivered by the post office establishment of the United States, certain letters, writings, and advertisements in newspapers. It then describes the fraudulent scheme and artifice to have been that the conspirators organized and caused to be organized a corporation under the laws of the state of Nebraska, in the name of U. S. Live Stock Company, having its principal place of business at Omaha, in the state of Nebraska, with a pretended capital stock of \$200,000, which they would fraudulently and falsely claim and represent to be of the value of \$200,000; that the nature of the business to be transacted by said corporation would be to buy, sell, breed, and raise live stock of all kinds and descriptions, and engage in certain other businesses, not necessary to set out; that they then pretended to be the owners of large numbers of horses, located on a range in Coconino county, state of Arizona; that they would represent the horses were of a value of not less than \$50 per head, averaging in weight from 900 to 1,200 pounds and upward; that said horses were in part Percheron, Hamiltonian, and Belgian breeds, and among them were a number of valuable stallions; that said horses were running wild upon the said range, but were easily accessible, and could be readily caught and reduced to possession at very little expense by purchasers; that they would make pretended

sales of said horses, in large numbers, to all such persons as might thereby be induced to purchase the same, and thereupon would execute a pretended bill of sale in the name of said corporation and in the names of some of the defendants, in which bill of sale the horses pretended to be sold would be described as from 2 to 3 and 6 to 8 years old, sound and free from blemish and disease, weighing from 900 pounds upwards, free from all incumbrances, on said range in Coconino county, Ariz., and to be gathered and loaded at the expense of the purchasers.

It is then charged that the capital stock of said corporation was of little or no value, and was not intended to be any part of the business to be transacted by it, as stated in the articles of incorporation; that neither of the defendants, nor the U. S. Live Stock Company, owned or possessed any considerable number of horses in said Coconino county, Ariz., nor elsewhere; that they owned less than 500 horses, which had been running wild upon said range for many years, were practically worthless, even if they could be secured, all of said horses being so wild and untamable as to render it impossible to secure them, and all of which were at the time incumbered for more than their value; that there were no horses of Percheron, Hamiltonian, or Belgian breeds, or any stallions of any appreciable value; that all of the representations made by them to purchasers were false, as they well knew, and were intended by the conspirators for the fraudulent purpose, to deceive intending purchasers, and defraud them of large sums of money and property of great value. It then charges 12 overt acts of the use of the mails, naming persons to whom the letters were sent through the mails, and advertisements in a number of newspapers published in a number of cities in different Western states, which were largely circulated through the mails.

A demurrer to the indictment was by the court overruled, and upon a trial to a jury a verdict of guilty was returned against these defendants and a number of others, who are not prosecuting writs of error.

[1] After the granting of the writs of error, the defendants applied to this court for leave to file additional assignments of error, which was denied. Notwithstanding this denial, counsel for defendants in their briefs and oral arguments relied almost entirely upon these assignments of error, which are no part of the record. This is not permissible. *Kreuzer v. United States*, 254 Fed. 34, 165 C. C. A. 444.

Under rule 11 (188 Fed. ix, 109 C. C. A. ix) the court, at its option, may notice a plain error not assigned. Nor will the court refuse to notice a substantial error committed during the trial, when the accused's liberty is involved, although no exceptions were taken, nor included in the assignment of errors. But it is only in a clear case, to prevent a miscarriage of justice, that an appellate court will consider an alleged error, not called to the attention of, and not passed on by, the trial court. *Gillette v. United States*, 236 Fed. 215, 149 C. C. A. 405. If it appears from the entire record that the accused is clearly guilty, errors not excepted to will afford no ground for reversal. It

was so held by this court in the late case. *Williams v. U. S.* (C. C. A.) 265 Fed. 625.

[2] The ground upon which counsel for defendant relied for the demurrer to the indictment was that it fails to charge that the scheme to defraud, devised by the defendants, was intended to be effected by the use of the post office establishment of the United States, although it charged that, for the purpose of executing it, newspapers and letters were placed and caused to be placed by them in the post office of the United States to be carried by the post office establishment to certain persons named in the indictment. While under section 5480, Rev. Stat., as amended in 1889, it was necessary to so charge, section 215 of the Penal Code, in force at the time the acts charged were committed, does not require it. It is sufficient if the fraudulent scheme and artifice has been devised and the mails of the United States are used for the purpose of carrying it into effect. *United States v. Young*, 232 U. S. 155, 34 Sup. Ct. 303, 58 L. Ed. 548; *Stockton v. United States*, 205 Fed. 462, 123 C. C. A. 530, 46 L. R. A. (N. S.) 936; *United States v. Maxey* (D. C.) 200 Fed. 997.

[3] It is next claimed that the court erred in permitting witnesses to testify as to overt acts of the defendants, or some of them, before the conspiracy had been established by proper evidence. But the court, in overruling the objections of the defendants to that testimony, admitted it only tentatively, saying:

"The only position the court can take at this time is to admit the testimony which appears to be relevant, and allow the defendants exceptions, and that our attention will be called to any link in the testimony, or any insufficiency in the connecting up of the links of the government's testimony. And it seems to me important that some record be kept by the counsel for defendants, and the court's attention called, if the testimony is not connected up."

In another instance the court, in overruling a similar objection, said, "I assume that the government will connect him up with the defendants;" to which the counsel for the government replied, "We will certainly do so;" and later did connect the defendant objecting with the other defendants. This was a matter of judicial discretion, with which appellate courts will not interfere. *Kansas City Star v. Carlisle*, 108 Fed. 344, 366, 47 C. C. A. 384; *Spencer v. Read*, 217 Fed. 508, 516, 133 C. C. A. 360, 368.

[4] In prosecutions of this nature, great latitude in the introduction of testimony is allowed, as in most instances the offense can only be established by circumstantial evidence. In *Williamson v. United States*, 207 U. S. 425, 451, 28 Sup. Ct. 163, 52 L. Ed. 278, the court quoted with approval from *Holmes v. Goldsmith*, 147 U. S. 150, 164, 13 Sup. Ct. 288, 292 (37 L. Ed. 118):

"As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be. The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though

remotely, to a determination probably founded in truth.' * * * The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases, because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

No exceptions were taken to the charge of the court, and a careful reading of it convinces that no error was committed by the court. The law was stated correctly, and the issues of fact fairly and impartially submitted to the jury. The only special request made on behalf of the defendants, and by the court denied, was for a directed verdict of not guilty. Without setting out the voluminous testimony (the trial lasted 24 days), we are convinced that there was substantial—in fact, we may say conclusive—evidence of the guilt of the defendants.

[5] Briefly stated the evidence established the following facts: The defendants organized a corporation under the name of the U. S. Live Stock Company, having its principal place of business in Omaha, Neb., with a pretended capital stock of \$200,000, very little of which, if any, was paid in by the defendants, who organized the corporation, although some of the stock was sold to other parties on misrepresentations as to its value. The purpose of the corporation, as stated in the articles of incorporation, was to raise and sell live stock and engage in other businesses. They thereupon advertised in a number of newspapers published in several Western states, having a general circulation through the mails, that they had range horses for sale for cash or exchange for lands. The horses were represented as heavy, flat-boned, easily broken, weighing from 900 to 1,200 pounds. They never owned over 500 horses on the range in Arizona, where the horses offered for sale were claimed to be, yet they sold over 17,000 horses, realizing considerably over \$100,000 in money and property. Bills of sale were executed to the purchasers, giving different brands; each bill of sale containing, in addition to the brand mentioned, the statements:

"Or any other horses in any brand I own on the range. * * * The above horses are sold running on the range in Coconino county, Arizona, and are to be gathered and loaded at the second party's [the purchaser's] expense. * * * It is further understood that other parties having horses in the above bands of horses have the same rights to gather their horses as the party or the second part."

There were a large number of letters sent through the mails by the defendants, some in the name of the U. S. Live Stock Company, others in the name of the Omaha Land & Investment Company, another corporation controlled by them, and some in the names of some of these defendants. Most of the letters were in reply to inquiries from parties, who had read the advertisements published in the newspapers, which were received through the mails; that, for the purpose of inducing the intending purchasers to buy these horses, they had photographs taken of a number of fine large horses, none of which were on or from the range in Arizona. At the time these photographs were taken no brands were on these horses, and the evidence shows these

supposed brands were scratched on the plates after the photographs had been taken and before they were developed. These photographs were shown to many of the purchasers, and represented to be true pictures of the horses offered and sold to them. It is also in evidence that those horses which were on the range were wild, small broncos; that it was hard to catch them; that less than 50 of them were ever captured, and they proved to be of little value.

[8] It is conclusively established that these defendants, and several of the others in the indictment, who were also found guilty, but did not prosecute writs of error, acted in concert in pursuance of agreements, and that in order to carry out the fraudulent scheme the United States mails were freely used by them. The evidence of the guilt of these defendants was so conclusively established that, even if there had been some error in the admission of evidence, and we do not hold that there was, the modern law so clearly stated by Judge Hook in *Williams v. United States* (C. C. A.) 265 Fed. 625 (opinion filed April 29, 1920), applies. Judge Hook there said:

"Whether prejudice results from the erroneous admission of evidence at a trial is a question that should not be considered abstractly or by way of detachment. The question is one of practical effect, when the trial as a whole and all the circumstances of the proofs are regarded. * * * It is manifest that he was not prejudiced by the admission of the testimony to which reference has been made."

This conclusion makes it unnecessary to consider whether the testimony objected to was relevant or material. We find no error in the record, and the judgments are affirmed.

McNUTT v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 15, 1920.)

No. 5539.

1. Criminal law \S 1030(1), 1048, 1129(1)—Appellate court may review, although errors are informally presented.

While it is the general rule that objections and exceptions are necessary to entitle a party to review the judgment, in criminal cases, where the life or liberty of a citizen is at stake, the courts of the United States, in the exercise of a sound discretion, may notice and relieve from radical errors in the trial, which appear to have been seriously prejudicial to the rights of defendant, although the questions they present were not properly raised or preserved by objection, exception, request, or assignment of error.

2. Criminal law \S 656(5)—Court's remarks as to witness' inconsistency held prejudicial.

The action of a court in reminding a witness for the prosecution, who made a statement favorable to defendant and not in agreement with a previous affidavit he had signed, of the penalty for perjury, on which the witness changed his testimony, in the presence of other witnesses and the jury, held so calculated to intimidate other witnesses and to prejudice the jury as to deprive defendant of the fair and impartial trial to which he was entitled.

3. Criminal law ⚡658—Committing defendant's witness for perjury in presence of jury prejudicial error.

The commitment for perjury of, or the direction to file an information for perjury against, a defendant or one of his witnesses, in the presence of the jury during the trial of a criminal case against him, is prejudicial error.

4. Internal revenue ⚡47—Evidence held insufficient to show carrying on business of retail liquor dealer without paying tax.

A conviction for carrying on the business of retail liquor dealer, without paying the special tax, *held* not sustained, where it did not appear that defendant had any appliances of a liquor dealer or held himself out as such by offering it for sale, and the only evidence of a sale was that of a witness who testified to buying liquor, of a kind not stated, on two occasions at the boarding house kept by defendant, but that it was dark and he was not sure from whom he obtained it.

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Criminal prosecution by the United States against W. C. McNutt. Judgment of conviction, and defendant brings error. Reversed.

M. E. Dunaway, of Little Rock, Ark. (Gardner K. Oliphint, of Little Rock, Ark., on the brief), for plaintiff in error.

June P. Wooten, U. S. Atty., of Little Rock, Ark. (R. W. Wilson, Asst. U. S. Atty., of Monticello, Ark., on the brief), for the United States.

Before SANBORN and CARLAND, Circuit Judges.

SANBORN, Circuit Judge. The writ in this case charges errors in the trial of the defendant below for carrying on the business of a retail liquor dealer without having paid the special tax of \$25, as required by law. He was convicted and sentenced to pay a fine of \$100, and to be imprisoned in the penitentiary for 18 months.

When his case was called for trial, he entered the plea of not guilty. He was then asked if he had counsel to represent him, and he answered that he had not. He was next asked if he desired the court to appoint counsel to represent him, to which he replied that he was not guilty of the offense charged against him, that he did not think it was necessary for him to have counsel to represent him in the case, and that he did not wish the court to appoint counsel for him. Thereupon he was tried without counsel. He did not make any objections or take any exceptions to any testimony or to any rulings of the court, he did not cross-examine any of the witnesses, nor did he take any part in the trial, except that he took the stand, was duly sworn, and testified that he never sold any whisky or intoxicating liquor to Roy Paine, a witness for the government, or to any one else, but that he did bring a carload of whisky into the city of Little Rock with the intent to sell it, but that he never sold any, because he was arrested and the whisky taken from him.

[1] After the defendant's trial and conviction he evidently procured the services of Mr. Dunaway as his counsel, who prepared an assign-

ment of errors, sued out the writ of error, and briefed and argued his case for him in this court. The United States attorney meets his brief and argument with the objection that because there were no objections or exceptions to any of the evidence, or any of the rulings of the court at the trial, there is nothing here for this court to consider or review and the judgment must be affirmed. Such is undoubtedly the general rule, but there is an exception to it as firmly established as the rule itself. It is that in criminal cases, where the life or liberty of the citizen is at stake, the courts of the United States in the exercise of a sound discretion, may notice and relieve from radical errors in the trial which appear to have been seriously prejudicial to the rights of the defendant, although the questions they present were not properly raised or preserved by objection, exception, request, or assignment of error. *Wiborg v. United States*, 163 U. S. 632, 658, 16 Sup. Ct. 1127, 41 L. Ed. 289; *Weems v. United States*, 217 U. S. 349, 363, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705; *Sykes v. United States*, 204 Fed. 909, 914, 123 C. C. A. 205, 210; *August v. United States*, 257 Fed. 388, 392, 168 C. C. A. 428, 432; *Fiedler v. United States*, 227 Fed. 832, 833, 142 C. C. A. 356, 357. An examination of the record of the trial of the defendant has persuaded that this is one of the cases that fall under this exception. That record discloses this state of facts:

[2] The indictment alleged that on the 1st day of August, 1918, the defendant was carrying on the business of a retail liquor dealer in the Western Division of the Eastern District of Arkansas, without having paid the special tax imposed by the acts of Congress. The trial was on October 29, 1919. The United States attorney called as a witness for the government Roy Paine, and asked him how long he had known the defendant, and he answered, "About 3 months." Then the record reads in this way:

"Q. Are you not mistaken about that? A. I think not.

"Q. Do you mean from now, or from the time of the finding of the indictment? A. I mean about 3 months ago from now I met the defendant.

"Q. Is this your affidavit and signature (handing to the witness a certain paper or writing)? A. It is my signature.

"Q. Did you not state in that affidavit that you had known the defendant 15 months at that time, which was more than 6 months ago? A. I signed that paper, but I did not do the writing that is in it; cannot be positive whether I made all the statements contained therein.

"The Court: Do you know what the punishment is for perjury (addressing the witness Paine)?

"Witness: I think I do, your honor.

"The Court: Well, when were you telling the truth, at the time you made that affidavit (referring to the paper or affidavit which had previously been handed the witness by the district attorney), or are you telling the truth now? A. I knew him 15 months ago, before the indictment was returned, and the statement in the affidavit is correct."

The prosecutor then took the witness, asked him if he ever bought any liquor of the defendant, and he answered that he did not know whether he bought it of him or not; that he bought some twice, a pint each time, at the defendant's house, which was a large boarding house; that he went into the hallway of that house at night in the dark and bought it from some one; that he could not say for sure

whether it was the defendant he bought from or not, but that he thought it was the defendant, but that he was not absolutely positive that it was he. This concluded the testimony of Mr. Paine, whereupon, in the presence of the jury, the court said:

"Mr. District Attorney, I think you had better file an information against the witness Roy Paine, charging him with perjury; the bond will be \$5,000."

And the district attorney replied:

"Very well, your honor; that will be done."

There was no other evidence in this case of the sale of any liquor by the defendant, or of the holding out or offering to sell any liquor to any one by the defendant, or of the carrying on of the business of selling liquor by him. The prosecutor called another witness on this subject of the sale of liquor by the defendant, who testified that he had known him pretty well for many years, but that he had never bought any liquor of him, and had never known of any one else purchasing any liquor from him. The prosecutor then proved by revenue officers that one night in August, 1918, when the defendant was away from home, they commenced a search of the defendant's house, and found five or six pints of whisky in an old trunk, that they had a tip that the defendant was coming in with a load of whisky that night, and the next morning they searched again and found 40 pints more. The defendant testified that he had never sold any whisky to any one as has been stated, and this was all the material testimony in the case.

The purpose of the review by appellate courts of trials in the courts below is to ascertain whether, according to recognized rules of procedure, those trials were fair and impartial, and if in a criminal case there is serious doubt about it to make sure by another trial that the accused has a trial that is fair and impartial. If this purpose is to be really and practically accomplished, both trial and appellate courts must strive to find out the actual effect upon the jury of the action of counsel for the parties and of the court which tries the case. What was the natural and probable effect upon the witnesses and jurors in this case of the court's treatment of the witness Paine? Was it not to impress the former with the imminent danger to them of arrest for perjury, if they failed to answer questions as the prosecutor desired, and to indicate to the jury that the court thought little attention ought to be paid to evidence that did not tend to convict the defendant? Must it not have had the effect to have strongly impressed the jury with the view that the court was convinced of the guilt of the defendant?

[3] The more this record has been studied and considered, the more difficult it has become to resist the conviction that these questions ought to be answered in the affirmative, to resist the conviction that the course pursued by the court, doubtless inadvertently in the speedy trial of what perhaps seemed an unimportant case, was very likely to intimidate witnesses subsequently called, to prejudice jurors against the defendant, and to lead them to think that the court was strongly impressed with the view of the defendant's guilt. While there is some conflict among the decisions, the great weight of authority is that the

commitment for perjury of, or the direction to file an information for perjury against, the defendant or one of his witnesses in the presence of the jury during the trial of a criminal case against him, is a fatal error. *Rutherford v. United States*, 258 Fed. 855, 860, 863, 169 C. C. A. 575, 580, 583; *Reed v. State*, 5 Okl. Cr. 365, 114 Pac. 1114; *Glover v. United States*, 147 Fed. 426, 427, 429, 77 C. C. A. 450, 451, 453, 8 Ann. Cas. 1184; *State v. Hughes*, 33 Kan. 23, 26, 27, 5 Pac. 381; *Martin v. State*, 130 Ark. 442, 443, 197 S. W. 861; *Brandon v. State*, 75 Miss. 904, 23 South. 517, 518; *Keiser et al. v. Yandes*, 45 Ind. 175, 177; *State v. Swink*, 151 N. C. 726, 66 S. E. 448, 449; *State v. Primmer*, 69 Wash. 400, 125 Pac. 159.

If the thought suggests itself that Paine was not the defendant's witness, the answer is that it was because, though called by the prosecutor, he commenced to testify to a fact favorable to the defendant that he was taken in hand by the court and at the end of his testimony directed to be committed for perjury. There is nothing in this record to show that the affidavit which was presented to this witness was more truthful in its statements than his testimony under oath in the presence of the court and jury would have been, if he had testified in the ordinary way, and been permitted to state as he commenced to do, why he could not be positive whether he made all the statements contained in it. It is not impossible that the statements in that affidavit might have been written down without his understanding them, or that he might have been improperly influenced by persuasion or fear to make them. Whatever the facts regarding this affidavit may have been, it is not possible to resist the conclusion, in view of the absence of counsel for the defendant in this trial and the record which has been recited, that the trial lacked something of that fairness and impartiality to which the defendant was entitled under the Constitution and the laws of this land. In *Rutherford v. United States*, 258 Fed. 862, 863, 169 C. C. A. 575, wherein the court unduly pressed a witness to testify as it thought the witness ought to testify, and committed him for contempt of court during the trial in the presence of the jury, the Supreme Court discharged the witness on writ of habeas corpus (*In re Hudgings*, 249 U. S. 378, 39 Sup. Ct. 337, 63 L. Ed. 656, decided April 14, 1919), and the Circuit Court of Appeals of the Second Circuit reversed the judgment against the defendants, with the remark that they did not have the temperate and impartial trial to which they were entitled.

[4] Again, this is not a prosecution for selling liquor; it is a prosecution for carrying on the business of a retail liquor dealer without having paid the special tax required by law under the following provisions of the acts of Congress:

"That retail dealers in liquors shall pay twenty-five dollars. Every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereinafter provided in less quantities than five wine gallons at the same time shall be regarded as a retail dealer in liquors." U. S. Comp. St. § 5973.

"Every person who carries on the business of a * * * retail liquor dealer * * * without having paid the special tax as required by law, shall, for every such offense, be fined," etc. U. S. Comp. St. § 5965.

"The offense," says the Supreme Court, "does not consist in selling or offering for sale to a particular person distilled spirits, etc., in less quantities than five gallons at one time, but in carrying this on as a business; in other words, in the defendant holding himself out to the public as selling or offering for sale, etc." *Ledbetter v. United States*, 170 U. S. 606, 610, 18 Sup. Ct. 774, 775 (42 L. Ed. 1162).

One or two sales of liquor are not sufficient to convict of carrying on the business of a retail liquor dealer without having paid the special tax when made by one having none of the appliances or surroundings of retail liquor dealers, to an intimate acquaintance or friend out of the seller's private stock not held for or offered to purchasers who should apply for it. *United States v. Jackson*, 26 Fed. Cas. 556, No. 15,455; *United States v. Rennecke* (D. C.) 28 Fed. 847; *United States v. Bonham* (D. C.) 31 Fed. 808, 809; *Bailey v. United States*, 259 Fed. 88, 89, 91, 170 C. C. A. 156, 157, 159. Under these Acts of Congress there was no substantial evidence at the trial below in this case that the defendant was guilty of carrying on the business of a retail liquor dealer. There was no evidence of the times when the two purchases of liquor were made to which Paine testified; there was no evidence that the liquor he testified he purchased was either foreign or domestic distilled spirits or wines or malt liquors. The legal presumption is that it was none of these because the defendant is to be presumed to be innocent until he has been proved to be guilty, and one who carries on the business of selling other liquors than distilled spirits, wines, or malt liquors, is not a retail liquor dealer within the terms of the statutes cited. There was no evidence that the defendant had any of the usual appliances and accommodations of a retail liquor dealer, that he held himself out as a dealer or that he had or offered distilled spirits, wines, or malt liquors for sale to those who might apply for it.

The only witness who testified to the purchases was denounced by the court as a perjurer. The defendant testified that he had never made any sale of any whisky or any other intoxicating liquors to Paine or to any one else, and the other witness whom the prosecutor called to prove the carrying on of the business by the defendant testified that he had known him pretty well all the time for years, and he had never purchased or known of any one purchasing any liquor from him. In this state of the case the evidence here was too slight and unsubstantial to sustain a judgment which deprives the defendant of his liberty for a year and a half and imposes on him a substantial fine.

For the reasons which have now been stated, the judgment below must be reversed, and the case must be remanded to the court below, with directions to grant a new trial; and it is so ordered.

LUCKENBACH S. S. CO., Inc., et al. v. W. R. GRACE & CO., Inc.

(Circuit Court of Appeals, Fourth Circuit. July 6, 1920.)

No. 1769.

1. **Estoppel** ⇐63—Party cannot at trial assign reason for breach different from that given at time of breach.

Where a shipowner assigned, as the only reason for its refusal to perform its contract to carry cargoes for libellant, a claim that the outbreak of the war with Germany had abrogated the contract, it could not, at the trial for breach of its contract, defend on the ground that the original contract was invalid for want of mutuality.

2. **Shipping** ⇐58(2)—Answer held not to allege want of mutuality of contract.

An answer, which set forth a provision of the contract that the quantities to be carried should be mutually arranged between the parties, merely for the purpose of explaining its failure to carry cargoes before the proclamation of war against Germany, is insufficient to raise the defense that such provision made the contract invalid for want of mutuality.

3. **War** ⇐10(1)—Domestic contract for carriage of contraband not terminated by war.

A contract between two domestic corporations for the carriage of cargoes of nitrates from South American ports to domestic ports was not terminated by the declaration of the war with Germany, though thereafter its performance was subject to greater hazards.

4. **Shipping** ⇐51—Danger of capture by enemy held not "restraint of princes," within charter party exemptions.

The increased danger of capture or destruction by German submarines, subsequent to the declaration of war between the United States and Germany, based on mere rumors of the presence of German submarines, and on the instructions to the submarines by the German government, is not "restraint of princes," within charter party exemption from liability.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Restraints of Kings or Princes.]

5. **Corporations** ⇐459—Owner of ships held liable for breach of contract by practically identical leasing corporations.

Where a corporation, which owned a number of ships, leased them to another corporation, which had a small capital stock, and which was controlled by the same officers and directors, and 90 per cent. of whose stock was owned by the same stockholders, at a rental which, though more than nominal, was far below the value of the ships, the owning corporation so far participated in the contracts of the leasing corporation as to be liable for their breach.

6. **Admiralty** ⇐83—Allowance of \$5,000 to commissioner held not excessive.

An allowance of \$5,000 to the commissioner, who took the testimony in a libel suit, in which the amount in controversy was large and the questions were of some difficulty and received thorough and painstaking examination, will not be set aside as excessive.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Libel by W. R. Grace & Co., Incorporated, against the Luckenbach Steamship Company, Incorporated, and another. Decree for libellant (258 Fed. 49; 248 Fed. 953), and respondents appeal. Decree affirmed.

Certiorari denied 254 U. S. —, 41 Sup. Ct. 14, 65 L. Ed. —.

Peter S. Carter and Oscar R. Houston, both of New York City (Carter & Carter, of New York City, Harry E. McCoy, of Norfolk, Va., and Israel A. Washburne, of New York City, on the brief), for appellants.

John M. Woolsey, of New York City (Kirlin, Woolsey & Hickox, of New York City, Edward R. Baird, Jr., of Norfolk, Va., and Harrison Lillibridge, of New York City, on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and WATKINS, District Judge.

KNAPP, Circuit Judge. The case in outline is this: On October 25, 1916, the appellant Luckenbach Steamship Company, a Delaware corporation, entered into a written contract with the appellee, W. R. Grace & Co., a Connecticut corporation, whereby the former agreed to provide freight room and carry for the latter, between December 1, 1916, and July 31, 1917, 75,000 tons, 10 per cent., more or less, at the option of the steamship company, of nitrate and/or ores from designated ports in Chile to a port of the United States Savannah-Boston range; the appellee agreeing to pay therefor \$15.50, United States gold, per ton of 2,240 pounds, delivered. Under this contract the steamship company carried one cargo, of 5,998 tons, delivered at the port of New York about the 1st of May, 1917, and no more. In a letter to that company under date of April 21, 1917, the appellee asked to be advised of the position of certain steamers named, and when they would be ready to load with nitrate, and on the 23d, two days later, this reply was sent:

"Your letter of the 21st in reference to freight contract nitrate of soda received and contents noted. In answering the same, beg to inform you that we cannot carry out this freight room contract, which was supplemented by the usual form of nitrate charter party adopted and used by your company, and which usual form of nitrate charter party was made a part of the freight room contract, for the reason that a state of war exists between this government and the government of Germany, and we are released under article 13 of this nitrate charter party reading: "The * * * enemies, pirates, * * * arrest and restraint of princes, rulers, and people, political disturbance or impediments * * * always mutually excepted."

Not long afterwards, on June 7, 1917, the appellee filed the libel and complaint herein, to recover damages for breach of contract, against the Luckenbach Steamship Company and the Luckenbach Company, charging the latter with liability because the two companies were "maintained and managed as one corporation," and alleging certain facts in that regard which presently will be stated. Accompanying the libel were a number of interrogatories, addressed to the respondents severally, which they were called upon to answer under oath. A monition was issued, as prayed for in the libel, and the marshal attached the steamer Florence Luckenbach, owned by the Luckenbach Company, and leased to the Luckenbach Steamship Company, which was then discharging cargo in the harbor of Norfolk, Va. A few days later the respondents entered a general appearance and filed

a bond, under which the steamer was released. In August following each of them filed an answer to the libel, and also answers to the several interrogatories.

To these answers the appellee filed exceptions, on the ground that the facts therein stated did not constitute a defense to the cause of action alleged in the libel, and on that ground the exceptions were sustained, as appears from the opinion of the learned District Judge filed in March, 1918. 248 Fed. 953. The order thereupon entered, however, granted the respondents 15 days in which "to answer over, or make such valid defense, if any they have, as they may be advised." On their failure to answer further within the time allowed, an interlocutory decree was entered, adjudging the respondents and each of them liable for the damages suffered by the appellee, and appointing a commissioner to ascertain the amount thereof, with directions to return "a report of his findings and conclusions, together with the evidence and exhibits upon which they are based."

In November, 1918, the commissioner submitted an elaborate report, in which he reviews the evidence at some length and fully explains his reasons for fixing the damages, as he does, at \$1,311,059.16, with interest from November 1, 1917. Exceptions were filed by both parties, but all of them were overruled, and confirmation of the report ordered in a brief opinion, which quotes the report in full, filed in May, 1919. 258 Fed. 49. Final decree was entered accordingly, on June 26, 1919, from which the respondents bring this appeal.

With this recital of the proceedings in the court below, we pass to such discussion as seems to be appropriate of the various grounds on which the appellants ask reversal of the decree.

[1] 1. Is the contract valid?

The contention that it is not rests on this clause in one of the articles:

"All quantities and deliveries to be mutually arranged between the party of the first part and the party of the second part, to suit the steamers of the party of the first part."

And the argument is that thereby the contract was rendered so imperfect and incomplete as not to be enforceable, under the rule that a contract which leaves something for future agreement, though otherwise definite and certain, is not binding on the parties. It would be enough to say in reply that the steamship company makes no such claim in the letter of April, 1917, refusing performance, or in its previous correspondence with the appellee. On the contrary, it assumes in that letter, as it had before, that the contract was in all respects complete and valid, and would have to be carried out, except for the reason therein stated.

[2] Nor does the answer of the steamship company set up any such defense. True, the clause in question is quoted in the answer; but the allegations based thereon are merely to the effect that the company had many other commitments for its steamers, to which the performance of this contract had to be adjusted, as Grace & Co. well knew; that at the time the contract was executed it was impossible to tell

when the steamers would be released from such commitments; and that "from time to time after October 26, 1916, the time for this respondent to furnish steamships was discussed with the libelant, and such time was, from time to time, extended by mutual agreement until after the 6th of April, 1917." This discloses the purpose for which the clause was inserted in the contract, as plainly appears upon reading the entire provision from which the clause is taken. In short, there is no averment by the steamship company that the stipulation here referred to operated to release it from obligation.

But the further and equally conclusive answer is found in the settled rule of law that one who breaches his contract for reasons specified at the time will not be permitted afterwards, when sued for damages, to set up other and different defenses. This rule has been long established and frequently applied. Thus, in the leading case of *Railway Co. v. McCarthy*, 96 U. S. 258, often quoted and followed, the Supreme Court says, at page 267 (24 L. Ed. 693):

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. *Gold v. Banks*, 8 Wend. (N. Y.) 562; *Holbrook v. White*, 24 Wend. (N. Y.) 169; *Everett v. Saltus*, 15 Wend. (N. Y.) 474; *Wright v. Reed*, 3 Durnf. & E. 554; *Duffy v. O'Donovan*, 46 N. Y. 223; *Winter v. Colt*, 7 N. Y. 288."

Other illustrative cases, among many, are *Oakland Sugar Mill Co. v. Fred W. Wolf Co.*, 118 Fed. 239, 55 C. C. A. 93, *Goodman v. Purnell*, 187 Fed. 90, 109 C. C. A. 408, *Polson Logging Co. v. Neumeyer*, 229 Fed. 705, 144 C. C. A. 115, and *Wall Grocer Co. v. Jobbers' Over-all Co.* (decided by this court January 12, 1920) 264 Fed. 71.

In its letter of April 23, 1917, above quoted, the steamship company placed its refusal to perform the contract distinctly and solely on the ground of "restraint of princes," and it cannot now be heard to say that it had some other excuse. The contention here considered is clearly untenable.

[3] 2. Was the Luckenbach Steamship Company released from its contract obligation by the proclamation on April 6, 1917, of the existence of a state of war between the United States and Germany?

We are of opinion that this question should be answered in the negative. The contract is between domestic corporations, one of Delaware and the other of Connecticut, and covers the transportation of nitrate from a neutral country to a port in the United States. The outbreak of war with Germany did not make this contract illegal as matter of law, or impossible of performance as matter of fact. The carriage of contraband is not per se unlawful, nor is it rendered unlawful by the circumstance that it may be attended with risk. As the Supreme Court says in *Northern Pacific Ry. Co. v. American Trading Co.*, 195 U. S. 439, 465, 25 Sup. Ct. 84, 92 (49 L. Ed. 269):

"The contract was not unlawful when made. It may be assumed that the lead was contraband of war, but that fact did not render the contract of transportation illegal nor absolve the carrier from fulfilling it."

On this point it is sufficient to observe that the contract in question carries no implication of dependence on the continuation of peace, and therefore was not in anywise affected by the subsequent declaration of war. This being so, we might properly reject without further comment the appellants' contention that the contract was abrogated by the war proclamation. Seventeen days after that proclamation was issued, the steamship company took the position, evidently with deliberation, that the state of war which had then come into existence operated ipso facto to release it from obligation, even though that state of war made performance of the contract in no respect more difficult or dangerous. On the principle declared in *Railway Co. v. McCarthy*, supra, and many cases of like import, the company was thereby precluded from assigning any other or different reason for breaking the contract. That is to say, its election to stand on the proposition of law estopped it thereafter from setting up matters of fact in defense of its action.

[4] Aside from this, however, we are constrained to hold that no facts are alleged in the answers which would justify refusal to carry out the agreement. The most that is said in that regard appears in the answer of the steamship company to this interrogatory:

"Please state in what manner you claim that the existence of a state of war between the United States government and the government of Germany operated to affect your contract of October 26, 1916, with the libellant."

Omitting immaterial parts, the answer is as follows:

"After the existence of the war between the United States and Germany, American steamships, and particularly those carrying Chilean nitrate and other contraband of war from South American ports to United States ports, were liable to capture or destruction by German warships, both under the established rules of international law and under the rules and instructions of the German government. The presence of German submarines in, or in the neighborhood of, trade routes between South America and the United States, was rumored and suspected at various times subsequent to the entry of the United States into the war against Germany, and this respondent reasonably feared that its vessels carrying Chilean nitrate to the United States would be liable to capture or destruction by German war vessels."

It seems clear to us that this general allegation, which recites no facts and rests its conclusion upon nothing but rumor, comes far short, under all the authorities, of stating a case of "restraint of princes," or otherwise setting up a defense to the action. And the specious character of the plea, if not its insincerity, is made manifest by the fact, admitted by the steamship company, that on the 28th of April, five days after breaking its contract with appellee, it chartered a vessel to another party, to carry a cargo of nitrate from Chilean ports to the United States, at \$29 per ton, and less than a month later chartered two more vessels to different parties, also to carry nitrate from Chilean ports to the United States, in one instance at \$33 and in the other at \$34 per ton! In view of these and other admissions in its answers to the libel and interrogatories, we need not argue further that the steamship company fails to show any valid excuse for refusing to perform its contract.

[5] 3. Is the Luckenbach Company liable for the default of the Luckenbach Steamship Company?

From the statements and admissions in their respective answers these facts appear: The Luckenbach Steamship Company has a capital of only \$10,000. The Luckenbach Company, also a Delaware corporation, is capitalized at \$800,000. They have the same directors and the same officers, and Edgar F. Luckenbach, who was president of and personally managed both companies, owns 94 per cent. of the stock of the Luckenbach Steamship Company, and almost 90 per cent. of the stock of the Luckenbach Company. The latter company owns all or most of the steamers referred to in the record, some eight or nine in number. By contracts of May 1, July 1, and October 1, 1915, copies of which are annexed to the libel, these steamers were leased to the steamship company for terms running into the year 1926, and upon terms which, though something more than nominal, are obviously far below their rental value.

Putting aside any inquiry into the motive for this arrangement, we think it too plain for serious question that the facts here considered show such identity of the two corporations, or at least give rise to such a strong presumption of their identity, as warrants the conclusion that the Luckenbach Company is equally responsible with the steamship company for the breach by the latter of its contract with the appellee. For all practical purposes the two concerns are one, and it would be unconscionable to allow the owner of this fleet of steamers, worth millions of dollars, to escape liability because it had turned them over a year before to a \$10,000 corporation, which is simply itself in another form. We have only to add that on this issue the case is covered by our recent decision in *The Willem Van Driel, Sr.*, 252 Fed. 35, 39, 164 C. C. A. 147, 151, wherein it is said:

"The elevators were constructed and operated merely as a facility to the business of the railroad company. Applying the language of Judge Wallace in *Lehigh Valley Railroad Co. v. Du Pont*, 128 Fed. 840, 64 C. C. A. 478, the potential and ultimate control of all its property and business affairs of the elevator company was lodged in the railroad company, and this control was exercised as completely and as directly as the machinery of corporate organisms would permit. Such complete dominance and control by the railroad company made the elevator company its mere puppet. *United States v. Del., Lack. & West. R. R.*, 238 U. S. 516, 35 Sup. Ct. 873, 59 L. Ed. 1438."

4. To what damages is the appellee entitled?

We reply to this question by adopting the commissioner's report, which was approved and confirmed by the court below; and as it is quoted at length in the opinion of Judge Waddill, in 258 Fed. 49, it need not here be reproduced. This report, in our judgment, states fully and fairly, and answers convincingly, the several contentions of appellants respecting the measure of damages, and we find no occasion to add anything to what is therein so clearly and ably said. It is enough to repeat the paragraph with which the report closes:

"The answers to the interrogatories filed as a part of the record in the case fully sustain the foregoing conclusions, and except for the fact that the respondent declined to offer any evidence, it is not too much to say that the record doubtless would have shown that even the large amount of damages

here allowed were but little, if any, larger than the additional profits received by the respondent in the breach of the contract and the chartering of the ships to others. By such act on its part it has received and has in pocket large gains, while, on the other hand, the libelant, without fault on its part, has been compelled to complete the defaulted contract with funds of its own, for which it has received neither principal nor interest."

[6] 5. Was the commissioner overpaid?

The commissioner was allowed a fee of \$5,000, and appellants allege that this "is not reasonable—it is exorbitant—for the services rendered." But the case involves an unusually large amount, besides questions of some difficulty, and the report shows that it received the most thorough and painstaking examination. Taking all the circumstances into account, we are not prepared to say that the compensation awarded is in any sense excessive, and the contention to the contrary must be held without merit.

The decree appealed from is right, and will be affirmed.

FARLEY v. RATLIFF, Deputy United States Marshal, et al.

(Circuit Court of Appeals, Fourth Circuit. July 6, 1920.)

No. 1778.

1. Army and navy ⚡20—Registrant, failing to receive notice of induction, not "deserter."

If one registered, examined, and accepted under the Selective Service Draft Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a-2044k), and informed that he would be notified by mail when to report for military duty, never received such notice, when it was subsequently mailed to him, and did not otherwise know of it, it could not be said that the mailing of the notice inducted him into military service, and that, for his failure to respond, he was a deserter therefrom.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deserter.]

2. Army and navy ⚡38—Intent essence of offense of "desertion."

Under section 140, subsec. 1, pars. (a), (b), (c), of the regulations promulgated by the President under authority of Act May 18, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a-2044k), the Selective Service Law, prescribing as a deserter a registrant who does certain acts "with the intent to evade" military service, the intent, and, a fortiori, knowledge, is of the very essence of the offense.

3. Habeas corpus ⚡76—Return not showing alleged deserter's intent defective.

Where registrant under the Selective Service Law (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a-2044k), sought by habeas corpus to test the validity of his arrest for the purpose of delivering him to the military authorities as a deserter, return made by the officer to the writ, merely alleging that the registrant failed to respond to call and report for military duty, pursuant to the call theretofore mailed him, not averring that he did so with intent to evade military service, set up no reason for holding petitioner as deserter.

4. Habeas corpus ⚡16—After hostilities, registrant entitled to hearing before civil, instead of military, tribunal.

Where a registrant failed to get notice of his induction into military service, and heard nothing more of the matter until about a year after

cessation of hostilities, at which time the draft board had long discontinued, the registrant is entitled preferentially to a hearing before the civil tribunals, instead of being treated as a deserter, under the Selective Service Law (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a-2044k), and delivered to military authorities, and habeas corpus lies to prevent his being delivered to the military authorities for trial.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Petition by Manderville Farley for writ of habeas corpus against A. O. Ratliff, Deputy United States Marshal, and the Sheriff of Kanawha County, W. Va. From a judgment denying the petition, the petitioner appeals. Reversed, with directions.

Russell S. Ritz, of Bluefield, W. Va., for appellant.

J. N. Kenna, Asst. U. S. Atty., of Charleston, W. Va. (Lon H. Kelly, U. S. Atty., of Charleston, W. Va., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge. This is an appeal from a decision and order of the District Court for the Southern District of West Virginia, at Charleston, rendered on the 22d day of November, 1919, whereby the court refused to grant the petition of the appellant, praying for a writ of habeas corpus to discharge him from the custody of the appellee Ratliff, a deputy marshal, who claimed to hold appellant as a deserter from the United States army, and dismissed said petition. The facts of the case may be briefly stated as follows:

Appellant, hereinafter called the petitioner, on the 5th of June, 1917, was duly registered under the Selective Service Draft Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a-2044k) for military duty, having filed his questionnaire as required by the act, and subsequently appeared for physical examination, classification, etc., was accepted, and informed that he would be notified by mail when to report for military duty. The petitioner resided on his father's farm in the country, some 20 miles from Princeton, where the draft board sat. Subsequently, in the month of May or June, 1918, a call was made for the petitioner to appear and report for military duty, and notice thereof regularly mailed to him at his post office address in the neighborhood of his home. That this notice petitioner did not receive, nor hear of until August, 1919, when he was under trial at Princeton for a state offense, of which he was discharged. That he was then taken before a United States commissioner, charged with the violation of the Selective Service Draft Act, in that he had failed to report for military duty after notice to do so, duly mailed to him. At that hearing he was sent on to the United States grand jury for the next session of the United States District Court, at Charleston, in November, 1919. Petitioner did not learn of the fact that the letter or call had been mailed to him, and had been received at his local post office without his knowledge, until several days after he was sent on to the grand jury.

Petitioner appeared at the November term of court at Charleston on

the 18th day of November, 1919, to answer his bail bond to do so, and remained in attendance to meet the charge against him. He was indicted on the 19th of November, and while still in attendance on the court to answer the indictment returned against him, he was, on the 21st day of November, arrested by the appellee, Ratliff, deputy marshal, not to answer the charge for violating the Selective Service Draft Act, for which he had been indicted, but as a deserter from the military forces of the United States, to be delivered to the military authorities at Camp Lee, Va. Petitioner immediately sued out his writ of habeas corpus, with a view of testing the validity of his arrest and detention, to which appellee made return; evidence was adduced by the government and the petitioner, the petitioner's prayer for the writ of habeas corpus was denied, and he held as a deserter, from which action of the court, this appeal is taken.

[1] A careful consideration of the record shows that the sole question presented is whether the petitioner was properly amenable to the civil authorities under the indictment returned against him for the offense with which he was charged, or to the military authorities for desertion; in other words, whether he was a deserter or not. Petitioner was unquestionably subject to call for military duty, and failed to respond in answer to the call. The point turns entirely upon whether he acted innocently or not in failing to respond. If, as a matter of fact, he never received notice, and knew nothing of its issuance, his liability for any offense is a matter of serious doubt, and least of all could it be said that the mailing of a notice he did not receive, and did not know of, inducted him into the military service, and for his failure to respond, that he was a deserter therefrom.

[2] The regulations promulgated by the President under authority vested in him by the act of Congress of May 18, 1917, commonly known as the "Selective Service Law" (second edition, Selective Service Regulations, p. 104), section 140, subsec. 1, paragraphs (a), (b), and (c), prescribe who shall be deemed a deserter, namely, a registrant, who, after the time for his induction into military service, and with the intent to evade such service (a) fails to report for military duty under induction orders, etc.; (b) fails to entrain for mobilization camp pursuant to orders; or (c) who absents himself from his party en route to embarkation camp, etc. Before either one of these requirements respecting desertion can become effectual, and the right of a citizen to a hearing in a civil, as distinguished from a military, court, denied, it must appear that the registrant acted "with intent to evade" such service. The intent with which the alleged act was committed, and, a fortiori, knowledge on the subject, is of the very essence of the offense.

[3] In this case, the return made by the officer to the writ of habeas corpus, in fact sets up no reason for holding petitioner as a deserter; it being merely averred that the petitioner, duly registered under the Selective Service Draft Act, failed to respond to the call, and report for military duty, pursuant to the call theretofore mailed to him. No averment is made that he did so, with intent to evade military service, and the only testimony offered to support the claim of desertion was that of the chairman of the local draft board, who testified that he did not know whether petitioner ever got the notice of his call for military

duty or not, and that his post office was some 20 miles away from Princeton, where the board sat. This of itself entitled the petitioner to discharge from answering the crime of desertion, and he should have been allowed to meet the indictment for failure to respond to the call of the board, if the government desired to proceed with the prosecution.

The petitioner made full explanation of why he failed to receive the letter in question, and that he did not know of its existence until he had been sent on by the United States commissioner in the manner herein indicated. He denied all knowledge of the letter under oath, and called a witness who testified that he lived on petitioner's father's farm, where petitioner also lived, about half a mile away from petitioner; that the farm was a mile and a half from the post office, and that it was the custom of whoever went to the post office to call for the mail of all persons on the farm; that in May or June, 1918, witness' father, who had since died, went to the post office, and upon returning told witness that he had received from the post office a call for the petitioner to report for military duty, but he had lost it on his way home; that witness and his father then walked back to the post office to try and find the notice, but were unable to do so, and witness' father requested him to go to the home of Manderville Farley and tell him of the call and its loss, which witness said he did about 3 or 4 o'clock in the afternoon, but found no one at home, and on the following day witness left the farm and went to Lillybrook to engage in timber work, and forgot all about the call, and did not advise Farley about it until 2 or 3 days after the latter was arrested in August, 1919, when he recalled it.

This uncontradicted evidence would seem to preclude any idea of petitioner being a deserter, if not to exonerate him from the violation of any of the provisions of the Selective Service Draft Act.

[4] The effect of the arrest of the petitioner, and his committal as a deserter, instead of proceeding with the indictment theretofore duly returned against him, and for which he had been held to answer, was to subject him to trial for the offense charged, viz. the violation of the Selective Service Law, by a military court-martial, instead of by the civil court, in which he had been indicted. This was of doubtful propriety in any event. The war had been over, save technically, more than a year, and some 9 months prior to the original arrest; the selective service draft board had been long discontinued and dissolved; and every reason existed, apparently, why the citizen was entitled preferentially to a hearing in the courts of his country, with the right of trial by jury, rather than in a military tribunal by court martial. The case of *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281, contains a full, most interesting, and comprehensive review by the Supreme Court of the United States of this subject, from which it will be seen that, in times of peace, the citizen's right to trial in the civil courts will not be lightly disregarded.

For the reasons stated, the order of the lower court is reversed, and the proceedings remanded to said court, with directions to discharge the petitioner from detention as a deserter.

Reversed.

THE COAMO. THE W. F. DALZELL. THE AGNES MORAN.

(Circuit Court of Appeals, Second Circuit. April 14, 1920.)

Nos. 196, 197.

1. Collision ⚡106—Special circumstance rule held applicable.

Where a tug, with barge in tow, was coming up the river, while a steamship was turning around, so as to swing into a slip broadside, the situation was clearly one of special circumstance within article 27 of the Inland Regulations (Comp. St. § 7901), which required each vessel to navigate with prudence, so as to avoid immediate danger.

2. Collision ⚡95(7)—Steamship navigator and tug with barge, which collided, held at fault.

On cross-libels for damages caused by collision between a barge in tow of a tug and a steamship being turned around in the channel, the steamship and the master of a tug assisting her, who was in charge of her navigation, *held* at fault for insufficient lookout, and the tug having the barge in tow *held* also at fault for insufficient lookout and failure to sound timely warning.

Appeals from the District Court of the United States for the Southern District of New York.

Separate libels by the Central Union Stockyards Company against the steamship Coamo, claimed by the New York & Porto Rico Steamship Company, in which Fred. B. Dalzell & Co., Incorporated, and the tug W. F. Dalzell were impleaded, and by the New York & Porto Rico Steamship Company against Fred B. Dalzell & Co., Incorporated, and others. From decrees holding the tugs W. F. Dalzell and Henry S. Beard (now known as the Agnes Moran) at fault, and liable for the damages, the claimant of the tug Fred. B. Dalzell appeals. Reversed, with directions.

Kirlin, Woolsey & Hickox, of New York City (Robert S. Erskine, of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones and Leonard J. Matteson, both of New York City, of counsel), for appellee Central Union Stockyards Co.

Burlingham, Veeder, Masten & Fearey, of New York City (Chaunsey I. Clark and Charles E. Wythe, both of New York City, of counsel), for appellee New York & Porto Rico S. S. Co.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for appellee Moran Towing & Transportation Co.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. April 4, 1916, about 7 a. m., in perfectly clear weather, the tide strong flood, about midstream in the East River between the Brooklyn Navy Yard and Corlears Hook Park, where there is a width of water of from 1,600 to 1,800 feet, and where there was no other shipping to embarrass the vessels, the double-decked cattle barge 103 in tow on the starboard side of the tug Henry S. Beard, subsequently named the Agnes Moran, at a point about 25 feet forward of her stern, came into collision with the stern of the Coamo,

both vessels sustaining damage. Such a situation inclines one at the outset to the belief that there must have been fault in both the steamer and the tug.

The steamer was engaged in backing and filling, so as to round to on a port helm and head down stream against the tide. The tug W. F. Dalzell was at her port bow and the tug Ackerman at her starboard bow; it being the duty of the Dalzell to push ahead and of the Ackerman to pull astern when the steamer was moving ahead under her own steam, so as to help her round to. The purpose of the maneuver was to let the steamer drop back on the flood tide and go broadside into a basin between piers at the foot of South Third and South Fifth streets, Williamsburgh, where she was to lie alongside the bulkhead and discharge her cargo. The master of the tug Dalzell was on the bridge in charge of the navigation, and with him were the captain, third officer at the telegraph, and a quartermaster at the wheel. The first officer was at the bow, and the second officer was at the stern.

No one on the steamer seems to have seen the Beard coming up the river with her tow until the collision was imminent, except the captain of the Dalzell, who says he saw her when she was passing under the Brooklyn Bridge and the steamer had begun her turning movement. The master of the Beard says, when he was passing under the Brooklyn Bridge, he saw the steamer beginning this maneuver and he understood exactly what the purpose was. The distance between the vessels was at that time over a half a mile. The cattle barge was much longer and much higher than the Beard, so that her pilot was placed on top of the barge, in order to give the captain at the wheel directions as to the navigation on the starboard side, while the captain himself navigated for the port side.

[1] This situation was clearly one of special circumstances, under article 27 of the Inland Regulations (Comp. St. § 7901), which required each vessel to navigate with prudence so as to avoid immediate danger. *The Servia*, 149 U. S. 144, 13 Sup. Ct. 877, 37 L. Ed. 681; *The John Englis*, 176 Fed. 723, 100 C. C. A. 579; *Transfer No. 19*, 194 Fed. 77, 114 C. C. A. 155; *The John Rugge*, 234 Fed. 861, 148 C. C. A. 459; *The Washington*, 241 Fed. 952, 154 C. C. A. 588.

The steamer blew no signals and heard none from the Beard, though her witnesses say that when within 700 or 800 feet away she blew a signal of two blasts to indicate her intention to go under the steamer's stern, and afterwards an alarm. We are satisfied that these signals were not blown until the collision was imminent. The steamer, still making sternway, though her engines were going full speed ahead, struck the starboard side of the cattle float about 20 feet forward of her stern, so that it is evident that a little more care on the part of either or both vessels would have enabled them to pass clear.

The first suit was by the owner of the cattle barge against the steamer Coamo, whose claimant brought in under the Fifty-Ninth rule (29 Sup. Ct. xlvii) *F. B. Dalzell & Co., Incorporated*, and the tug Dalzell, whereupon *F. B. Dalzell & Co., Incorporated*, brought in the tug Beard under the same rule. The second suit was by the New York & Porto Rico Steamship Company, owner of the steamer Coamo,

against F. B. Dalzell & Co., Incorporated, and its tug Dalzell, who brought in the tug Beard under the Fifty-Ninth rule.

Both cases were tried together, and the oral opinion of the judge, delivered at the close of the case, indicates that his attention was centered upon the disputed question whether the navigation of the steamer was in charge of her master or of the captain of the tug Dalzell. On this point he found that it was in charge of the captain of the tug, and a decree was entered against F. B. Dalzell & Co., Incorporated, and the tug Dalzell.

[2] We think he was right in holding that the navigation was in charge of the captain of the Dalzell, but that there should have been no decree against the tug which was doing nothing at the time of the collision to contribute to it, as the steamer was then moving astern, and could have done nothing to prevent it. Although the navigation of the steamer was in charge of the captain of the tug her own officers and men were co-operating in the maneuver and were as much bound to the careful discharge of their duties as if the master of the steamer himself had been in charge of the navigation. The owner in personam and the steamer in rem are liable for any of their faults which contributed to the collision.

Plainly a most insufficient lookout was maintained on the steamer. The second officer was especially negligent for not advising the bridge to go ahead on the engines when the vessels were in dangerous proximity, which he could have done either by voice or by using the telegraph which connected the poop deck with the bridge. He was in the best possible position to appreciate how near to each other the sterns of the cattle float and the steamer were. On the other hand, the Beard was at fault for a bad lookout and for keeping ahead at full speed on a course close to the steamer's stern. She did nothing to prevent the collision in the way of slowing, stopping, or giving timely danger signals.

The court below is directed to enter a decree in favor of the cattle float, with interest and costs, against F. B. Dalzell & Co., Incorporated, the steamer Coamo, and the tug Henry S. Beard, and in favor of the New York & Porto Rico Steamship Company, claimant of the steamer Coamo, for two-thirds of its damages and costs, with interest, against F. B. Dalzell & Co., Incorporated, and the tug Henry S. Beard.

Decree reversed.

NISSEN v. FIRST NAT. BANK OF WATERLOO, IOWA.

(Circuit Court of Appeals, Eighth Circuit. July 7, 1920. Rehearing Denied Sept. 18, 1920.)

No. 5523.

1. Pleading **§ 406(9)**—Complaint in action on assigned bill sufficient, where proof showed assignment not alleged.

That the complaint in an action on an accepted bill did not allege a written assignment of the bill to plaintiff *held* not material, where the answer did not deny plaintiff's title and the proofs showed the bill properly indorsed.

2. Bills and notes **§ 94(2)**—Compromise of claim sufficient consideration.

A compromise and settlement of matters in dispute, after full and fair negotiation, is binding on the parties, and an acceptance given by one in execution of the settlement is not open to defense.

3. Evidence **§ 409**—Conversations preceding written settlement inadmissible to impeach it.

Where a settlement which was reduced to writing was made by an agent for one party acting under instructions from his principal, evidence of conversations with the agent preceding the settlement *held* inadmissible to impeach it.

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Action at law by the First National Bank of Waterloo, Iowa, against W. C. Nissen. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank McNulty, of Aberdeen, S. D., for plaintiff in error.

J. T. Sullivan, of Waterloo, Iowa (William G. Porter, of Sioux Falls, S. D., on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. For convenience the parties will be referred to as they appeared in the court below; the defendant in error as plaintiff, and the plaintiff in error as defendant. The plaintiff instituted an action against the defendant to recover on a trade acceptance of the defendant the sum of \$5,000. This is a copy of the acceptance:

"Waterloo, Iowa, September 20, 1918. \$5,000.00

"Ninety days after date pay to the order of Interstate Tractor Company, Waterloo, Iowa, five thousand dollars. The obligation of the acceptor hereof arises out of the purchase of goods from the drawer.

"To W. C. Nissen, Aberdeen, South Dakota.

"[Signed] Interstate Tractor Co., by C. McNally, Treas."

On the same day, the bill was accepted by the defendant, by writing across the bill the words:

"Accepted, September 20, 1918, payable at Aberdeen National Bank, Aberdeen, South Dakota.

[Signed] W. C. Nissen."

Upon the back of the bill was the indorsement: "Interstate Tractor Company, by C. McNally, Treasurer."

The complaint alleges that in due course, for value, before maturity, the Interstate Tractor Company duly transferred and assigned the bill to the plaintiff, who has ever since been the owner and holder thereof; that at maturity it was presented for payment and refused, whereupon it was protested. The answer, in addition to a general denial, pleads no consideration, full payment, and that the bill had been fraudulently obtained from the defendant. Upon a trial to a jury the court directed a verdict for the plaintiff, and this writ of error is prosecuted to reverse the judgment entered on the verdict.

[1] The contention of counsel for the defendant that, as the complaint fails to allege that the bill was assigned to the plaintiff by indorsement in writing, it cannot claim to be a bona fide holder thereof. The bill, which was introduced in evidence, shows that it had been properly indorsed by the payee. It was therefore established beyond question that it had been properly indorsed by the payee, which carried with it the assignment, and required no further proof, especially in view of the fact that the defendant in his answer did not plead that there was no assignment of the bill, except the general denial. This contention is without merit.

Without setting out the evidence, it is sufficient to say that it established beyond question that the plaintiff bank had discounted for value a number of notes executed by the defendant to the Interstate Tractor Company, discounted a bill of exchange drawn by the Tractor Company with bill of lading attached for four carloads of tractors, and was a bona fide holder of them.

[2] In the business transactions of the defendant with the Tractor Company a number of disputes had grown up between them, which the defendant insisted should be adjusted, before he would pay the notes and bills held by the plaintiff, by assignment from the Tractor Company. One of the matters in dispute was that the Tractor Company had shipped to the defendant four carloads of tractors, which defendant had not ordered, and therefore declined to receive. Against this shipment the Tractor Company had drawn a sight draft on the defendant with bills of lading attached, and discounted the same with the plaintiff. There were some negotiations between the defendant and the Tractor Company for the purpose of making a settlement, which caused the plaintiff to send the notes which defendant had executed to the Tractor Company, and which were held by the plaintiff, and also the bills of lading for the four cars of tractors shipped by the Tractor Company, but not accepted by the defendant, to the Aberdeen National Bank, with directions to make a settlement with the defendant in accordance with the instructions contained in the letter of plaintiff, and when the settlement was made and the consideration paid to turn over to the defendant all the notes and bills, including the bills of lading covering the four carloads of tractors.

After a number of conversations by the president of the Aberdeen National Bank with the defendant, propositions and counter propositions submitted to the plaintiff, as shown by letters and telegrams from the Aberdeen Bank to plaintiff, and replies thereto from the plaintiff, all of which were exhibited by Mr. Bassett, the president of the Aber-

deen National Bank, and who acted for it, a final compromise was made in accordance with the instructions of the plaintiff. The defendant paid \$7,210.62 in cash and executed three acceptances, of which one is the basis of this action. Thereupon Mr. Bassett delivered to him his notes and bills and the bills of lading for the four cars of tractors.

This evidence establishes beyond question a compromise and settlement between the parties. There was, therefore, an accord and satisfaction, a compromise in settlement of disputed claims between the parties, fully executed. That a settlement of disputed claims between parties, dealing on terms of equality, which have knowledge or opportunity to acquire knowledge of every fact bearing upon the validity of their claims, is binding on the parties in the absence of fraud, mistake or duress is well settled. *Hemingway v. Stansell*, 106 U. S. 399, 1 Sup. Ct. 473, 27 L. Ed. 245; *Hennessy v. Bacon*, 137 U. S. 78, 85, 11 Sup. Ct. 17, 34 L. Ed. 605; *Chicago, M. & St. P. Ry. v. Clark*, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1099; *City of San Juan v. St. John's Gas Co.*, 195 U. S. 510, 522, 25 Sup. Ct. 108, 49 L. Ed. 299, 1 Ann. Cas. 796; *Daly v. Busk Tunnell R. Co.*, 129 Fed. 513, 64 C. C. A. 87; *Sims v. Three States Lumber Co.*, 135 Fed. 1019, 68 C. C. A. 413; *Sovereign Camp, Woodmen of the World, v. Bridges*, 165 Fed. 342, 91 C. C. A. 328; *Kiefer Oil & Gas Co. v. McDougal*, 229 Fed. 933, 939, 144 C. C. A. 215, Ann. Cas. 1916D, 343. No evidence was offered that any fraud had been practiced on the defendant, or any mistake made, or that he was induced to make the compromise by duress.

[3] Another contention on the part of the defendant is that the court erred in refusing to permit him to testify as to the conversations with Mr. Bassett, the president of the Aberdeen National Bank, who was acting as the agent of the Tractor Company and the First National Bank in the compromise and settlement, before the settlement was completed, the money paid, and the bills accepted. As the settlement was in writing, evidence preceding it was clearly inadmissible. This court so held in *Sioux Falls National Bank v. Klaveness*, 264 Fed. 40.

Another ground upon which this evidence was inadmissible is that the agency of the Aberdeen National Bank was limited by the instructions contained in the letters and telegrams from the plaintiff bank to the Aberdeen National Bank, all of which were shown to the defendant before the compromise was concluded and the acceptances executed.

There are other assignments of error, which have received careful consideration, but they are clearly without merit. Upon the record no other verdict could have been rendered than that directed by the court.

The court committed no error, and its judgment is affirmed.

UNITED STATES v. LEVINSON et al.

(Circuit Court of Appeals, Second Circuit. June 9, 1920.)

No. 241.

1. **Interpleader** ⇨3—Appropriate remedy when each of two bidders claims property as purchaser.

Where each of two bidders claimed to be the purchaser of a vessel offered for sale by the government, a bill of interpleader *held* properly filed by the United States, which still retained possession of the vessel.

2. **United States** ⇨40—Not bound by unauthorized act of officer or agent.

To bind the government, its agent must act strictly within his official authority, and every one who deals with him takes the risk of his doing so.

3. **United States** ⇨58—Not bound by delivery of bill of sale of vessel by department through mistake.

Where the Secretary of the Navy, pursuant to orders of the President, advertised a vessel for sale to the highest bidder, but through a mistake in his department the highest bid was not properly filed, and he executed a bill of sale to a lower bidder, such act *held* without authority and not binding on the government, and as between the two the highest bidder *held* entitled to the vessel, which had not been delivered.

Hough, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Bill of interpleader by the United States against Morris Levinson and S. Harry Johnson. From the decree the United States and Johnson appeal. Appeal by United States dismissed. Reversed on Johnson's appeal.

Certiorari denied 254 U. S. —, 41 Sup. Ct. 15, 65 L. Ed. —.

Francis G. Caffey, U. S. Atty., of New York City (Peter B. Olney, Jr., Asst. U. S. Atty., of New York City, of counsel), for the United States.

Henry Amerman, of New York City, for appellant Johnson.

Duncan & Mount, of New York City (John A. McManus, of New York City, of counsel), for appellee.

Before WARD, HOUGH and MANTON, Circuit Judges.

WARD, Circuit Judge. Section 5 of the act of March 3, 1883 (Comp. St. § 2787), relating to the sale of vessels stricken from the navy register, requires an appraisal to be made and advertisement for sealed proposals; the vessel to be sold to the highest bidder above the appraised value, unless the President of the United States shall otherwise direct in writing. January 7, 1919, the President directed that all vessels purchased or commandeered by the government during the war between the United States and Germany be appraised and sold to the former owners at the appraised values, and that if they are not desirous of purchasing—

"the Secretary of the Navy shall advertise and sell at public sale any and all of said vessels which are in his opinion not necessary for the needs of the navy at such price as he shall approve."

⇨ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

July 11, 1919, the Secretary of the Navy having advertised, among other vessels, the steam yacht Wadena for sale August 20th for cash to the highest bidder, one Levinson submitted a bid of \$5,150 and one Johnson a bid of \$6,500, both in full compliance with the terms of sale. Through inadvertence in the offices of the Navy Department, Johnson's bid was placed with the bids for another vessel named the Wandena, to be sold September 8, which bids were opened 18 days after the bids for the Wadena had been opened. In the meantime the Secretary notified Levinson that his bid had been accepted; it being the highest known to him. Levinson paid the amount and a bill of sale was given to him September 3, 1919.

September 8, when the bids for the Wandena were opened, Johnson's bid for \$6,500 for the Wadena was found, and the Navy Department stopped delivery of the Wadena to Levinson, returned him the checks given in payment, and requested a return of the bill of sale. This Levinson refused to do, at the same time returning his checks, with the claim that title to the vessel had passed to him. Johnson has offered to pay the full amount of his bid, and has demanded the delivery of the vessel to him as the highest bidder.

Thereupon the government filed this bill of interpleader, setting forth the foregoing facts, and both of the bidders filed answers, admitting the allegations of the bill. The trial judge directed that the vessel be delivered to Levinson on the ground that, having under the executive order a discretion to accept or reject bids, the Secretary had accepted Levinson's. Johnson has taken this appeal, and so has the government, by direction of the Attorney General.

[1] Though no party objected to the jurisdiction in equity of this bill, the trial judge raised the question whether it was a proper bill of interpleader, or bill in the nature of interpleader. We think he was right in holding that it was. The government is in possession of the vessel. Two different bidders are claiming it, and the government does not know to which bidder to deliver it. This is a typical case for a bill of interpleader. The only difficulty is that the Secretary of the Navy having delivered the bill of sale to one of the parties, has an interest, and is not a mere stakeholder, if the government is to be treated like a private suitor. On the other hand, if it is not bound by the mistake in the Navy Department, a question now to be considered, it remains a mere stakeholder, without interest.

The Secretary of the Navy intended to sell the vessel to the highest bidder, and so stated in the offer of sale. Although he reserved in the notice of sale the right to reject any and all bids, he did not reject, or intend to reject, Johnson's bid, because he did not know of its existence. The effect of the authority given him by the executive order to sell for such price as he shall approve is only to relieve him of the restriction of the act of 1883 that a bid, to be accepted, must be more than the appraised value, and to permit him to reject all bids, if they be wholly inadequate.

[2] It was argued that the sale to Levinson should be set aside, because made under a mutual mistake. The District Judge was of opinion that there was no mutual mistake, and that because knowledge of John-

sons bid, which came to the Navy Department through the mail, is to be imputed to the government, just as such knowledge would be imputed to a private party, although by a mistake of his agent he had no actual knowledge. In this we cannot concur. The relation of the government to its agents is different from that of private parties. To bind the government, its agent must act strictly within his official authority, and every one who deals with him takes the risk of his doing so. The subject has not been frequently considered, but is treated of in *United States v. Stockgrowers' Nat. Bank* (C. C.) 30 Fed. 912; *The Floyd Acceptances*, 7 Wall. 666, 19 L. Ed. 169; *Cooke v. United States*, 91 U. S. 389, 23 L. Ed. 237; *Steele v. United States*, 113 U. S. 128, 5 Sup. Ct. 396, 28 L. Ed. 952.

[3] The Secretary agreed to sell the Wadena to the highest bidder, and this he supposed he was doing when he accepted Levinson's bid. He exercised, and intended to exercise, no discretion to accept anything but the highest bid. He had no authority to do so under the notice of sale. Therefore, in delivering the bill of sale to Levinson, he acted without authority to bind the government. It is necessary as matter of public policy that the government be protected in this way against liabilities, unlimited in number and amount, resulting from the mistakes or misconduct of its agents.

It is further contended on behalf of Levinson that the government, in selling the vessel, had descended into commercial business and abandoned its sovereign capacity. We are of opinion that in selling vessels not needed by the navy it exercises a governmental function, and does not go into business. The case is not at all like a department buying, carrying, and selling merchandise as was disclosed in the case of the Panama Railroad, owned by the United States. *Salas v. United States*, 234 Fed. 842, 148 C. C. A. 440.

We are of opinion that the United States, being a mere stakeholder, has no standing to take an appeal, and its appeal is dismissed, but that, the Secretary having no authority to deliver the bill of sale to Levinson, and being bound to deliver it to Johnson as the highest bidder, the decree must be reversed.

HOUGH, Circuit Judge, dissents.

ATLANTIC COAST LINE R. CO. v. RAULERSON.

(Circuit Court of Appeals, Fifth Circuit. July 1, 1920. Rehearing Denied July 31, 1920.)

No. 3502.

1. Negligence \S 119 (1)—Proof of one of several charges sufficient.

To entitle a plaintiff to recover on a count containing several charges of negligence it is not necessary to prove all of such charges.

2. Appeal and error \S 273 (5)—Exceptions to charge must be specific.

An exception to a charge is not available, where it is general and does not direct the attention of the court to the particular part objected to and afford an opportunity for its withdrawal or correction.

In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Action at law by Emma Raulerson against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Certiorari denied 254 U. S. —, 41 Sup. Ct. 15, 65 L. Ed. —.

J. L. Doggett, of Jacksonville, Fla., for plaintiff in error.

George C. Bedell, A. H. King, and Roswell King, all of Jacksonville, Fla., and T. A. Wallace, for defendant in error.

Before WALKER and BRYAN, Circuit Judges, and HUTCHERSON, District Judge.

WALKER, Circuit Judge. This was an action by the defendant in error to recover damages for the death of her husband, which was attributed to negligence of the plaintiff in error in breach of its duty to the decedent as a passenger upon one of its trains from Jacksonville to Camp Joseph E. Johnston, a United States army camp, where the decedent was employed as a workman under a contractor engaged in government work there. The case went to trial on the second, third, and fifth counts of the amended declaration. The second and third counts charged that the deceased was killed by being thrown from the train in consequence of the negligent way in which it was stopped. The fifth count contained the following:

"For a fifth count plaintiff alleges all the allegations in the preceding counts, and further alleges that the defendant was also guilty of carelessness and negligence in the premises in this, to wit: That at said place defendant had carelessly and negligently placed and dumped a large pile of soft sand, and had allowed same to remain along the side of the track where said train stopped for deceased to alight, and that when deceased alighted or fell, as he was forced in the premises to do, on said pile of sand, it gave way under him, and he was thereby thrown under said train and instantly killed."

To each of the counts the plea of not guilty and several special pleas were interposed, and the following special plea was filed:

"And for an additional and special plea to the fifth count of said amended declaration the defendant says that it is untrue that it had placed or dumped a large pile of soft sand and/or had allowed the same to remain along the side of the track at the stopping place of said train."

Issue was joined on the above-mentioned pleas. There was evidence tending to prove that the cars in which the deceased and other workmen were carried by the plaintiff in error to Camp Johnston were box cars and cattle cars not provided with seats; that, as the train approached and reached the stopping place chosen by the defendant, the deceased was sitting in the door of a cattle car, and was either thrown out by a sudden jerk of the train, or alighted on a pile of sand alongside the track, which caused him to lose his balance, with the result that he fell under a car wheel and was killed by the sudden forward movement of the train, following its coming to a stop.

[1] Complaint is made of the court's refusal to give a written charge, requested by the defendant, which required a verdict in its favor on the fifth count. That complaint is based on the absence of

evidence to support the averment of that count that the defendant placed or dumped the sand along its track at the stopping place; the contention being that the evidence as to the sand did not show more than that the defendant allowed it to remain where it was placed or dumped along the side of the track. The refusal of the charge mentioned is justifiable, on the ground that the fifth count repeated the allegations of negligence made in the second and third counts, and made an additional charge of negligence, that it was capable of being supported by proof of either of the charges of negligence it contained, and that there was evidence to support the charges of negligence made in the second and third counts and repeated in the fifth count. For the plaintiff to recover on that count it was not necessary for her to prove all of the several charges of negligence it contained. 14 Ency. Pleading & Practice, 345.

[2] An assignment of error is based upon a part of the court's charge to the jury which was to the effect that it was a question for the jury to find from the testimony if the defendant placed or dumped a pile of sand, or had allowed the same to remain, along the side of the track. That particular part of the court's charge was not so excepted to as specifically to call the court's attention to the feature of it which in argument in this court was pointed out as the fault in it, namely, the absence of evidence proving that the defendant placed or dumped the sand alongside its track. The exception as made embraced other parts of the charge, which were not subject to criticism. The court's attention should have been so specifically directed to the particular part of its charge intended to be complained of as to be afforded the opportunity of withdrawing or correcting the part complained of, if, on consideration of the exception, it was deemed to be well founded. We are not of opinion that the exception in question was sufficiently distinct and specific to support an assignment of error based on it.

The conclusion is that no one of the assignments of error relied on in behalf of the plaintiff in error is sustainable.

The judgment is affirmed.

UNITED STATES v. ONE DIAMOND NECKLACE.

(Circuit Court of Appeals, Second Circuit. June 2, 1920.)

No. 174.

1. Appeal and error ⚡1008(1)—Finding by court conclusive on appellate court.

A general finding of facts by the court in a case tried without a jury is binding on the appellate court.

2. Trial ⚡388(2)—Trial to court; special findings discretionary.

In a case tried to the court by stipulation under Rev. St. § 649 (Comp. St. § 1587), it is entirely for the discretion of the court whether to make special findings of fact.

In Error to the District Court of the United States for the Southern District of New York.

Libel by the United States against One Diamond Necklace, containing 57 stones. Judgment for claimant and libelant brings error. Affirmed.

Francis G. Caffey, U. S. Atty., of New York City (John E. Walker, Sp. Asst. Atty., of New York City, of counsel), for the United States.

Gerry & Wakefield, of New York City (Carl E. Whitney, of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a libel of information for forfeiture of a diamond necklace, of the value of \$5,600 or thereabouts, first, under section 2802, Rev. Stat. (Comp. St. § 5499); second, under section 3, subdivisions H and T, of the Tariff Act of October 3, 1913 (Comp. St. §§ 5526, 5791). Two claimants appeared, viz. Madame de Ocon and Madame de Yglesias. A trial by jury was waived in writing, and the issues of fact and law submitted to the court, who entered a general judgment dismissing the libel and awarding the necklace to the claimant Ocon. The government took this writ of error.

March 28, 1919, at the close of the case, the following stipulation was entered of record:

"Decision reserved; briefs to be submitted, the evidence to be written out, and both sides to submit briefs. The court is to render its decision and send the decision to New York to be entered as of to-day. The record is to show that the defeated party is to have the right to enter exceptions, and such length of time as he may require to file a bill of exceptions; the judgment to be entered as of this date."

December 12, 1919, the judge signed a bill of exceptions and entered a judgment, dismissing the government's libel and directing the return of the necklace to Madame de Ocon. The assignments of error were as follows:

"1. The court erred in denying the motion of the United States for judgment in its favor for condemnation of the diamond necklace, and in granting the motion of the claimant De Ocon for judgment in her favor.

"2. The court erred in denying the application of the United States to rule upon specific requests for findings on the facts and on the law."

[1] No exception was taken by the government to the dismissal of the libel, so that no question of law is raised before us, and the general finding of the court upon the facts is binding upon us.

[2] As to the second assignment of error, the government applied to the judge to make special findings of fact and conclusions of law after the judgment was entered. It is a matter entirely for the discretion of the court whether to make special findings of fact. The cases are collected in *Joline v. Metropolitan Securities Co.* (C. C.) 164 Fed. 650.

The judgment is affirmed.

LETHBRIDGE v. WARDELL et al.

(Circuit Court of Appeals, Second Circuit. April 14, 1920.)

No. 187.

Wharves — 20 (5) — Consignee or pier manager not liable for injury to boat entering slip to discharge.

Where the master of a canal boat insisted on entering a slip to his discharging berth, although it was so obstructed by other vessels as to be unsafe, as he was warned, neither the consignee of the cargo nor the manager of the pier, who assisted him in his attempt, *held* liable for injury to the boat.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty by George W. Lethbridge against Winant B. Wardell and the Commercial Coal Company. Decree for respondents and plaintiff appeals. Affirmed.

The following is the opinion of Garvin, District Judge, in the court below:

The canal boat Agnes Hickey, with a cargo of coal, was injured at a pier at the foot of Twenty-Fifth street, Brooklyn. She arrived there on September 6, 1917, with a cargo of coal consigned to the respondent the Commercial Coal Company. The slip was not clear, and as she proceeded to the coal pockets of the Commercial Coal Company, which are situated at the inner end of the slip, she found her passage barred by a stone barge.

The respondent Wardell controlled the pier, and when his son learned of the difficulties he at once went to the canal boat and was active in persuading those in control of the stone barge to move it across the slip, so that the canal boat might go through. The employes of the Commercial Coal Company assisted in moving the latter boat. This moving, however, should have been done under the direction of the captain of the canal boat. Inasmuch as the space between the wharf and the stone barge was too narrow to permit the canal boat to go through, and as the tide fell, she was injured.

It seems to the court that, even if either one or both of the respondents was prevented access to the pockets of the Commercial Coal Company, nevertheless the canal boat had no right to attempt to pass any point in the slip where conditions were such that a passage could not be effected without danger to the boat. The testimony shows that the captain was warned of this danger, and in view of the fact that he nevertheless made the attempt, neither one of the respondents should be held responsible.

The libel is dismissed.

Macklin, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for appellant.

Alexander & Ash, of New York City (Mark Ash, of New York City, of counsel), for appellee Wardell.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellee Commercial Coal Co.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

WEIDENFELD v. PACIFIC IMPROVEMENT CO.

(District Court, E. D. New York. September 7, 1920.)

- 1. Bills and notes ⚡523—Evidence held to show indorsed note was delivered to defendant for collection.**

In an action for proceeds of a note, evidence that neither the original note nor the renewal note was entered on the books of the defendant, and that defendant had no record showing that anything was advanced for the note, with testimony of defendant's witness that it made no claim to the note, *held* to justify the jury's finding that the note indorsed by plaintiff was delivered to defendant for collection only.

- 2. Evidence ⚡420(7)—Parol evidence admissible to show delivery of note for collection.**

Parol evidence is admissible to show that a note indorsed by plaintiff and delivered to defendant was delivered for collection only; such evidence merely tending to show a condition to the delivery, and not to deny the liability on the indorsement.

- 3. Pleading ⚡345(1)—Complaint to recover money collected on note held not to allege unconditional indorsement, so as to authorize judgment on motion.**

In an action for the proceeds of a note, a complaint alleging that the note was duly indorsed and delivered to defendant does not entitle defendant to judgment on the pleadings, where it also alleged in detail the circumstances showing the delivery to have been conditional for collection and application on plaintiff's debt to defendant.

- 4. Corporations ⚡417—President held to have authority to release collateral.**

The president of a corporation, who was shown by the testimony to have authority to release collateral, and to have released other collateral, had authority to act for the corporation in settling a disputed question and avoiding litigation, and in doing so to release collateral pledged to the corporation.

- 5. Limitation of actions ⚡41—Claim barred by limitations as counterclaim not available as set-off.**

A claim which defendant cannot interpose against plaintiff as a counterclaim, because it is barred by limitations, is not available to him as a set-off against plaintiff's claim.

- 6. Limitation of actions ⚡95(1)—Knowledge of cause of action essential.**

Where defendant, in settlement of a claim against plaintiff, took a note payable to plaintiff and secured by bonds already pledged to defendant for other notes, and thereafter defendant released a portion of the bonds from the prior pledge and agreed to apply the proceeds of the sale to plaintiff's note, plaintiff's right to sue for the proceeds of the sale of such bonds did not accrue until he knew that defendant had sold the particular bonds, though he knew that some of the bonds had been sold.

- 7. Limitation of actions ⚡88—Action may be brought within limitation period after foreign corporation secures state license.**

Under Code Civ. Proc. N. Y. § 401, allowing an action accruing against a person without the state to be commenced within the time limited therefor after his return into the state, an action against a foreign corporation can be brought within the period of limitations after the corporation first procured a license to do business within the state, though the debt matured many years before.

- 8. Limitation of actions ⚡88—Allowing action against foreign corporation securing license held not contrary to other statute.**

The application of Code Civ. Proc. N. Y. § 401, allowing actions after defendants acquired a residence within the state, to a foreign corporation first procuring a license within the state, does not make that statute

conflict with section 390, as amended by Laws 1916, c. 538, which relates generally to causes of action arising outside the state, without regard to the residence of the persons against whom they accrue.

9. Equity ⚡75—Estoppel ⚡70(2)—Laches and estoppel not a bar, where delay was due to advice of counsel.

The fact that the delay in bringing a cause of action was due to the advice of an attorney of recognized ability that plaintiff had no cause of action is a complete answer to the defense of estoppel and laches, especially where the defendant, by bringing suit on notes held by it, could have secured a settlement of all the issues involved.

At Law. Action by Camille Weidenfeld against the Pacific Improvement Company. On motion by defendant to set aside a verdict in favor of plaintiff. Motion denied.

Walter Jeffreys Carlin and Herman J. Witte, both of New York City (C. C. Daniels and Thomas Downs, both of New York City, of counsel), for plaintiff.

Larkin & Perry, of New York City (Adelbert Moot, of Buffalo, N. Y., and Orville C. Sanborn, of New York City, of counsel), for defendant.

GARVIN, District Judge. This is a motion by defendant to set aside a verdict in favor of the plaintiff for \$74,746.87, with interest, after a trial before the court and jury. This sum is the amount of a promissory note (the renewal of a previous note) which reads as follows:

"\$74,746.87.

New York, February 25, 1897.

"The Central New York & Western R. R. Co., six months after date, and upon return of securities given, promise to pay C. Weidenfeld, or order, seventy-four thousand seven hundred forty-six and $\frac{87}{100}$ dollars, for value received, with interest at six per cent. per annum, having deposited with him as collateral security: Two hundred and eight thousand dollars (\$208,000) Central New York & Western R. R. Co. 1st mortgage 5% bonds, with authority to sell the same or other security subsequently substituted, at the board of brokers, or at public or private sale, at their option, on the nonperformance of this promise and without further notice; applying the net proceeds to the payment of this note, including interest, and account to us for the surplus, if any. In case of deficiency, we promise to pay to said C. Weidenfeld the amount thereof, forthwith after such sale, with legal interest.

"The Central New York & Western R. R. Co.

"By [Signed] John Byrne, President.

"[Signed] F. R. Pemberton, Treasurer."

The motion is made upon the following grounds:

"(1) That it is contrary to the evidence and contrary to law.

"(2) Upon each and every exception taken by the defendant upon the trial to the rulings of the court denying defendant's motion at the beginning of the trial for judgment in favor of the defendant upon the controlling facts admitted in the pleadings; also upon each exception to the rulings of the court admitting evidence offered by the plaintiff to the admission of which the defendant objected and excepted; also to the ruling of the court denying defendant's motion to strike out the parol evidence of plaintiff tending to show a conversation contradicting or varying a written instrument; also to the exceptions taken to the rulings of the court denying defendant's separate motions for the direction of a verdict upon separate grounds stated; also to the

exceptions taken by defendant to the charges of the court, especially those leaving the case to the jury upon the basis of parol evidence as to the alleged agency of defendant for plaintiff; also to the exceptions taken by defendant to the charges by the court at the request of the plaintiff, and to the refusals of the court to charge as requested by the defendant.

"(3) Upon the ground that there was no evidence before the court and jury to show that the note of February 25, 1897, was worth its face value, and the evidence showed that it was made by a railroad company, already insolvent, that had made default in the payment of interest upon its bonds as early as January, 1894, and the jury had no evidence before them to show that said note had anything more than a mere nominal value; also that the bonds pledged by said note as collateral to it were subject to a prior pledge for a million dollars, from which pledge said bonds were never released and upon which pledge said bonds were duly sold November 10, 1897, and by such sale, if valid, defendant obtained good title to said bonds, and if invalid, the defendant still had lawful right to retain said bonds; also that the note in question was held by the defendant as a bona fide holder for value as collateral security to an antecedent debt and plaintiff established no cause of action with respect thereto."

The plaintiff, a stockbroker, has been actively engaged in business as such in New York City for many years. Prior to 1893 he was a member of the brokerage firm of I. B. Newcombe & Co. During that year and prior thereto said firm, having become indebted to defendant, on August 7, 1893, executed and delivered to the defendant five promissory notes, to the order of defendant, payable on demand, four for the sum of \$1,000,000 each, and the fifth for the sum of \$24,727.42. These notes recited the security held against them, and included among the securities so recited were 333 bonds of the Central New York & Western Railroad Company of the face amount of \$1,000 each. Later it developed that this railroad company claimed to own 208 of the bonds, and after some negotiation an arrangement was made by which the note in suit was executed by the railroad to the plaintiff, and by him in turn indorsed and delivered to the defendant. Plaintiff claims that this delivery was for the purpose of collection only, the proceeds, when paid by the railroad company to defendant, to be credited upon the indebtedness of the Newcombe firm to defendant.

Defendant asserts that, when the note sued upon was executed, an agreement was made with plaintiff by which defendant undertook to turn over to the railroad 208 of the bonds in question, provided the note was paid when due; if it was not so paid, the bonds were to remain as part of the collateral securing the notes of the Newcombe firm. The questions presented for determination, and the rulings upon which defendant claims errors were committed at the trial, will be considered in order as they appear in defendant's brief.

[1] It is urged that no legal evidence was given to vary or contradict the terms of the note in suit, and consequently there is no legal foundation upon which to sustain the verdict of the jury. The testimony given by plaintiff, taken in connection with the proof that neither the original note nor the note in suit (the renewal note) was entered on the books of the defendant, although it was the custom to enter all notes received by it, and that defendant has no record to show that anything was advanced for the note, not to speak of the testimony of defendant's witness Vanderver that defendant makes no claim to

be entitled to the note, justified the jury's finding that the note was delivered for collection only.

[2] It is contended by defendant that plaintiff's testimony that the note was delivered for collection only was incompetent, because it tended to vary the express terms of the note. The case of *Bank of U. S. v. Dunn*, 6 Pet. 51, 8 L. Ed. 316, upon which reliance is had, was an action by a third party, into whose hands a note had come, against a prior indorser. It was there held that the defendant could not be permitted to show that he had indorsed the note under an agreement that he was to assume no responsibility, or at least would not be held liable on the note, until the security pledged for its payment had been exhausted. That case is not analogous to the action at bar, as is pointed out in *Davis v. Brown*, 94 U. S. 423, 24 L. Ed. 204. In the *Dunn* Case, *supra*, an attempt was made to evade liability by proving a secret agreement; here plaintiff sought to show the condition upon which the note was delivered to the defendant by the plaintiff, and his right to offer proof that delivery was conditional is supported by ample authority. *Benton v. Martin*, 52 N. Y. 570; *U. S. Nat. Bank v. Ewing*, 131 N. Y. 506, 30 N. E. 501, 27 Am. St. Rep. 615; *Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32, approved in *Niblock v. Sprague*, 200 N. Y. 390, 93 N. E. 1105; *Grannis v. Stevens*, 216 N. Y. 585, 111 N. E. 263.

[3] Defendant moved for judgment on the pleadings at the opening of the trial, asserting that the complaint set forth that plaintiff duly indorsed and delivered to defendant the note in suit. It appears, however, that the complaint alleges in great detail plaintiff's version of what occurred, particularly with reference to the agreement providing for a conditional delivery of the note, and alleges that the indorsement and delivery were pursuant to the agreement in question. The motion, therefore, was properly denied.

With regard to defendant's contention that plaintiff could not dispute the note in question by parol evidence, because, the note being a collateral note and promising the return of the securities therein pledged to the railroad company, the plaintiff could only properly use the note in such manner as to put the railroad company in a position legally to enforce the return of its securities to it, should the railroad company pay the note, the jury has found that defendant released the 208 bonds from the lien of the \$4,000,000 notes and put them back of the note in suit.

[4] Defendant claims that as an officer of defendant, Hubbard, its president, had no power to make a binding promise to take the note from plaintiff for collection and give the latter the proceeds of the note. Corporations must act through officers, and it appears by the testimony that Hubbard had authority to release collateral, and that he actually did release collateral and act for the defendant in similar transactions. From the entire record the conclusion is warranted that the acts of defendant were in the ordinary course of business, and that what was done was for the purpose of adjusting differences, reaching a settlement of disputed questions, and avoiding litigation. Its presi-

dent had ample authority to act in its behalf in an endeavor to accomplish these purposes.

[5] If it claimed that error was committed in striking out the facts pleaded by defendant to show that it had a right to a set-off, because it is an established principle that in a case like this, in a state such as New York, set-off is a legal right not to be denied the defendant. As a matter of fact the testimony referring to the large notes was not struck out, but the court merely ruled that the counterclaim upon those notes was barred by the statute of limitations (with which the learned counsel for defendant agreed), and that for the same reason the notes could not be used as a set-off. If the large notes could not serve as the basis of an action against plaintiff, being barred by the statute, it is difficult to perceive why they should be permitted to defeat plaintiff's cause of action by pleading them as a set-off, which in itself presupposes a valid claim against plaintiff.

The verdict of the jury disposes of the claim that plaintiff was an interloper, having no cause of action against defendant. Nor can it be held that plaintiff proved no damage. The bonds of the railroad company had a substantial value, and if defendant had performed what the jury found was its agreement, ample would have been realized to pay the note,

[6] Defendant has pleaded that plaintiff's cause of action was barred by the statute of limitations, and argues that no demand for the proceeds of the collection of the note in suit or for the note and bonds (which demand was first made in 1918) was necessary, inasmuch as defendant had written a letter to plaintiff on November 17, 1897, giving notice that the bonds in question had been sold by defendant, thus giving the plaintiff the right to sue without a demand. Under the numerous authorities cited by defendant, this would be so if defendant at any time had conceded that any bonds identified as thereafter sold as collateral securing the large notes, had been put behind the note in suit, in the manner claimed by plaintiff. Upon the whole record it does not appear that any of the bonds sold by defendant in 1897 were the bonds which the jury had found were the bonds put behind the latter note, nor has defendant met the requirement that it must prove that it converted the identical 208 bonds that were back of the note in suit. Such must be held to be the law under *Kilbourne v. Supervisors, etc.*, 137 N. Y. 170, at page 178, 33 N. E. 159. Very earnest, but unsuccessful, efforts were made during the trial by plaintiff's counsel, jury, and court to obtain from defendant an admission or an unequivocal statement to this effect. It should be observed, in addition, that if defendant relies on its conversion of the bonds, no conversion has been pleaded. On the contrary, defendant's amended answer alleged that no bonds were pledged as collateral to the note which is involved in this action.

But, however that may be, even if plaintiff's right of action accrued in 1897, it has not been barred by the statute of limitations. For some years prior to 1916 section 390 of the Code of Civil Procedure of the state of New York provided as follows:

"Where a cause of action, which does not involve the title to or possession of real property within the state, accrues against a person, who is not then a resident of the state, an action cannot be brought thereon in a court of the state, against him or his personal representative, after the expiration of the time, limited, by the laws of his residence, for bringing a like action, except by a resident of the state, and in one of the following cases:

"1. Where the cause of action originally accrued in favor of a resident of the state.

"2. Where, before the expiration of the time so limited, the person, in whose favor it originally accrued, was or became a resident of the state; or the cause of action was assigned to, and thereafter continuously owned by a resident of the state."

On May 15, 1916 (Laws 1916, c. 536), this section was amended to read as follows:

"Where a cause of action, which does not involve the title to or possession of real property, within the state, accrues against a person, who is not then a resident of the state, an action cannot be brought thereon in a court of the state, against him or his personal representative, after the expiration of the time, limited by the laws of his residence, for bringing a like action, provided that if the limitation of the time fixed by the laws of his residence for bringing such action be less than the time fixed by the laws of this state for a like action, the limitation fixed by the laws of this state shall apply. This section shall not apply to a case in which a person is entitled, when this section as amended takes effect, to commence such action, where he commences the same before the expiration of six months after this section as amended takes effect; in which case the provisions of law applicable thereto immediately before this section as amended takes effect shall continue to be so applicable, notwithstanding the repeal thereof."

[7] The plaintiff has at all times been a resident, the defendant a foreign corporation, not licensed to do business in this state prior to October, 1916, when it filed an application to do business here. Section 401 of the Code of Civil Procedure provides:

"If, when the cause of action accrues against a person, he is without the state, the action may be commenced within the time limited therefor, after his return into the state. If, after a cause of action has accrued against a person, he departs from the state, and remains continuously absent therefrom for the space of one year or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state under such false name is not a part of the time, limited for the commencement of the action. But this section does not apply, while a designation, made as prescribed in section 430 or in subdivision second of section 432 of this act, remains in force."

This suit was brought in 1918. For many years a foreign corporation had no right to plead the statute of limitations. *Olcott v. Tioga Railroad Co.*, 20 N. Y. 210, 75 Am. Dec. 393. The fact that the corporation had an office and agents within the state was immaterial. *Rathbun v. Northern Central Railway Co.*, 50 N. Y. 656. This drastic prohibition has been modified, and a foreign corporation, having received a license to do business and designated a person within the state upon whom process may be served, may now avail itself of the statute of limitations when it is applicable. *Comey v. United Surety Co.*, 217 N. Y. 268, 111 N. E. 832, Ann. Cas. 1917E, 424. If the defendant had filed no certificate by which it secured a license to do business within

the state, it undoubtedly could not have successfully maintained the defense of the statute of limitations, if plaintiff's right of action accrued in 1897; but once having elected to file its certificate and make a designation thereby obtaining the benefits incident thereto, it acquired a residence and upon filing a designation required by law it could then avail itself of our own statute of limitations, subject to the provisions of section 401 of the Code of Civil Procedure, which permits an action to be commenced within the time limited therefor, after a person absent from the state when a cause of action accrues against him returns.

[8] It is not contrary to section 390 of the Code of Civil Procedure, as amended, to hold that section 401 applies to the case at bar. *Smith v. Western Pacific Railway Co.*, 154 App. Div. 130, 139 N. Y. Supp. 129. In the more recent case of *Whiting v. Miller*, 188 App. Div. 825, 176 N. Y. Supp. 639, upon which defendant relies, it is said:

"Section 390-a relates generally to causes of actions arising outside of the state, without regard to the residence of the persons against whom they accrue, excepting where the cause of action originally accrued in favor of a resident of this state. It may be that the provisions of section 401 of the Code of Civil Procedure, extending the statute of limitations with respect to a cause of action accruing against a person who is without the state or who departs from the state and remains continuously absent therefrom for the space of one year or more after the cause of action accrued, or resides in the state under a false name, still applies to some causes of action against nonresidents, who were such when the cause of action accrued. See *Olcott v. Tioga Railroad Co.*, 20 N. Y. 210, 75 Am. Dec. 393; *Mayer v. Friedman*, 7 Hun, 218, affirmed 69 N. Y. 608; *Moloney v. Tilton*, 22 Misc. Rep. 682, 691, 51 N. Y. Supp. 19; *Goldberg v. Lippmann*, 6 Misc. Rep. 35, 25 N. Y. Supp. 1003; *Plummer v. Lowenthal*, 165 N. Y. Supp. 220. And in the case of *Plummer v. Lowenthal*, supra, the Appellate Term held that section 401 is applicable to the causes of action embraced in section 390-a. I am of opinion, however, that the provisions of said section 401 should not be deemed applicable to section 390 as so amended in 1916, and that the latter section should now be construed as embodying the only statute of limitations applicable to an action against a nonresident who was such when the cause of action accrued and when the action thereon was brought. See *Iseberg v. Rainier*, 145 App. Div. 256, 130 N. Y. Supp. 27, affirming 70 Misc. Rep. 498, 127 N. Y. Supp. 411."

It is apparent that this does not prevent the application of section 401 to the case at bar for the reason that this defendant was not a non-resident when the action was brought, having acquired a residence within the state by complying with our statutes by taking out a license to do business in the state. It must be held that the defendant thereby acquired a residence here. *Smith v. Western Pacific Railway Co.*, supra.

I am of the opinion that the case at bar is one of those referred to in *Whiting v. Miller*, supra, which suggested that section 401 of the Code of Civil Procedure applies to "some causes of action against nonresidents, who were such when the cause of action accrued." The defendant's assertion that no equitable reason exists for applying section 401 to this case, in view of the fact that plaintiff could at any time have effected service of process on the defendant, within the state, loses much of its weight (if indeed this court has any power to force a construction of a statute because of such a consideration) in view of the uncontradicted testimony of plaintiff that he was advised many

years since by one of the then leaders of the bar, an attorney of recognized and conspicuous ability, that he had no cause of action.

[9] This is a complete answer also to the defense of estoppel and laches, even if estoppel and laches were a defense to an action of this character, which is exceedingly doubtful. Nor can the court ignore defendant's failure to bring suit upon the larger notes, within these many years. If defendant had begun action promptly, all of the questions involved would have been long since settled.

That this is an unusual case is no reason for disturbing the verdict of a jury, and upon a careful consideration of all of the reasons advanced by defendant, upon its motions to set aside the verdict and to dismiss the complaint, I am of the opinion that the motions must be denied.

STREET v. LINCOLN SAFE DEPOSIT CO. et al.

(District Court, S. D. New York. February 10, 1920.)

1. Equity Ⓒ363—On motion to dismiss bill, facts well pleaded are taken as true.

On defendant's motion to dismiss the bill, all the facts therein well pleaded must be taken as true.

2. Intoxicating liquors Ⓒ13—Under Eighteenth Amendment Congress has full police powers to make prohibition effective.

Under the Eighteenth Amendment, prohibiting the manufacture, sale, or transportation of intoxicating liquors, and giving Congress power to enforce the article, Congress has, under the police power thereby granted, full authority to make the prohibition effective.

3. Intoxicating liquors Ⓒ139—Possession outside of private homes by those not holding permits is illegal.

Volstead Act, § 33, making possession of liquor by person not legally permitted to possess it prima facie evidence of unlawful purpose, requiring persons legally permitted to possess liquor to report amounts in possession, and permitting possession in homes for personal use without report, does not impliedly recognize lawful possession outside of homes by those not holding permits, so as to permit owner of liquor for personal use to keep it in a storage warehouse.

4. Intoxicating liquors Ⓒ139, 236(5)—Possession in homes is possession of different character from that which is prima facie evidence of commercial intent.

Possession of intoxicating liquor for personal use in a home, permitted by the last sentence of Volstead Act, § 33, is possession of a different character from that made prima facie evidence of intent to sell by the preceding provisions of that section, so that the two provisions cannot be construed together as authorizing possession outside of a home for personal use.

5. Intoxicating liquors Ⓒ17—Restriction of possession for private consumption to possession within home is valid.

The restriction by Volstead Act, § 33, of possession of intoxicating liquors for personal consumption to such possession within private homes, is a valid exercise of power to enforce the prohibition of transportation of intoxicating liquor, given by Const. Amend. 18, § 2.

In Equity. Suit by William G. Street against the Lincoln Safe Deposit Company and Daniel L. Porter. On motion of complainant for

preliminary injunction, and by defendant Porter to dismiss the bill. Preliminary injunction denied, and bill dismissed.

Decree reversed 254 U. S. —, 41 Sup. Ct. 31, 65 L. Ed. —.

Davies, Auerbach & Cornell, of New York City (Joseph S. Auerbach and Charles H. Tuttle, both of New York City, of counsel), for complainant.

Francis G. Caffey, U. S. Atty., of New York City (Earl B. Barnes, Asst. U. S. Atty., of New York City, of counsel), for defendant Porter.

KNOX, District Judge. The complainant is the lessee of certain rooms within a storage warehouse operated by the defendant Lincoln Safe Deposit Company, in the Second internal revenue collection district of New York. Among the goods stored by the complainant in the leased rooms is a quantity of lawfully acquired wines and liquors. The defendant Porter is an agent of the Commissioner of Internal Revenue, and is charged with the enforcement of the provisions of the National Prohibition Law, commonly known as the Volstead Act, within the said collection district.

It is alleged that the wines and liquors owned by the complainant are intended for consumption by himself and the members of his family, or his bona fide guests. The complaint then proceeds to aver that Porter, with the approval of the Commissioner of Internal Revenue, has claimed, publicly stated, and threatened that after January 16, 1920, the date upon which the Eighteenth Amendment to the federal Constitution goes into effect, the aforesaid possession of said wines and liquors by the complainant, in the said storage warehouse, will be unlawful by reason of the said amendment and the provisions of the National Prohibition Act, and that the continued possession thereof will subject both the complainant and the Deposit Company to the penalties of the act. The complaint further avers that, by reason of such threats and fear of prosecution, the Deposit Company has notified complainant to remove the said wines and liquors from its premises, and that, unless complainant does so remove them, the Deposit Company threatens and intends to remove the liquors from the rooms in which they are now stored and possessed, and deliver them to the defendant Porter, who will seize and hold the same as outlawed goods, to be dealt with as such under the provisions of the National Prohibition Act.

It is alleged that the attitude of the defendants arises from an erroneous belief and construction of law upon their part, and it is claimed that the possession of the wines and liquors situated as aforesaid is now and will be lawful after January 16, 1920, and that, if the amendment and the Enforcement Act be construed to the contrary, such construction would render the statute unconstitutional. There is said to be no adequate remedy at law, and injunctive relief is prayed.

Upon the filing of the bill a temporary restraining order was issued against the Deposit Company, and the matter now comes before me upon an order to show cause why the outstanding restraint should not be continued, and the defendant Porter included within it.

[1] The latter, appearing by the United States attorney, moves, upon a number of grounds, for a dismissal of complainant's bill. I

shall not detail the reasons urged for a dismissal, save to say that the motion made upon behalf of Porter raises a question as to the construction to be placed upon title II of the act of Congress of October 28, 1919, *supra*, with respect to the state of facts shown by the bill. On the pleadings, all the facts therein well pleaded must be taken as true.

It is the contention of the complainant that the power delegated to the federal government by the Eighteenth Amendment to the Constitution is a subtraction from the general police power of the several states, and is limited to so much thereof as is comprehended within the specific subjects to be dealt with by Congress and essential for appropriate legislation thereon. The Eighteenth Amendment reads as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

In pursuance of the provisions of section 2, Congress has enacted title II of the Volstead Act as embodying its conception of appropriate legislation. It will thus be seen that nothing is said in the amendment as to the possession, as such, of intoxicating liquors, nor is there any prohibition against the consumption of intoxicating liquors; and it is urged by reason of this that it is therefore lawful for a person situated as is the complainant to have a supply of liquors intended for personal use, in a storage warehouse, upon which supply he may draw as desired; and, incidental to such possession, it is further claimed that the complainant may transport such liquors from their place of storage to his residence, that he may carry liquors on his person and consume them when and where he pleases, and it is to these propositions that I shall direct attention.

[2] Congress unquestionably sought by the Volstead Act to prohibit the traffic in intoxicating liquors for beverage purposes, and, in doing so, possessed, under the police power granted to it by the amendment, full authority to make the prohibition effective. The framers of the bill had definitely before them the difficulties of enforcement, as is indicated by the report of the Committee on the Judiciary accompanying H. R. 6810, in which report it was said:

"Congress also takes into consideration the fact that the legislation in question operates upon the most lawless and scheming traffic with which the government deals. Both the courts and legislative bodies recognize this and their judgments are rightly influenced by it."

In this connection the report calls attention to what was said by Mr. Justice McReynolds in delivering the judgment of the Supreme Court in *Crane v. Campbell*, 245 U. S. 304, 38 Sup. Ct. 98, 62 L. Ed. 304, to wit:

"And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose."

Consequently, in the present instance, Congress has seen fit, by way of carrying into effect its legislative purpose, to limit the places where liquors may be lawfully possessed, and particularly is this true as to liquors that are to be used for beverage purposes. This last limitation is contained in section 33 of the act, which reads:

"After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the Eighteenth Amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. *But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used.*"

[3] It is urged, however, that nowhere in the act is the personal possession of liquor penalized or declared to be in violation of law; but, on the contrary, section 33 of the act specifically recognizes a possession by persons not of the class of those in receipt of express legal permits, and as to such possession declares that it shall be only prima facie evidence of an intent to keep the same for commercial purposes. It is said in this connection that upon a rebuttal of the presumption there is a residuum of legal right which prevents a person in the position of complainant from falling within the class who possess liquors in violation of the provisions of title II.

[4] With this contention I am unable to agree. I say this because section 3 of the act provides that the possession of intoxicating liquors for any purpose, except as authorized by the act, is unlawful. I am also of the opinion that the possession of liquors for beverage purposes by the owner thereof within his dwelling is a possession differing from that referred to in the first sentence of section 33. This, it seems to me, is indicated by the language employed in the grant of permission to a householder to have liquors for personal consumption in his dwelling. Had Congress intended to legalize the possession of such liquors in any location, it would not have been necessary to employ a new sentence (as is the case), wherein words of specific limitation are used.

[5] The very exclusiveness of the place of possession necessarily excludes all other places, and in making the restriction so exclusive Congress did not transcend its powers. It appreciated that, were liquors possessed elsewhere than in the private dwelling of the owner, transportation would be a necessary incident to the use of the liquors, and to the end that the act might be effectively enforced it did not mean to authorize the promiscuous transportation of liquors. Such transportation as the act permits may be carried on only under the most stringent regulations. If possession of liquors anywhere were to be permitted, and if the places where liquor might lawfully be consumed for beverage purposes were likewise without limit, it would be neces-

sary to imply that such liquors might lawfully be transported. This would inevitably follow.

It is suggested that there is no reason why the abuse of such incidental transportation might not be prevented by a system of permits. Without attempting to conclude why Congress did not cover the situation in the manner suggested, I may say that, to my mind, a system of permits for the promiscuous transportation of liquor for beverage purposes would be highly impractical.

It may be said—indeed, it is said—that inasmuch as the complainant here lives but a short distance from the warehouse where his liquors are stored, transportation would play such a small part in their removal as to be negligible. Notwithstanding, their removal would involve some degree of transportation; and if what the complainant desires to do be held lawful, I can see no reason why a resident of a distant city might not have a store of liquors in the same warehouse and be permitted to transport them to his home, even though such transportation involved a movement by car, wagon, train, or boat. The answer is, I think, that under this statute transportation, other than as specifically provided for, cannot be a matter of degree. As to liquors for beverage purposes, the definite limits of their transportation are within the confines of the dwelling of their owner. It is my judgment that any other construction of the act would result in its emasculation. The sure defense of the purveyor and the bootlegger, found with a flask of liquor in his pocket, would be that he possessed the same for his personal use.

So, under the Eighteenth Amendment, I am satisfied that Congress, under the police power delegated thereby, had the right to prohibit *any* transportation of liquors, and in order to reduce the necessity for transportation to a minimum it had the power to legislate as to the places where liquor might lawfully be possessed. It seems to me that in doing so Congress cannot fairly be said to have overstepped the boundaries of appropriate legislation.

The limitation of the places where liquors may lawfully be possessed is but a corollary to the prohibition against their transportation, and, under the authority of *Crane v. Campbell*, *supra*, I do not think the inhibitions as to the places of possession are "arbitrary and unreasonable, or without proper relation to the legitimate legislative purpose."

Upon the subject as to whether the carriage of liquor upon the person comes within the act, it is argued that the facts present in *United States v. Hill*, 248 U. S. 420, 39 Sup. Ct. 143, 63 L. Ed. 337, are not applicable, owing to the fact that the prosecution in the Hill Case was based upon the Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8739a, 10387a-10387c) and that the court merely held that—

"The transportation of liquor upon the person of one *being carried in interstate commerce* is within the well-established meaning of the words 'interstate commerce.'"

That is quite true, but it must be remembered that the only jurisdiction of Congress to enact the prohibitory law then under discussion was based upon the interstate commerce clause of the Constitution,

and an interstate transportation was essential to conviction. Now, however, the power of Congress has been amplified by the adoption of the Eighteenth Amendment, and Congress can deal not only with interstate, but also with intrastate, transportation of liquor.

In view of the foregoing, and without regard to the technical objection urged against the complaint, I cannot do otherwise than to dismiss complainant's bill.

This opinion expresses my views of the situation as it existed upon the date when I filed my former memorandum herein, in which I said that I would dismiss complainant's bill and would file my reasons therefor at a later date.

WISCONSIN-MINNESOTA LIGHT & POWER CO. v. RAILROAD COMMISSION OF WISCONSIN et al.

(District Court, W. D. Wisconsin. July 21, 1920.)

1. Public service commissions ⇐7—Jurisdiction to restrain enforcement of statutory rate must await action of state commission.

Where a light and power company, serving 32 communities in the state at rates fixed by statute, but which are subject to change by a state commission, has applied to the commission for an increase in rates, it cannot, pending such application, invoke the jurisdiction of a court of equity to enjoin enforcement of the existing rates as confiscatory; nor does the fact that the commission has acted in respect to certain of the rates, unsatisfactorily to the company, give the court jurisdiction to review all the rates, which are more or less interdependent, and must be considered together to determine their reasonableness, in advance of final action by the commission.

2. Public service commissions ⇐7—Temporary loss pending adjustment of statutory rates not ground for injunction.

A light and power company *held* not entitled to a preliminary injunction from a federal court to restrain enforcement of rates fixed by the state, alleged to be confiscatory, to protect it against loss pending an application to a state commission for an increase of such rates.

3. Injunction ⇐137(4)—Preliminary injunction not granted, where facts are in dispute.

A case for granting of a preliminary injunction, restraining enforcement of rates fixed by a state commission as confiscatory, *held* not made, where the allegations of the bill were met by affirmative counter allegations of fact in the answer, tending to show that the rates are reasonable.

In Equity. Suit by the Wisconsin-Minnesota Light & Power Company against the Railroad Commission of Wisconsin and John J. Blaine, Attorney General. On motion for preliminary injunction. Denied.

The plaintiff, a corporation organized under the laws of Wisconsin, is in the conduct of a public utility, and the defendants are the Railroad Commission, created under the laws of Wisconsin, with authority to regulate rates to be charged by public utilities, and the defendant Blaine, the Attorney General of the state. The plaintiff, as such utility, furnishes electric, gas or hot-water heating service in 32 communities in this district, gas service in La Crosse, Eau Claire, and Chippewa Falls, and hot-water heating service at La Crosse. The plaintiff's outstanding common stock and preferred stock are \$2,500,000 and \$5,000,000, respectively, its outstanding bonds, secured by mortgage lien upon its property, \$10,720,000, the entire proceeds of which, so

the original bill avers, are invested in plaintiff's properties in Wisconsin and Minnesota, and "the fair value of plaintiff's properties is not less than the aggregate amount of such outstanding securities."

The bill makes reference to various provisions of the Wisconsin Statutes, conferring upon the defendant commission power to regulate public utility rates, imposing upon utilities the duty of filing with the commission schedules exhibiting effective rates, tolls, and charges, which rates are required to be, not in excess of those in force on April 1, 1907, the prohibition against charging or receiving greater or less or other compensation for service than the schedule rates, except and unless authorization therefor be obtained from the commission, the penalties denounced by such statutes against the violation of the provision just noted, the procedure and the right to follow it in respect of dissatisfaction by utility with its rates, to which reference complainant adds the following allegation: "But there are no provisions in the statutes of Wisconsin requiring the commission to determine the matters involved in such complaint within any fixed period, or providing any manner of reimbursement to the utility for the losses it may sustain while its complaint is pending and undecided." Reference is made to the statute (Wis. St. 1919, § 1797m102) imposing upon the commission the duty to enforce the provisions of the sections referred to, and imposing upon the Attorney General the duty to prosecute actions for the enforcement of such sections.

The complaint proceeds, upon general allegation, to aver that, beginning with and since the year 1907, the increasing prices of commodities required to be purchased in the operation of the plaintiff's utility have reduced the plaintiff's net earnings, constituting the return for the use of its properties, to a grossly inadequate point; in fact, leaving it, as to some branches of its service, without return whatsoever. It specifies increases in commodities, such as coal, oil, unskilled labor, from and including the year 1916, to and including the year 1919, at the cities of La Crosse, Eau Claire, and Chippewa Falls, being three of the communities served by the utility, which increases vary, as to the different commodities, from approximately 40 to 80 per cent., and the bill submits an estimate of still further increases reasonably to be expected during the current year of 1920. It is averred that after the loss in revenues, resulting from increasing prices, plaintiff applied to the defendant Railroad Commission "for emergency relief," but was unable to obtain and did not obtain any relief sufficient to make the plaintiff's rates compensatory; that on July 2, 1919, it filed with the commission applications for revision of its electric rates and gas rates in practically all of the communities in Wisconsin in which it supplies electricity and gas as heretofore described. In each of said applications to the commission plaintiff alleged that, by reason of the rapidly increasing costs, its rates then in effect were no longer adequate and compensatory, and asked that it be permitted to increase them "in each of said communities to such amounts as were necessary to enable it to obtain compensation for the use of its property devoted to the public service." The bill continued: "More than ten months have elapsed since said applications were filed, and except in the case of the gas rate at Chippewa Falls, heretofore referred to, the defendant Railroad Commission has not reached a determination on any of said applications, nor has plaintiff been able to obtain any relief. During the ten months that said applications have been pending and undecided, the rates which plaintiff has been permitted to collect have not been sufficient to afford plaintiff fair compensation for the value of its property devoted to the public service."

The bill then proceeds to make specific reference to the proceedings before the rate commission in respect of the revision of the electric rates in the city of Eau Claire, reciting the filing of the plaintiff's inventories of its properties, the holding of a hearing on December 4, 1919, whereat testimony of witnesses was introduced to prove the accuracy of inventories, appraisals, revenues, and operating costs under existing schedules; also adjournments of such hearing at the request of representatives of the city of Eau Claire, a subsequent hearing during which final proofs were introduced, and that "since February 25, 1920, no action has been taken, and plaintiff is apprehensive that it will be several months before the engineers of the Railroad Com-

mission will complete their work upon the appraisal, and several months after the appraisal is completed before action will be taken by the defendant Railroad Commission upon plaintiff's application." It is averred that, in other applications for revision of electric rates filed by the plaintiff with the defendant Railroad Commission, proceedings similar to those in the Eau Claire case had been had, except that by mutual consent the final closing of the proofs has been left open until the decision in the Eau Claire case shall have been made; it having been the opinion of the plaintiff that a final decision in all of such cases would be expedited by such course of procedure.

The bill discloses the proceedings had upon the plaintiff's application for a revision of its gas rates at Eau Claire and the uncompleted and undetermined state of such case before the commission. It is also averred that plaintiff's application for a revision of its gas rates in the cities of La Crosse and Chippewa Falls has been similar to those in the application for a revision of the gas rates at Eau Claire, excepting that in respect of the gas rates at Chippewa Falls the defendant commission on May 1, 1920, made an order authorizing plaintiff to increase its rates in that city approximately 25 cents per 1,000 cubic feet. Of the order evidencing such determination, the bill says: "The said order shows upon its face that the rates fixed by the Railroad Commission are sufficient only to afford plaintiff an earning of 6 per cent. upon the amount which the defendant Railroad Commission considers may have been invested in the property at the prices prevailing at the dates of construction. In making such order, operating conditions such as existed in 1919, but which, owing to the increasing cost of labor and materials, do not now exist, are used by the defendant Railroad Commission as the basis for computing the plaintiff's net revenues. The rates so fixed are not sufficient to reimburse plaintiff the cost of operating its gas property in the city of Chippewa Falls under the conditions now existing, and if plaintiff is compelled to operate its property at such rates it will receive no substantial return whatever for the use of its property."

It is further averred: "Plaintiff has been diligent in making use of every method afforded it by the statutes of Wisconsin, and the method of procedure of the defendant Railroad Commission to obtain the approval of the defendant Railroad Commission of such rates as are necessary to enable it to obtain from its revenue a fair return on the value of its property devoted to the public service, and has been unable to obtain such permission from said Railroad Commission." The bill charges that in the order last above referred to the commission, "in placing a valuation upon the physical properties of the utilities as a basis for fixing rates, has adopted its estimate of the amount invested in such physical properties, less the percentage of depreciation in such physical properties from use prior to the date of such valuation, as the value of such physical properties upon which a return may be earned, and has denied to the utilities any increase in value due to the increase in commodity costs and increase in value generally, subsequent to the time of the purchase or construction of such physical properties," and that the commission intends, in making valuations of plaintiff's physical properties for rate-fixing purposes, to be effective hereafter, to pursue a like method in making valuations of physical properties, and to deny to the plaintiff "return upon the increase in the value of its physical properties subsequent to the time of purchase or construction, regardless of any increase in the value of such physical properties that may actually exist."

The bill reiterates the low rate of return derived from its present rates for furnishing hot-water heating service at La Crosse, and "if plaintiff shall be compelled to continue operating its utilities in the Western District of Wisconsin, at the rate now in effect, its revenues under such rates will fall short of providing a fair return upon the fair valuation of its property devoted to such service by an amount in excess of \$25,000 per month." The plaintiff, as a condition of obtaining the relief prayed for in its bill, offers in its bill "to enter into an understanding with the court, for the benefit of all parties interested, that it will promptly file with the defendant Railroad Commission applications asking for a revision of all its electric, gas, and heating rates, subject to the jurisdiction of the defendant Railroad Commission, to accord

with present values and operating conditions, and to proceed with reasonable diligence to bring such proceedings to a conclusion, and if the rates prescribed by the defendant Railroad Commission and such proceedings, when their validity shall have been established, are lower than the rates which plaintiff shall have applied and collected, plaintiff will refund to each person who shall have paid to plaintiff more than the rates so fixed by the commission, the full amount collected in excess of such rates. The rates set out in the schedules marked Exhibits B, C, and D, hereto attached and made a part hereof, are not higher than is necessary to provide a fair return upon the fair value of the property of the plaintiff devoted to the service to which such schedules of rates apply."

The bill contains the formal allegation that the compulsion of the plaintiff to operate its utilities under existing rates, unless and until the same are varied by the Railroad Commission, will, as such rates are not remunerative, deprive the plaintiff of its property without due process of law, and the enforcement of the penalties prescribed by the statutes of Wisconsin will, as the existing rates are confiscatory, deny to plaintiff the equal protection of the laws, all in violation of the Fourteenth Amendment of the Constitution of the United States.

The bill prays for a judgment declaring the rates referred to as unlawful and confiscatory, as not affording to the plaintiff an adequate return upon its property, that the statutes making effective the rates and conferring upon the commission the power to enforce them be decreed to be null and void, and that pending the determination of the case, the defendants be enjoined from taking any action of any nature whatsoever to enforce the rates or the statutes relating thereto, or any rates lower than those tendered by the plaintiff in the Schedules B, C, and D. Annexed to the bill is an exhaustive exhibit, being the report of the determination made by the Railroad Commission in respect of the gas rates in the city of Chippewa Falls, to which reference was made in the bill.

Upon the motion for a preliminary injunction the defendants submitted to the court an answer which, under the equity rule, saved the question respecting the sufficiency of the bill, and also made detailed response to the latter's allegations. During argument, notwithstanding the voluminous complaint, answer, and affidavits, it was conceded that, excepting for the partial showing made in respect of the situation at La Crosse, Chippewa Falls, and Eau Claire, the record contained no facts showing in detail the matters properly to be considered in determination of values of property of income or operating expenses at any one of the other 29 communities served by the plaintiff's utilities. Thereupon leave to amend the bill was granted, and upon the second hearing the allegations of an amended bill and answer were before the court for consideration of the merits of the motion, and extended argument and written briefs were presented touching both upon the sufficiency of the bill as presenting a cause of action, and also the equities, if the bill be deemed sufficient, in their adequacy to support a motion for a preliminary injunction.

The plaintiff, by amendment, added paragraphs supplying particular allegations respecting the value of its property at La Crosse, also its gross earnings and operating expenses and taxes earned and incurred, leaving a net profit of approximately \$13,000 applicable to depreciation and return on its investment of \$900,000, and that during three months ending March 31, 1920, the gross earnings in that city were approximately \$40,000, its operating expenses and taxes approximately \$52,000, leaving a deficit of approximately \$12,000. In like manner allegations were supplied respecting the value of the property, the gross earnings, and operating expenses at Eau Claire during the year 1919, and during the three months ending March 31, 1920, leaving for the one period a balance of approximately \$13,000 applicable to depreciation of property and a return upon an investment alleged to be \$500,000, and for the second period nothing. Like allegations with respect to the situation at Chippewa Falls, upon a valuation of not less than \$160,000, aver that during the year 1919 operating expenses and taxes exceeded gross

earnings by approximately \$5,000, and during the first three months of the year 1920 by approximately \$2,200.

The amendments also show that on May 21, 1920, since the filing of the bill, the defendant commission made an order permitting the plaintiff to increase its rates for gas in the city of Eau Claire 20 cents per 1,000, but that the order shows upon its face that the rates so now fixed are sufficient only to afford plaintiff an earning of 7 per cent. upon \$355,000 under operating expenses such as existed in 1919, but which, because of recent increases, do not now exist; that the commission valued the plaintiff's physical properties "at the amount it considered had been invested in said physical properties when said properties were purchased or erected, less depreciation at the time of appraisal; that the amount allowed plaintiff, under the order to recover depreciation of the property used in the service, was only sufficient to enable plaintiff to recover through its rates the original cost of the property worn out in the service, and is not sufficient to enable plaintiff to renew such property at the higher prices now prevailing." Certain items showing the recent increase of operating costs are set forth in support of this allegation.

The amended bill gives further details of increased operating costs claimed to cut down net earnings in the city of La Crosse, and particularly operating costs during the year 1919, as compared with the first three months of the year 1920. These allegations concur with the charge that the rates received at La Crosse are pursuant to an order of the defendant commission made January 6, 1919, based upon evidence showing operating costs for the season of 1917 and 1918, since which years operating costs have greatly increased.

By amendment plaintiff also alleges that its utilities in the communities of Wisconsin and Minnesota "are all interconnected by a system of high voltage transmission lines, and all in common receive their supply of electric energy from plaintiff's hydro-electric generating stations at Cedar Falls, Menominee, and Rice Lake, on the Cedar river, and at Wissota on the Chippewa river, and from the plaintiff's steam electric generating station at La Crosse"; that plaintiff owns approximately 336 miles of high voltage transmission lines, employed in transmission to the several communities, and also makes use of approximately 57 miles of transmission lines not owned by it, but licensed to it by other utilities. The bill gives the names of the 32 communities served, and alleges that the value of its property, "excepting the Wissota hydro-electric development, devoted to supplying electric service to all of the communities, * * * is not less than six million six hundred thousand dollars," and "the value of plaintiff's hydro-electric development at Wissota and the Chippewa river is omitted, because of the fact that only a portion of its electrical output is consumed in the loop district, and the contention, sometimes made, that the said Wissota development is not required for the service of the utilities in the loop district is most easily met by omitting such development from property used in the loop district, and included in the operating expenses of the loop district the fair cost of the current delivery to the loop district from the Wissota development." The "loop district" is the name commonly given to the communities where the plaintiff supplies electric energy.

The bill avers that the plaintiff's gross earnings from the sale of current in the loop district for the calendar year 1919 were approximately \$1,000,000, in addition to which it had certain miscellaneous earnings approximating \$35,000; that during the said year operating expenses and taxes "incurred in the operation of its said utilities in the loop district, exclusive of any allowances for replacements and renewals, were \$840,636.02, leaving available to plaintiff for replacements and renewals of worn-out property, and for a return upon a value of the property used in the service, approximately \$192,000." A proper reserve to cover the depreciation of the depreciable property used in said loop service during said period would be approximately \$109,000, leaving available for return for the use of the property devoted to such service during said period approximately \$82,000; and the bill avers that "included in the operating expenses of \$840,636.02, as above described, there is a charge of \$377,182.69, for 16,763,675 K. W. H. of electric energy delivered to the loop district from plaintiff's Wissota hydro-electric development during said period

and charged for at the rate of 2¼ cents per K. W. H. The said electric energy was delivered to the loop district from the Wissota generating station at a low factor of approximately 18 per cent., and at a maximum demand of approximately 10,000 K. W. The cost to plaintiff of delivering said electric energy from its Wissota development at such demand and upon such low factor was not less than the amount charged against the loop district for such concurrence, and that amount is not more than it would have cost the plaintiff to produce said current by any other method."

It is charged that in the schedule attached to the original bill there is disclosed an equitable distribution "among all of plaintiff's customers in said loop district; the cost of performing the service including a return in no case exceeding 8 per cent. upon the value of the plaintiff's property devoted to such service. In preparing the rates set forth in said Schedule E, recognition is given to the fact that rates in the larger cities, in which the business is well developed, should be lower than in smaller communities. The rates set forth in said Schedule E are not in all cases higher than the rates now in effect, and are higher than the rates now in effect only in those cases, where the rates now in effect are so low that the customers obtaining service under such rates do not contribute their fair share toward the cost of the service."

To the original and amended bills the defendants, at the second hearing, interposed a voluminous amended answer, wherein issue is taken upon many of the plaintiff's allegations, including, among others, the valuation of properties, the gross earnings, operating costs and charges, and also the net returns; specific issue being taken upon allegations respecting either the disparity between gross earnings and operating costs, and upon the claim of deficit in any branch of the service rendered by the utilities to the public. Such answer singles out with some particularity the plaintiff's so-called "Wissota" dam, averring it to have been exceedingly expensive and projected upon a scale "not needed for the service which the plaintiff was then rendering to the public in Wisconsin, and now greatly exceeds the needs of said services, and that plaintiff has a poorly developed market in Wisconsin for the product of said power plant; that during the Wissota development * * * the plaintiff owned and was operating a hydro-electric plant at Chippewa Falls having an annual capacity of approximately 2,000,000 K. W. H., another hydro-electric plant at Eau Claire, having an annual capacity of 4,000,000 K. W. H., and that the hydro-electric plants just mentioned are both carried on the books of the company at a very large amount; that the plaintiff has entirely discontinued the use of, and at present does not use, the hydro-electric plant at Chippewa Falls, and has leased outright to the E. C. Dalles Improvement Company for an annual rental of \$30,000, which rental makes no provision for depreciation or taxes, its plant at Eau Claire; that the capacity of the electric generating properties owned by the plaintiff, at the time it entered upon a construction of the Wissota plant, and throughout the progress of such construction, exceeded the plaintiff's market and demand for electricity."

The answer continues: "That the chief object of the construction of the Wissota dam and electric development was to furnish electricity to consumers or purchasers outside the state of Wisconsin, and chiefly to the Northern States Power Company, a Minnesota corporation; that the plaintiff claims that the development of this water power and the construction of the transmission lines therefrom to the state line represent an investment and property of the value of more than \$7,000,000; that the plaintiff seeks to require the Wisconsin consumers of its product to bear a large and undue portion of the burden of said Wissota development; that less than 12 per cent. of said property and investment is used or usable in the service rendered to Wisconsin consumers; that the plaintiff is now under contract with the Northern States Power Company for delivery to it at the state line, for consumption in the Twin Cities, of a vast amount of electric current for a term of years, and that the plaintiff is thereby required to and does deliver an exceedingly large amount of constant electric current, sometimes called 'firm power,' generated at Wissota at a very low rate, and to deliver its surplus current

or dump power at still lower rates; that the rates stipulated in said contract are very much lower absolutely and relatively than the rates now in force in Wisconsin and charged to plaintiff's Wisconsin consumers; that by said contract the plaintiff agrees to deliver to the Northern States Company constant electric energy to the amount of 52,000,000 K. W. H. at 5½ mills per K. W. H. for the year 1920, and for each year thereafter during the life of the contract; that by said contract the purchaser agrees to take and pay for surplus and additional energy at the rate of 3 mills per K. W. H. for 52,000,000 K. W. H. during the year 1920, and for each year thereafter during the life of the contract; that by said contract the plaintiff agrees to supply said purchaser at 2 mills per K. W. H. with all surplus energy furnished to the purchaser in the year 1920, and each year during the life of the contract, in excess of 104,000,000 K. W. H. per year, and the plaintiff thereby further agrees to supply the purchaser with all surplus energy each year up to the full capacity and stream flow available at the Wissota hydraulic electric generating plant, in excess of the plaintiff's other requirements."

The bill alleges that, of the power generating at Wissota in 1919, nine-tenths went to said Northern States Power Company, and about one-tenth was consumed in the loop district. The facts are alleged in some detail.

The defendants, referring to the proceedings initiated by the plaintiff before the commission, in July, 1919, after diligent consideration thereof, in view of the scope of the inquiry and the necessity of committing its expert accountants and engineers to the task, the early probable completion of their work and submission of the same to the plaintiff for examination—the defendant averring that plaintiff had requested that no order be made by the commission fixing the rates for electric energy until opportunity for such examination be afforded to the plaintiff. The answer likewise refers to the determinations made by the defendant commission with respect to rates in the three communities referred to in the bill, but sharply controverts its allegations respecting valuations, operating expenses, and the distribution thereof as contended by the plaintiff, and generally denies the confiscatory or unlawful character of any of the rates fixed by it. It avers the binding force and effect of certain of the rates fixed unless and until application for revision be made to the commission upon facts not heretofore presented to it—that is, that any revision based upon conditions developing since the award must first be requested of the defendant commission before proceeding in a court of equity to impugn the existing rate by reason of such conditions. It likewise sets forth various applications for emergency relief made and granted, and, in respect of the allegations of the amended complaint, specifically denies the valuations claimed by the plaintiff in respect of its property at Eau Claire, La Crosse, and Chippewa Falls; and with respect to these communities, as well as the value of plaintiff's entire property, the defendants by specific allegation aver the respective properties to be fairly and reasonably worth a much smaller sum than set up in the bill.

Specific issue is taken on the allegations respecting the amount of electric energy delivered, during the year 1919, to the public of Wisconsin, and a like issue respecting the fair rate to be charged for such as was delivered. In this aspect of the case the defendant sets up in considerable detail evidentiary matters bearing upon the question of value, costs, and reasonableness of rate, as well as distribution of values and operating expenses, in view of certain contracts for delivery of electric energy which the plaintiff holds. The prayer of the answer is for a dismissal of the bill.

Lees & Bunge, of La Crosse, Wis., and Norris, McPherson, Harrington & Waer, of Grand Rapids, Mich., for plaintiff.

M. B. Olbrich, Deputy Atty. Gen., and E. E. Brossard, Asst. Atty. Gen., of Wisconsin, for defendants.

Before ALSCHULER and EVAN A. EVANS, Circuit Judges, and GEIGER, District Judge.

GEIGER, District Judge (after stating the facts as above). [1] There are presented sharply contested questions, which the parties variously state as bearing upon the jurisdiction of the court, or upon the sufficiency of the bill in its disclosure of a cause of action, or upon the propriety of granting an injunction pendente lite, in view of certain issues of fact to be alluded to.

Speaking generally, the parties will agree that a cause of action to restrain an aggression by the state, through its tribunals or officials, upon the property or property rights of the plaintiff, in violation of the protection afforded by the Fourteenth Amendment, is within the general equitable cognizance of the court; and of course no other statutory requisite need be present than an appropriate disclosure of a case so arising in the plaintiff's behalf under the Constitution or laws of the United States. The voluminous pleadings and record have necessitated such references thereto and excerpts therefrom as enable an understanding of the propositions deemed vital in the disposition of the pending motion. We feel that two questions must be answered, each of which is more or less dependent, in the facts out of which it arises and the answer to be given to it, upon the other. They are: First. What are the dominant facts, disclosed in the bill, respecting the plaintiff, its situation in its property and property rights, particularly in their relation to the state of Wisconsin, the defendant commission, and to proceedings pending before the latter? Secondly. Can the court award a writ of injunction pendente lite, in view of the answer to be given to the foregoing question, and, if so, should it exercise the power, in view of issues of fact tendered in this case?

In their consideration, the inquiry must proceed upon recognition of the plaintiff company as a creature of the state of Wisconsin, and, as such, subject generally to its laws and public policy respecting the conduct of its business as a public utility; that presumptively the acts of the state and its tribunal, the defendant commission, are valid, and not repugnant to any right or immunity guaranteed to the plaintiff by the Constitution of the United States; that likewise the defendant commission presumptively has full jurisdiction to function obediently to the state law, and hence the proceedings now pending before it at the plaintiff's instance must be deemed to have been initiated, and to be pending, rightfully, to the end that the vested power of such commission may be exercised, not merely to bring about a result satisfactory to the plaintiff's wishes or desires, but to determine the quantum of relief to which it is entitled, consistently with its obligations to, and the rights of, the public, which are equally within the cognizance of the commission for protection. In other words, that the jurisdiction of the commission, to the extent that it has been invoked, be discharged.

We start, then, with the outstanding facts that in July, 1919, the plaintiff filed with the defendant commission its petition, asking for an increase of rates, in its entire service to 32 communities within the state of Wisconsin; that such proceeding is still pending and undetermined, except as to three communities heretofore referred to; that as to such communities the commission has acted, awarding an increase

of rates, which, however, as appears from the bill, is not satisfactory to the plaintiff, but is charged to be nonremunerative and confiscatory, in view of its claims respecting the value and cost of operating its property in those communities. The petition—at least so it was conceded upon the argument before us—is as broad in its scope as is the activity of the plaintiff in its business as a public utility within the state of Wisconsin, and certainly aims at an objective in respect of reviewing its rates just as broad as the present bill.

Obviously, in so far as the commission has passed upon the rates in the three communities referred to, the present bill challenges its determination; but with respect to all of the other communities it can do no more than to ask the judgment of this court respecting the reasonableness of rates, upon the apprehension that the commission, if it continue in its consideration of the petition pending before it, is certain to fail in giving the measure of relief to which plaintiff insists it is entitled. In other words, there has been no determination by the commission upon the petition pending before it, except as to three communities, although concededly the plaintiff's property situation—its plant, as it may be called—is in many respects unitary, necessitating, in considering the needs and obligations of any one community, a consideration of values and operating costs at central or outside sources of power, and the like.

Now the defendants rest upon these outstanding facts as a sufficient basis for challenging the plaintiff's attempt to resort to equity, in advance of a determination of the very matters comprehended within the bill by the tribunal which the state has constituted for that purpose, and whose jurisdiction the plaintiff has in fact invoked and concedes. We believe the challenge to be well founded, not only in reason and good sense, but rather clearly upon precedent, disclosed in cases like *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, and *Bacon v. Rutland Railroad Co.*, 232 U. S. 134, 34 Sup. Ct. 283, 58 L. Ed. 538, and, as it is not claimed in the case before us that the delay in determining fully the pending petition before the commission is unreasonable, or that the conduct of the commission has been arbitrary or capricious, the authority of such cases is controlling, with respect to equitable interference pending legislative or administrative procedure by a duly constituted tribunal. In the *Prentis Case*, this view of the bills there tendered was expressed:

"It appears on their face that the appellees did not avail themselves of the right of appeal to the Court of Appeals of Virginia, which absolutely vested in them by the Constitution and laws of that commonwealth. Such an appeal would have brought up the question of the alleged unreasonableness of the designated rate, and appellees cannot assume that the decision of the commission would necessarily have been affirmed. If reversed or changed to meet appellees' views, the whole ground of equity interposition would disappear. In such circumstances it is the settled rule that courts of equity will not interfere. The transaction must be complete, and jurisdiction cannot be rested on hypothesis. A fortiori, this must be so where federal courts are asked to interfere with the legislative, executive or judicial acts of a state, unless some exceptional and imperative necessity is shown to exist, which cannot be asserted here."

And in the Rutland Case, the court, although distinguishing the Prentis Case, still points out that before a party may resort to equity the matter or case must have reached "the judicial stage." See 232 U. S. 147, 34 Sup. Ct. 283, 58 L. Ed. 538.

If, therefore, we assume that the plaintiff in this case invoked the jurisdiction of the State Railroad Commission for the broad purpose of considering and revising its rates as disclosed by itself in the petition filed in July, 1919, it would be anomalous to recognize the constant alternative of resorting to equity merely if, because of delay, disappointment in partial determination, or for other considerations, the further prosecution, or the awaiting of the final result of, the commission proceedings, was no longer desirable. And it is equally true that if, as suggested by plaintiff's counsel upon the hearing of the present motion, a plaintiff may always resort to the federal equity courts for the mere purpose of challenging as confiscatory, a rate or rule established by a state commission, it must follow that preliminary injunctions, when having no other support than the claim made by a plaintiff in a case like this, will prove a means of perpetually tying up the functioning of the state laws.

The whole question arises, as we view it, not as one of comity, but rather one of fact, in establishing the proposition that the state, through its tribunals, has committed, or is threatening to commit, aggression upon the complainant's property or property rights. Taking the broad case made by the plaintiff's bill, it is not that the rates originally fixed are now confiscatory, and that the state, through the defendant commission, adheres to them and refuses to give consideration to the facts recited in the bill; for the plaintiff has availed itself of the jurisdiction furnished by the state to conduct an inquiry into its rates and to award an increase. The plaintiff, except as to the three communities, does not pretend that the commission has denied or will deny all relief which it asks for in its petition. The most that it can claim, upon the broad aspect of its petition and the present bill, is that, if it ultimately prevails, or if it fails upon the issues presented to the commission, and the latter's determination is ultimately condemned by the court, it will in either event sustain an interim loss. This seems to us to be purely a hypothetical, if not conjectural, basis for invoking the equity jurisdiction. *Prentis v. Coast Line*, supra.

[2] It clearly eliminates the necessity, ordinarily present in equity upon applications for a preliminary injunction, of a clear showing respecting not only the plaintiff's right, but of the defendants' wrong or aggression. It is one thing to make a clear *prima facie* showing, and quite another to merely set up the claim and ask that the injunction issue for interim protection because the plaintiff may prevail.

The matter can be presented in another way, through the simple query: Is the plaintiff in the present case disclosing, or attempting to disclose, a denial of, or an aggression upon, its property or property rights by the state, upon the same facts disclosed before the commission or inhering necessarily in the rate complained of; and has the state finally denied the plaintiff's right upon the facts so disclosed? This query, so it seems to us, is expressly answered in the negative

by the plaintiff's bill, which, while complaining of the rates existent when its petition was filed in July, 1919, seeks not merely to present to this court the facts which *then* may have been pertinent, but other facts transpiring since the commencement of the proceedings before the commission upon which it lays, or seeks to lay, great emphasis.

Now, omitting for the present reference to the facts transpiring during the current year, how idle would be attempts to regulate and enforce rates through a state tribunal, if concurrently with the prosecution of a remedy provided by the state law before the state tribunal the entire functions of the state law could be superseded by a federal (or state) court of equity, merely upon the hypothesis that the complaining party may ultimately prevail. In that event, the injunction *pendente lite* would, of course, be based upon no matter of *fact* in issue between the parties, and yet it would effectually operate to condemn the regulation of the state tribunal and forbid the latter from functioning, pending the trial, except to such an end as may meet the concurrence of the equity court.

As already noted, the situation, as disclosed in the present bill, is far from that of merely complaining of the rates in effect in July, 1919, and averring that such rates were the last expression of the legislative or executive will of the state, from which plaintiff, notwithstanding due representation of all of the facts averred in the present bill, could not be released or relieved, to the end of getting an adequate return. In other words, the plaintiff, upon the record before us, cannot be heard to say that, upon the facts now presented as relevant to the question of a lawful and nonconfiscatory rate, the state has denied, and is denying, relief, leaving the plaintiff no alternative but to resort to equity to restrain an impending unconstitutional aggression.

These considerations are emphasized when once we reflect what must ensue upon an injunction *pendente lite* in the situation disclosed. The plaintiff must, of course, concede that, whether or not an injunction is issued, the commission will retain its power to inquire into and regulate the plaintiff's rates. If the rates now under consideration by the commission are held preliminarily by this court to be confiscatory, will the parties proceed before the commission, or before this court, in further inquiry, to the end of fixing a constitutional rate? If before the former, will the future functioning of the commission be freed from the surveillance of the preliminary injunction, and from the effectiveness of a preliminary adjudication of the court respecting values and the like?

Certainly the courts could not by preliminary injunction restrain enforcement of any rate, without fixing for the time being some of the elements upon which lawful or nonconfiscatory rates are based; that is to say, if an existent rate is to be condemned, it can only be upon recognition of some standard of value, of property, likewise of operating expenses. So that, if in the case before us the court should condemn the existing rates, with or without recognition of the tentative rates tendered by the complainant, it would seem idle to have the commission function further in the pending proceedings before it, because ultimately it would lead merely to the necessity of a recession by

the court or the commission of either of their respective determinations, whether they be final or preliminary.

If, therefore, it be assumed that the equitable jurisdiction could ultimately prevail, there is none the less established a policy whereunder the system of regulating public utilities may be made nominal only; the real regulation being conducted in equity. We believe that the plaintiff's bill discloses this very infirmity, and, if the jurisdiction were exercised, this result would follow in the particular case before us, and that regulation by the defendant tribunal would amount to nothing, because the proceedings pending before it could at all times be frustrated in the accomplishment of their object through the concurrent exercise of the equitable power, which latter, of course, if not resorted to for the purpose of *dominating* it, ought not to be resorted to at all until *finality* of action by the state can be asserted.

This conclusion is reached upon consideration of the bill in its broader aspect and purposes, and is not limited to a consideration of the case which might be made upon the narrow facts pertaining to any one or all of the three communities concerning whose rates the commission has made an award. We are taking the situation in its entirety, as the plaintiff professed to present it, both in its application before the defendant commission and in its bill, which invokes the interference of the court as against the whole subject of rates rendered for service in the various communities referred to.

[3] Upon the view that the bill is fatally defective in the respects noted, wherefore the court, although answer has been interposed, will decline to issue an injunction, a consideration of the subsidiary feature of the second question heretofore suggested, and any other question argued, is unnecessary. But, dealing with the bill as a whole, or segregating the allegations pertaining to the plaintiff's properties, service and rates at La Crosse, Eau Claire, and Chippewa Falls, the defendants have, upon either aspect, met the allegations so fully by direct denial of the material matters of fact, by counter allegations setting up affirmatively either countervailing facts or disputation of the claims on the part of the plaintiff that the defendant commission was proceeding erroneously, by refusing to apply proper standards of value, or of operating expenses, or of distribution of values, or operating expenses between different communities, as render it impossible preliminarily to accept plaintiff's claim upon any of these matters, in satisfaction of the rule requiring a *prima facie* clear showing as a basis for an injunction *pendente lite*. The pleadings as they now stand, and the discussion by counsel upon argument, preclude the thought that any fact or facts could be seized upon by the court as sufficiently free from doubt and as sufficient basis in equity to justify the requisite preliminary conclusion. Therefore, even if the matters first herein considered could be eliminated, the court could not with propriety award preliminary relief.

The conclusion is that the application for an injunction *pendente lite* will be denied, and an order may be entered accordingly.

RICHMOND CEDAR WORKS v. KRAMER BROS. & CO. et al

(District Court, E. D. North Carolina. July 10, 1920.)

1. Partition ⚡16—Plaintiff not required to go behind common source of title.

While complainant in a suit for partition, in which his title is disputed, must recover on the strength of his own title, it is sufficient for him to show a right to recover against the defendant, and when it appears that both derive title from a common source he need not go behind that source.

2. Tenancy in common ⚡15(4)—Twenty years necessary to adverse possession.

Under the law of North Carolina an adverse possession of 20 years by one tenant in common is necessary to bar the entry of his cotenant.

3. Infants ⚡31(1)—Deed disaffirmed by another deed after reaching majority.

Under the law of North Carolina a deed by an infant may be avoided or disaffirmed by the execution of another deed to the same land within 3 years after the infant reaches the age of 21 years, but not thereafter.

In Equity. Suit by the Richmond Cedar Works against Kramer Bros. & Co. and W. E. Liverman. Decree for complainant.

R. W. Winston, of Raleigh, N. C., and Thompson & Wilson, of Elizabeth City, N. C., for plaintiff.

Aydlett & Sawyer and W. A. Worth, all of Elizabeth City, N. C., and Mark Majette, of Columbia, N. C., for defendants.

CONNOR, District Judge. Complainant alleges that it is the owner of an undivided interest, being ¹⁰/₂₁, defendant W. E. Liverman ⁵/₂₁, and defendants Kramer Bros. & Co. of the same interest in standing timber on the tract of land lying and being situate in Tyrrell county, N. C., containing about 600 acres; that defendants, Kramer Bros. & Co. have cut and removed a large portion of the timber from the land, for which they are liable to account. Complainant prays for partition and allotment to them of their share of the land in severalty, and an accounting by them for the timber cut and removed therefrom.

Defendants deny the tenancy in common and aver that defendant Liverman is seized in severalty of the land and Kramer Bros. & Co. of the standing timber thereon. The jurisdiction of the court is based upon diversity of citizenship. The locus in quo is covered by the deeds under which both parties claim, as fixed by the evidence and indicated by the plat introduced in evidence marked Exhibit A. It is conceded that title passed out of the state July 9, 1796, by the grant of a large body of land including the locus in quo to Josiah Collins.

Complainant claims title to a two-thirds undivided interest under a deed executed by J. W. Simmons and wife to W. R. Spruill and Frederick F. Jones, bearing date 24th of August, 1888, Book 36, p. 344, Tyrrell County registry. The land is described as:

"A tract of land conveyed by S. S. Simmons, administrator of Daniel Bate-man, to J. W. Simmons, by deed dated June 30, 1860 and recorded in the office

of the Registry of Deeds in Tyrrell county, Book 23, p. 124, reference being had to said deed for a more complete description of said land." (Tract X.)

The deed from S. S. Simmons to Daniel Bateman, corresponding in date to the call in the deed to J. W. Simmons, calls for a tract of land lying in said county—

"bounded on the west by Scuppernong river, on the south by Lake Phelps, east by Alligator river, north by Albermarle Sound, containing 500 acres, more or less, it being all the lands said Daniel Bateman owned in said bounds."

Recorded in Book 23, page 124, Registry of Tyrrell County.

Plaintiff introduced, for purpose of description and location, a deed from Joseph Bateman to Daniel Bateman, dated December 14, 1838, conveying a tract of land described by calls for Scuppernong river and other natural objects, which the evidence of surveyors and other witnesses fix as the same land covered by the deeds introduced by complainant. The location is not seriously contested, and is conceded by defendant W. E. Liverman upon his examination as a witness in the cause. Other deeds to J. W. Simmons, prior in date, are introduced, which appear to cover the land, but which are not of controlling import in this controversy. They all tend to show title in J. W. Simmons.

Complainant introduced a deed from W. R. Spruill and wife to T. H. Woodley, dated March 13, 1900, recorded in Book 47, page 111, registry of Tyrrell county. This deed conveys, among others:

"(10) a tract of land conveyed by S. S. Simmons, administrator of Daniel Bateman, to J. W. Simmons, dated June 30, 1860, registered in Book 23, page 124. The herein conveyed land being the same land conveyed in a deed made by J. W. Simmons and wife Amanda L. Simmons to W. R. Spruill and F. F. Jones, recorded in Book 36, page 344."

F. F. Jones died intestate, leaving as his only heir D. M. Jones, who on March 28, 1900, by deed recorded in Book 47, page 188, conveyed to T. H. Woodley his right, title, and interest in a tract of land described in the deed from W. R. Spruill and wife to Woodley, making specific reference to the deed from J. W. Simmons to Spruill and Jones. T. H. Woodley, on September 24, 1904, conveyed to complainant all of the right, title, and interest acquired by him under the deeds from Spruill and Jones to the land described in said deeds, to which specific reference is made. This deed is recorded on Book 52, page 131, registry of Tyrrell county. These deeds put in plaintiff the title to two-thirds undivided interest in the land in controversy.

For the purpose of showing that defendants claimed title under J. W. Simmons, and thus relying upon the rule of practice, estopping them for denying title in him, complainant introduced a deed from A. L. Simmons, Charles S. M. Simmons, Eulalia N. J. Newell and her husband, E. B. Newell, Durant W. Simmons, Dennis J. Simmons, Albert A. Simmons, Lula N. Simmons, and N. B. Simmons, describing themselves as the heirs at law of J. W. Simmons, conveying to defendant W. E. Liverman "all of their estate, right, title, and interest in and to that part or parcel of land situate in Columbia township, Tyrrell county, North Carolina, bounded as follows," etc., bearing date November 23, 1899, recorded in Book 47, page 27, Tyrrell registry.

The boundaries set forth, while not in all respects corresponding with the boundaries set forth in the deeds in complainant's chain of title, cover and include the same tract of land. This appears by reference to the oral evidence and the plat introduced (recorded Book 47, page 37, Registry of Tyrrell county). This is not seriously controverted. The allegation by complainant that two of the grantors in this deed were infants at the date of its execution and that, upon their arrival at full age, they disaffirmed their act and conveyed their interest to another party, who conveyed to complainant, will be dealt with hereafter.

It appears that W. E. Liverman, on March 15, 1904, conveyed to the Scuppernong Milling & Manufacturing Company the merchantable timber trees on a tract of land as described in a deed to W. E. Liverman from Charles S. Simmons and others, heirs at law of Joseph W. Simmons, deceased, by deed dated November 23, 1899, and recorded in the office of the register of deeds of Tyrrell county, N. C., Book 47, pages 37 and 38, etc. This deed also conveys all timber trees which may become merchantable at any time within 25 years from date thereof, with the usual easements, rights of way, etc., for cutting and removing the trees.

On March 10, 1910, the Scuppernong Milling & Manufacturing Company conveyed to defendant Kramer Bros. & Co. the timber trees, etc., conveyed by the deed from W. E. Liverman. In this condition of the record, it is manifest that complainant is seized of the land and timber, as tenants in common with defendants, in the proportion of two-thirds and one-third to each.

Defendants, however, make several contentions in opposition to this conclusion, which must be dealt with. Those relating to the paper title will be first disposed of. It will be noted that the land in controversy is valuable chiefly, if not entirely, for timber being swamp or pocosin land. As, with such lands in the section in which they are located, the boundaries are confused, by reason of the indefiniteness of the descriptions in deeds and other muniments of title. As shown by the recited consideration in the several deeds relating to them, their value, until recently, was inconsiderable. While there was considerable oral evidence, and, as usual in such cases, much uncertainty and more contradiction on the part of witnesses, several of whom were of great age and illiterate, I do not entertain any doubt that the deeds relied upon by both parties cover and include the lands in controversy. The testimony of defendant, W. E. Liverman, puts this question at rest.

[1] It is an elementary principle, recognized and enforced in numerous cases in the courts of this state, that while the plaintiff must recover upon the strength of his own title, it is sufficient for him to show a right to recover against the defendant, and whenever it appears that both derive title from a common source, he need not go behind that source. It is said:

"The rule is not strictly an estoppel, though often spoken of as such, but a rule of justice and convenience adopted by the courts to relieve the plaintiff from the necessity of going behind the common source. When the defendant can show a better title outstanding, and has acquired it, the rule ceases to apply." Sedgwick & Wait, *Trial of Title*, § 803, citing a North Carolina case.

It follows, therefore, that as both parties claim title under J. W. Simmons, the plaintiff is entitled to a decree, unless defendants show a superior outstanding title which they have acquired, or that they have a better title derived from J. W. Simmons, or those claiming under him, or that they have ousted plaintiff and acquired title by adverse possession for the statutory period.

Defendants introduced the record of a proceeding instituted by George W. Tarkenton, executor of S. S. Simmons, deceased, against J. W. Simmons and wife, April 1, 1889, in the superior court of Tyrrell county, in which it was alleged that S. S. Simmons died seized of a number of tracts of land, including the land in controversy; that J. W. Simmons was one of the heirs at law or devisees of said S. S. Simmons; that a sale of said land was required to make assets for the payment of the debts of said S. S. Simmons. The summons in said proceeding was served by publication, and a decree entered directing the sale of the lands, which sale was made and confirmed by the court and deed therefor executed to one T. W. Swain, the consideration being \$10.60.

Passing several irregularities in this proceeding, it is manifest that the decree was ineffectual as to W. R. Spruill and F. F. Jones, to whom J. W. Simmons, on August 24, 1888, had conveyed two-thirds interest in the land. This deed was recorded in the proper office Tyrrell county, August 25, 1888, eight months prior to the date of the summons in the proceeding of Tarkenton, executor, against Simmons. Neither Spruill nor Jones were parties to the proceeding. While it may be that the decree, and deed made pursuant thereto, divested the title to J. W. Simmons to the one-third interest remaining in him, there is no attempt to connect defendants with the title acquired by Swain to this undivided interest.

[2] We are thus brought to a consideration of the contention made by defendants that, conceding the tenancy in common created, between complainant and W. E. Liverman, by the deeds hereinbefore recited, they have acquired title to the entire tract by an ouster of those under whom complainant claims, followed by adverse possession for twenty years. It will be noted that the deed from the heirs of J. W. Simmons to defendant W. E. Liverman bears date November 23, 1899, and the bill herein was filed February 3, 1917. Liverman does not claim that he began work on the land, *claiming under the deed*, until a short time after its execution. Such possession as he then took is therefore restricted in point of time to the date of filing the bill—17 years, 2 months, and 10 days. It is well settled by the decided cases in this state, whatever may be held by other courts, that an adverse possession of 20 years by one tenant in common is essential to bar the entry of his cotenant. The rule is too firmly fixed in our jurisprudence to be regarded as open to debate. It is a rule of property. *Lumber Co. v. Cedar Works*, 168 N. C. 350, 84 S. E. 525, Ann. Cas. 1917B, 992, in which Mr. Justice Walker cites the numerous cases decided by that court.

Defendants, however, claim that the adverse possession of those under whom they claim began many years prior to the deed from the

heirs of J. W. Simmons to defendant W. E. Liverman, and has been at all times, open, notorious, continuous, and under a claim of right; that such possession "first commenced under S. S. Simmons" by the father of defendant W. E. Liverman. Witness A. W. West, referring to this use, says:

"He was cutting under S. S. Simmons, and he died not many years thereafter."

Anderson West says:

"I knew W. E. Liverman's father, and have known W. E. Liverman all my life. They went in there, cutting this timber, 32 years ago. I reckon they went in there under S. S. Simmons. S. S. Simmons lived within a mile of that place; boarded at Liverman's."

R. H. Spruill says:

"Liverman and his father both worked in the swamp. I knew Sam Simmons. He boarded at W. E. Liverman's while they worked in there, about 200 yards from this land. Simmons could see that Liverman was working there, unless he shut his eyes."

Z. T. Kemp says that the Livermans were in there working the swamp under S. S. Simmons more than 30 or 35 years ago, cutting juniper and pine. W. E. Liverman says:

"I first entered under a lease from S. S. Simmons in 1887. S. S. Simmons died in the spring of 1888. His son, J. W. Simmons, then came to see me, and we bargained and bought the swamp, paying him \$25 purchase money, and he gave a bond for the title. I bargained to buy it from him. A deed was then drawn according to that bargain, but he died before it was signed. After he died, I got the deed from his heirs. He died about 1890 or 1895. J. W. Simmons went on the land 12 or 14 months after his father died."

Defendants introduced a deed, executed by J. W. Simmons to his father S. S. Simmons, bearing date November 8, 1880, recorded on Book 28, page 363, Tyrrell county registry, conveying:

"Any and all swamp land lying between the Alligator and Scuppernong rivers in Tyrrell county, and on the east side of Scuppernong river, and known as the western thicket and northwest fork, containing 5,000 acres, more or less."

If, as contended and is probable, this description included the locus in quo, it explains the testimony showing that defendant W. E. Liverman and his father were cutting the timber under S. S. Simmons, and excludes the contention of an adverse possession. S. S. Simmons, by his last will and testament, dated May 8, 1888, devised his entire real estate to his son, J. W. Simmons. It was admitted to probate June 13, 1888. W. E. Liverman says that J. W. Simmons "entered upon the land and made a contract with him to sell it" to said Liverman, but instead of executing the deed sold two-thirds interest to W. K. Spruill and F. F. Jones August 24, 1888. The alleged bond for title is not introduced, nor does it appear that it was recorded. Spruill and Jones were not affected by it. It appears from the evidence of J. C. Meekins that S. S. Simmons made this contract and deed before it was signed and the money returned to Liverman. If, as defendants aver, W. E. Liverman was at that time cutting timber from the land, and subjecting it to

other uses, claiming under, and not adverse to, J. W. Simmons, such conduct was not adverse to the rights of Simmons and his grantees. The character of such possession as he had was not changed, so as to affect the rights of the grantees of J. W. Simmons, until the execution of the deed by the heirs of Simmons, which was less than 20 years before the bill herein was filed. The deed from the heirs of J. W. Simmons created a cotenancy between Spruill and Jones and W. E. Liverman, which could only be destroyed by a deed or by an ouster followed by 20 years' adverse possession.

There was evidence of a sale of the land by the sheriff for delinquent taxes, and by the board of education; but defendants do not seriously contend that any rights were acquired by them under either sale.

The evidence in regard to the extent of cutting timber and other acts denoting possession by W. E. Liverman and Kramer Bros. & Co. subsequent to November 23, 1899, is indefinite and unsatisfactory, especially in regard to its continuity. It is necessarily so, because the land in controversy is a portion of a large body of swamp or timber land. The lines are indefinite and uncertain. If the cutting and other acts relied upon by defendant constituted an ouster and adverse possession, it is manifest that they did not cover the period required to ripen title in defendant as against their cotenants, the grantees of J. W. Simmons, and those in succession to his title. The latest expression of opinion by the Supreme Court of North Carolina upon the subject is found in a well-considered opinion by Mr. Justice Walker in *Alexander v. Cedar Works*, 177 N. C. 140, 98 S. E. 312.

Complainant bases its claim to the interests of Mamie B. Simmons and Albert A. Simmons, two of the children of J. W. Simmons, who undertook to convey their interest in the land to W. E. Liverman, to the averment that they were minors at the time they executed the deed, and that upon reaching the age of 21 years they disaffirmed their deed by executing a deed conveying their undivided interest which have vested in complainants.

The only evidence which I find in the record, respecting the alleged nonage of these two children of J. W. Simmons, is that of J. S. Swain, who was sent by W. E. Liverman to the residence of the children in South Carolina to obtain the deed. Swain says that their mother told him that "three of the children were under age, Albert, Minnie, and Lula." He saw the children. Their mother said these three were under age. She is dead. W. E. Liverman says that Swain reported to him that one of the children was "under age," and that he would execute another deed when he "came of age"; that he afterwards went to South Carolina, and "they" told him that they were all of age except one, and that he "would give me deed after he became 21 years of age." It appears that A. A. Simmons executed to Charles R. Johnson a contract to convey his undivided one-seventh interest in the land, and that Johnson, on October 9, 1909, executed to complainant a deed for this interest.

[3] On August 12, 1902, A. A. Simmons, pursuant to the terms of his contract, executed a deed to said C. R. Johnson. If, at the date of the deed to W. E. Liverman, November 23, 1899, A. A. Simmons

was a minor, his deed to Johnson August 12, 1902, being within 3 years thereafter, was a disaffirmance of his first deed and avoided same. The execution of a deed by an infant may be avoided or disaffirmed by the execution of another deed for the same land, within 3 years after reaching 21 years of age. *Weeks v. Wilkins*, 134 N. C. 516, 47 S. E. 24; *Baggett v. Jackson*, 160 N. C. 26, 76 S. E. 86. The contract was made with Johnson prior to the execution of the deed and within 3 years after the deed to Liverman.

The deed from Mamie B. Simmons to Richmond Cedar Works is dated January 23, 1905, more than 3 years after the date of her deed to Liverman. The evidence in regard to her nonage is unsatisfactory and inconclusive. There is no evidence of the date at which she reached full age, assuming her infancy at the date of her first deed. The burden of showing the disaffirmance of her deed within 3 years after reaching her majority is upon complainant. I am unable to find that she was an infant, or that, if so, she disaffirmed within 3 years. Her deed executed January 23, 1905, does not sustain either averment.

The extent of cutting and removing timber from the land by defendants Kramer Bros. & Co. was reserved to be ascertained by a reference.

A decree may be drawn that complainant is the owner of $\frac{15}{21}$, and defendant W. E. Liverman of $\frac{6}{21}$ of the land described in the bill, and that complainant is entitled to $\frac{15}{21}$ and defendant Kramer Brothers & Co. $\frac{6}{21}$ of the timber standing thereon February 10, 1910, and that said defendants are liable to account to the plaintiff for the value of the timber cut and removed therefrom since said date in excess of their interest therein; that a reference be made to some disinterested person, or persons, to be named by the court, to take such account and make report thereof; that partition of said land be made by commissioners to be appointed by the court, and the shares of the parties hereto allotted in severalty in accordance with this opinion; that this cause be retained for other and further orders and decrees.

THE HANNA NIELSEN.

(District Court, E. D. New York. July 26, 1920.)

1. Seamen ⚓—Contract rights governed by law of nation where contract is made.

Where the contract with a seaman on a Norwegian vessel was made in Norway, the Norwegian law governs his contract rights, except in so far as the procedure must conform to the laws of the United States, where they are sought to be enforced.

2. Seamen ⚓—Law of place of personal injury governs liability of vessel.

Where an injury to a seaman occurs in a port of another nation, the laws of that nation determine the liability of the vessel in tort, and will be applied by its courts or by the courts of a third nation to which the vessel proceeds.

3. Seamen ~~C~~—11, 29(1)—Vessel not liable for injury beyond cost of maintenance and cure.

A seaman on a Norwegian vessel, injured in the port of Gibraltar by the explosion of a steam gauge glass, *held* not entitled to recover compensation from the vessel under any law proved, but entitled to the expense of his maintenance and cure.

In Admiralty. Suit by Ole Tolo against the steamship Hanna Nielsen; B. Stolt-Nielsen & Co., Incorporated, claimant. Decree for claimant on claim for damages, and for libellant for maintenance and cure.

Frederick R. Graves, of New York City, for libellant.

Duncan & Mount, of New York City (Warner C. Pyne, of New York City, of counsel), for claimant.

CHATFIELD, District Judge. Tolo, the libellant, an oiler on the Norwegian steamer Hanna Nielsen, signed articles in Norway, in August, 1919. On March 16, 1919, at Portland, Me., under the effect of the United States shipping laws, Tolo made a new oral agreement for a round trip to the Mediterranean and back to the United States. In other respects with which we have to do, the terms of the shipping articles were not changed. At Gibraltar a steam gauge glass had to be removed, and the new glass installed burst as soon as the steam was turned on. Tolo was standing in front of the glass, by the direct orders of the assistant engineer, and no question of assumption of risk or contributory negligence affects the situation. This glass was some distance above the fireroom floor, and an iron grating intended for use in going to the upper part of the fireroom was directly in front. The glass in question was not shut in by any guard or metal shield, and was not of the kind generally used in the United States Navy, which has a thick glass with a prism refractor, making visible the water level from the floor below.

The testimony in the case shows that gauge glasses are apt to burst at any time without warning, that close proximity is always dangerous, that some danger exists throughout the entire fireroom, and that some risk is thus always inherent in having a runway or ladder so arranged as to compel passing in front of the glass. On the other hand, the testimony shows that most vessels, even though knowing the dangerous character of these glasses, have not adopted the more expensive and modern Klinger gauge.

Reliance is placed upon the fact that these gauges are usually above the level of the men working in the fireroom, and that the stray fragments of glass do not ordinarily cause damage. This is of itself evidence that the maintenance of these glasses is negligence. *Seaboard Air Line v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. Such negligence is a defect showing unseaworthiness. *The Osceola*, 189 U. S. at pages 172-174, 23 Sup. Ct. 483, 47 L. Ed. 760, and cases cited; *The Lamington* (D. C.) 87 Fed. 752. While sailors may assume the risk of working around an ordinary fireroom where such glasses are present (*The Santa Clara* [D. C.] 206 Fed. 179), this would not apply to remaining directly

in front of one of these glasses under orders, after a new glass had been installed. The negligence in such an act is under general admiralty law that of a fellow servant, when these orders are given by an officer, directing the manner of use of the appliance, and are not actionable. *The Santa Clara*, supra.

Tolo received a cut on the wrist, which severed a tendon, so that his third finger fell helpless toward the palm of his hand. The superficial wounds healed in response to treatment. He was taken to a doctor at Gibraltar. This doctor advised that he be taken on the ship to Genoa. He was there treated by a doctor, but was not placed in the hospital, and the physician who treated him evidently did not recognize the fact that a tendon had been cut. The wound healed externally, but Tolo suffered pain, and inability to use his finger, until he reached Norfolk. The ship there offered to send him to a hospital, but he insisted upon being sent to New York. This was done, and at New York his hospital expenses were paid (by the Norwegian consul), resulting in an operation by which the tendon of his third finger has been joined to the tendon of his middle finger, somewhere near the wrist. This has restored to him somewhat the use of his fingers, but the union of the two tendons and the adhesions of the severed end of the tendon in his wrist cause him pain, which according to the testimony will last for a long time, with some permanent injury, which interferes more or less with the use of his right hand.

There seems to be no basis for charging the captain of the vessel and the vessel itself (under the doctrine of *The Troop*, 128 Fed. 856, 63 C. C. A. 584) with failure to give Tolo proper treatment, nor with any inhuman conduct. Doctors were consulted. Professional advice would seem to be to blame for allowing the wound to heal, instead of performing an operation, and the conduct of the owners of the vessel, after Tolo reached the United States, indicates that they were aware of their obligation to furnish him maintenance and cure. He has received his wages for the full period of the voyage. His hospital expenses have been paid, and there may be nothing due him on this basis. *The Van Der Duyn* (C. C. A.) 261 Fed. 887.

This accident did not occur upon the high seas, but in a harbor within the jurisdiction of the British Empire. The question therefore arises, first, whether this court should take jurisdiction of the case at all; second, whether the laws of the United States, the laws of Norway, or the laws of Great Britain apply; and, third, how may this court obtain proof of foreign law?

As to the first point, if the accident had occurred in a harbor of the United States, the laws of the United States would apply. If the accident happened on the high seas, jurisdiction is vested in the United States courts where the vessel comes into a United States port, and where the law of the United States allows the consideration of such a cause of action. *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; *The Cuzco* (D. C.) 225 Fed. 169, and cases therein cited; *The Osceola*, supra. But in such a case the laws of the nation whose territory is represented by the vessel, and where the accident occurred, will be considered in establishing the rights and liabilities of the parties.

The *Lamington*, supra; The *Cuzco*, supra; The *Belgenland*, supra; *Chelentis v. Luckenbach*, 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171.

A sailor upon a foreign vessel upon the high seas could not invoke the laws of the United States as the sole measure of the rights which he there enjoyed. Even though the vessel sailed from the United States, under a contract made in the United States for the services of the seaman, United States law would apply only in so far as the terms of the contract might bring in the United States law, and in so far as the maintenance of the action in the United States might have to do with the enforcement of the remedy.

[1] In the present case the contract in general was the one made in Norway, and Norwegian law applies to the contract rights of the sailor in all respects, except in so far as the procedure must be governed by the laws of the United States. But in considering a claim of tort the fact that the accident occurred in a British port alters the situation. The *Lamington*, supra, The *Cuzco*, supra; The *Scotland*, 105 U. S. 24, 26 L. Ed. 1001.

[2] As has been said, when an accident happens within the confines of a nation's jurisdiction, the laws of that nation apply and will be administered by its courts. When a vessel sails away from that port, and reaches the port of a third nation, the courts of this third nation cannot substitute its own law for the establishment of the rights of the parties, which have already been fixed. It can only apply the laws of the country where the accident happened. Nor would compensation laws of the country owning the vessel defeat the general maritime law, which establishes a liability for tort against the vessel, if that is given by the law of the place where the negligence occurred. *Chelentis v. Luckenbach*, supra.

[3] In the case at bar the original sailing articles were modified in certain respects in the United States, but no contract was made to have the Norwegian vessel governed by either United States or British law. In Gibraltar, the British law as to rights arising ex delicto governed the situation, and the *La Follette* Law would not be in effect to any extent beyond that to which the contract was actually modified in accordance therewith. When the steamer left Gibraltar its liability would be governed by Norwegian law, rather than by British. But under the Norwegian law, if that were applicable, the libellant cannot recover damages, nor any maintenance and cure beyond that which he has received. He is fortunate that the surgical skill shown by the surgeons in the Long Island Hospital in Brooklyn was sufficient to insure him partial recovery. But this court cannot fix any liability on the vessel for more than has been done, under the Norwegian law as proven on the trial.

This makes it necessary to consider what rights he might have under the British law of Gibraltar. The libellant claims that no proof of what is in the British law was needed, inasmuch as the court can take judicial notice of what is the common law of both the United States and Great Britain, and that a presumption exists against changes in the common law unless affirmatively shown by the claimant. Cuba

R. Co. v. Crosby, 222 U. S. 473, 32 Sup. Ct. 132, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40. Panama Electric Ry. Co. v. Moyers, 249 Fed. 19, 161 C. C. A. 79.

While this court may take judicial notice of what is the common law, in so far as this common law is proven to exist in the United States and in Great Britain, unmodified by statute, it is difficult to say where such presumption would lead. At common law the act in question would be that of a fellow servant. Admiralty is not common law. In admiralty the question is limited to the seaworthiness of the vessel, and the doctrine of fellow servant cannot be invoked, unless appliances to render the vessel seaworthy are at hand, and improperly or negligently used by those on the vessel who are properly to be classified as fellow servants. The laws of a foreign country must be pleaded and proven. *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *The Santa Clara*, supra; *Cuba R. R. Co. v. Crosby*, supra. The libelant has not alleged or proven the laws of Gibraltar. On the contrary, he has alleged, but not proven, that the laws of Norway require guards over such glasses on vessels.

It is difficult to avoid the conclusion that, where proof could be so readily furnished as in the case of these statutes, failure to offer such proof should carry an inference strongest against the person who does not offer the proof. The court is unwilling to establish a presumption that laws which may have been in force in a foreign country more than 133 years ago are still unmodified, when the party relying on such presumption shows unwillingness to give exact proof. The libelant insists that a duty rests on the claimant to prove any modification of the common law, but this court cannot see that this clarifies the situation. Until the libelant proves some law, no presumption at all can arise as to the subsequent course of that law.

The libel must be dismissed as to the alleged causes of action for damages. Decree and reference may be had for any items of maintenance and cure, such as was ordered by the Circuit Court of Appeals in the case of *The Van Der Duyn*, supra, and *The Santa Clara*, supra.

AKTIESELSKABET FIDO v. LLOYD BRAZILEIRO et al.
and other cases.

(District Court, S. D. New York. July 24, 1919.)

Nos. 67-192, 69-87, 69-88, 67-184, 68-248, 11-197, 68-354, 67-366, 68-332, 66-362, 67-322, 68-31, 67-209, 68-353, 67-210, 68-333.

1. Shipping ⚓181—Lay days commence when ship actually ready to load.

Under charter parties for sailing vessels requiring charterers to furnish ballast for stiffening before proceeding to loading ports, where they furnished coal of good grade, bought from reputable dealers, which was received without objection, but heated and was required to be taken out at ports of loading, neither owners nor charterers held in fault for such conditions, and lay days for loading held not to commence until such coal had been removed and the ships were actually ready to load cargo.

2. Shipping ⚡175—Delay in loading held not "default," rendering charterer liable for demurrage.

Failure to load ships within the time allowed by the charter parties, where it resulted from heating of coal furnished for stiffening, necessitating its removal, and for which neither owners nor charterers were in fault, held not through "default" of the charterers within the meaning of the charter parties, which rendered them liable for demurrage.

3. Shipping ⚡194—Cost of removing dangerous ballast, general average expenditure.

The cost of removing coal furnished by charterers to ships for stiffening while proceeding to loading port, and which became dangerously heated on the way, making it necessary to remove it before loading cargo, for the safety of both ship and cargo, where neither owners nor charterers were in fault for its condition, held an expenditure in general average.

4. Admiralty ⚡14—Contract for sale of coal for ballast not maritime, cognizable in admiralty.

A claim against sellers of coal furnished to charterers to be used as ballast on ships, for breach of warranty of quality, is not based on a maritime contract and not cognizable in admiralty.

In Admiralty. Libel by the Aktieselskabet Fido against the Lloyd Brasileiro, with Gano Moore & Co., Incorporated, and another, impleaded, heard with libels entitled as follows: Lloyd Brasileiro v. Aktieselskabet Fido, Claimant; Gano Moore & Co., Incorporated, v. Aktieselskabet Fido; Aktieselskabet Christianssand Corporation, Owner of the Sordwig, v. Berwind-White Coal Mining Company; Berwind-White Coal Mining Company v. Aktieselskabet Christianssand Corporation; Christianssand Shipping Company, Limited, v. American Coal Exporting Company (Knickerbocker Fuel Company, Respondent, Impleaded); American Coal Exporting Company v. Christianssand Shipping Company, Limited; Skibsakties Clyde v. S. S. Sorenson & Thorlief S. B. Nielson (Pocahontas Fuel Company, and Consolidation Coal Company, Impleaded, Respondents); Sorenson & Nielson v. Skibsakties Clyde; Aktieselskabet Christianssand Corporation v. Cia Comercio e Navegacao Company (Gano Moore & Co. and Knickerbocker Fuel Company, Impleaded), and cross-libel; Cia Comercio e Navegacao Company and Gano Moore & Co., Incorporated, v. Aktieselskabet Christianssand Corporation; Bechs Rederi Akties, Owner of Norwegian barge Trio, v. American Coal Exporting Company (Knickerbocker Fuel Company, Respondents, Impleaded); American Coal Exporting Company v. Bechs Rederi Akties; Skibsakties Glommen v. Chesapeake & Ohio Coal & Coke Company (New York & Philadelphia Coal & Coke Company, Respondent, Impleaded); Chesapeake & Ohio Coal & Coke Company v. Skibsakties Glommen. All matters referred to commissioner for general average adjustment.

Haight, Sandford & Smith, C. S. Haight, and Wharton Poor, all of New York City, for libelants.

Burlingham, Veeder, Masten & Fearey, Charles C. Burlingham and John L. Galey, all of New York City, for Gano Moore & Co., Cia Comercio e Navegacao Co., and Lloyd Brasileiro.

Macklin, Brown & Purdy and P. M. Brown, all of New York City, for Knickerbocker Fuel Co.

Kirlin, Woolsey & Hickox, and John M. Woolsey, all of New York City, for Sorenson & Nielson, as charterers, and Chesapeake & Ohio Coal & Coke Co.

Herbert Green, of New York City, for American Coal Exporting Co. and Berwind-White Coal Mining Co.

Henry W. Hardon, of New York City, for New York & Philadelphia Coal & Coke Co.

J. Walter Lord, of Baltimore, Md., and James K. Symmers, of New York City, for Consolidation Coal Co.

Edward E. Blodgett, of Boston, Mass., for Pocahontas Coal Co.

WARD, Circuit Judge. In the course of the European war, the United States compelled the owners of from 300,000 to 400,000 tons of Norwegian sailing tonnage, then in this country, to carry under a form of charter party prepared by the United States Shipping Board. In August and September, 1918, the government compelled all shippers of coal from the United States to South America to ship in vessels allocated to them by the United States Shipping Board under this form of charter. At the same time all miners and operators were compelled to consign their coal destined for the seaboard to the Tidewater Coal Exchange, by whose representative it was inspected at each port. The mines on the different railroads were classified in respect to the steam-producing qualities of their coal, into separate pools; each operator being credited with the number of cars he consigned to a particular pool. Purchasers from the mine operators were obliged to pay the prices fixed by the Fuel Administration, and to take their coal from the pool, whether it was wholly, or partly, their vendor's coal, or wholly coal of other operators. The purpose was to avoid delay and congestion, by treating the pool as an aggregate of cars containing the same quality and grade of coal, and deliverable upon all contracts for coal from that pool.

In this situation the seven Norwegian sailing vessels, Svalen, Fjong, Baunen, Trio, Dvgerso, Sordwig, and Clyde, belonging to the libelants, were allocated to the charterers to carry cargoes of bituminous steaming coal from Norfolk to Rio de Janeiro; six of them then lying at New York and one at Baltimore. The relevant clauses of the charter party are:

"2. If vessel is required to ship from her last port or berth of discharge in the United States to another port or berth to load, charterers shall furnish sufficient cargo or ballast for stiffening to enable vessel to shift ports or berths safely. Charterers to pay cost of towage, but time for shifting ports not to count as lay days. If ballast is furnished for stiffening to enable vessel to shift ports or berth safely, all cost, including loading and discharging, to be paid by charterers and time to count as lay days, just as if cargo was used for stiffening. Stiffening to be supplied when and where required or lay days to count. Master to give 48 hours' notice of readiness."

"5. Cargo to be delivered to vessel, loaded and stowed free of expense to vessel, and to be discharged by charterers or their agents at their expense. Master to give free use of vessels' winches, donkey boiler, and such tackle as may be on board. Vessel to be free of all lighterage.

"6. It is agreed that lay days for loading and discharging shall be as follows (if not sooner dispatched): Commencing from the time vessel reaches loading or discharging port or dock, or berth, if available, and master has filed written notice to that effect and all customs formalities have been complied with. In the event of berth for loading or discharging not being available, lay days to count from the time captain gives notice of readiness to proceed to loading or discharging berth, vessel being duly entered and all other customs formalities complied with.

"7. Cargo to be loaded at the average rate of not less than 250 tons per running day, Sundays and holidays excepted, and to be discharged at the average rate of not less than 250 tons per running day, Sundays and holidays excepted. Time reversible; i. e., any time saved at loading port to apply at port of discharge. Charterers to have the privilege of working vessel on Sundays and holidays if they so desire, provided they pay all extra expenses and overtime, actually incurred by working cargo in connection with ship and cargo. Sundays and holidays so used not to count as lay days.

"8. And for each and every day's detention by default of said party of the second part or agents *twenty cents per ton, U. S. gold, of vessel's agreed deadweight capacity*, and pro rata for part of a day, shall be paid by said party of the second part, or agents, to the party of the first part, or agents payable day by day as earned. * * *

And for each and every day saved in loading or discharging 10 cents per ton measured in the same way was to be paid by the owners to the charterers. The vessels could not stand up empty, and the charterers had the privilege of supplying coal as stiffening to enable them to be towed to Norfolk for the balance of their cargoes, and they did so. Upon the arrival of each of these seven vessels there it was found that the stiffening was heating with a steadily rising temperature, and marine surveyors, employed by the masters, having recommended that it be discharged, it was by agreement discharged and sold by the charterers for account of whom it may concern, without prejudice to any claims they and the vessels' owners might mutually have, the one against the other. The vessels were then given new stiffening and loaded with coal, which they carried safely to Rio.

All this resulted in delay, and the owners filed these libels to recover demurrage from the charterers, on the ground that they were liable for loading coal stiffening which was unfit for shipment. The charterers filed answers, denying any liability for demurrage, and cross-libels to recover the expense of discharging the heated stiffening and of replacing it with new stiffening as for ship's account, or, if this claim were not sustained, then to recover contribution from the owner in general average, and in some of the cases for the value of the heated stiffening at destination, less freight and proceeds of sale, and in some of the cases for dispatch money for time saved in loading and discharging. In addition, charterers, who had purchased their coal stiffening, petitioned in their vendors under the fifty-ninth rule (29 Sup. Ct. xlv), as being liable to indemnify them against any recovery by the owners, because of the unfitness of the coal for shipment.

I am referred to no case similar to this. All the charterers contracted with reliable people for coal from pools of good grade for export, which was discharged from the cars into barges, and loaded from the barges alongside the vessels in the usual way, without any objection by the masters. It is the law of this court that charterers are not liable

for concealed defects in the cargo or subject to any implied warranty of its fitness for shipment. *The William J. Quillan*, 180 Fed. 681, 103 C. C. A. 647. The tendency of coal to heat was as well known to the masters as it was to the charterers. If the coal was improperly loaded, as the libelants' experts testify, it was the duty of the masters to object. *Olsen v. U. S. Shipping Co.*, 213 Fed. 18, 129 C. C. A. 607.

[1] I think neither the owners nor the charterers were at fault in respect to the coal, and the question is: When, under these circumstances, do the lay days begin to run? The obligation to load and discharge at the rate of 250 tons a day was not absolute, but conditional. It arose by the terms of the charter party, when the vessels were ready to receive cargo and had given written notice thereof. That they were not ready to receive the balance of the cargo is shown by the refusal of the masters to take it on board until the heated stiffening was discharged and replaced by new stiffening. The lay days did not begin to run at Norfolk until that time. The case of this coal, dangerous to the ship herself, is not at all like delay caused by the decay of fruit cargo or by attachment of cargo stowed under other cargo. I agree that when the vessels were really ready the charterers were at the risk of delay in getting berths, or caused by the government's appropriation of equipment, conditions which existed and were well known to all concerned when the charters were entered into. The cases relied upon by the libelants differ in the material particular that the vessels then in question were ready to load or discharge. *Davis v. Wallace*, 7 Fed. Cas. 182; *Huron Barge Co. v. Turney* (D. C.) 71 Fed. 972; *Empire Transportation Co. v. P. & R. Coal & Iron Co.*, 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623.

[2] I think that, even if the vessels could be regarded, notwithstanding the heated stiffening, as ready to receive cargo, the charterers for another reason would not be liable for demurrage. The charter required them to pay demurrage for each day of detention by their own "default." Generally speaking, "default," as used in this connection, means failure to load or discharge within the agreed time, and not delay caused by the fault of the charterers. In other words, they take the risk of weather delays, strikes, crowded docks, etc. Still exceptions are recognized. In *Crossman v. Burrill*, 179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106, the vessel was ready to deliver and the charterer was ready to discharge, yet the Supreme Court held that he was not liable for demurrage, because his failure to discharge was due to hostilities prevailing in the port. This was held to be not a detention caused by his "default." It is true that the delay in this case was caused by vis major, but the reasoning of the court was not confined to that cause. Mr. Justice Gray, in delivering the opinion of the court said:

"In the case at bar, the defense of vis major, as pleaded in the answer, was that the shipowners were prevented from discharging the cargo, and the charterers were prevented from receiving it, any sooner than they did, by reason of acts of the public enemy, to wit, certain vessels of war, then in the harbor of Rio Janeiro, were engaged in firing upon the forts in the harbor and in making war upon the government of Brazil; that the firing between those ves-

sels and those forts made it impossible to discharge or to receive the cargo from the vessel any sooner than it was discharged or received; and that the detention alleged in the libel was caused by those acts of the public enemy, and not by any default of the charterers. The *vis major*, so pleaded, was, in the words of opinions above cited, a 'superior force, acting directly upon the discharge of the cargo'; 'a direct and immediate *vis major*,' an 'unusual and extraordinary interruption that could not have been anticipated when the contract was made'; 'a sudden and unforeseen interruption or prevention of the act itself of loading or discharging, not occurring through the connivance or fault of the charterers,' and an 'interference on the part of an armed force, preventing the handling or moving of the cargo.' Upon principle, and according to the general current of authority, the detention alleged was not caused by default of the charterers, and did not render them responsible for demurrage, under this charter party."

I think this heating of the coal was not an ordinary vicissitude, but a sudden and unexpected event, acting directly upon the further loading of cargo, without any fault whatever on the charterers' part, relieving them as fully from liability to pay demurrage as did the existence of hostilities in the Crossman Case. It is not at all like the case of cold or rainy or stormy weather, or of delay in getting a berth, or of strikes, all of which are matters of usual occurrence, fairly to be anticipated. Such are the cases relied upon by the libelants. *Southern Transportation Co. v. Unkel* (D. C.) 236 Fed. 779; *New Rupperra Steamship Co. v. 2,000 Tons of Coal* (D. C.) 124 Fed. 937; *Peck v. United States* (C. C.) 152 Fed. 524; *The Olaf* (D. C.) 248 Fed. 807.

The fact that these seven vessels, when only one-third loaded, with 500 to 800 tons of coal of good quality, should all in such a short time, two to three weeks, develop heat, indicating the imminence of spontaneous combustion, was most extraordinary and unprecedented. The proof is clear to this effect. No satisfactory explanation is offered by the libelants' experts why the stiffening coal should have heated, and yet that the vessels should have carried full cargoes of similar coal safely on the long voyage from Norfolk to Rio.

[3] The case seems to me plainly one of general average expenditures. The coal, whose temperature was steadily rising, if left in the vessels, was certain to be destroyed itself, and to injure or destroy them. It was not discharged merely to enable the voyage to be continued, but for the preservation of itself and the vessel from a common danger. The peril was real, certain, common to both, and clearly within the term "imminent," as used in the cases. The necessity of discharging the heated stiffening and of replacing it with new stiffening is admitted by all concerned, and I think it was the duty of the masters to discharge it.

[4] As to the sellers of coal brought in under the fifty-ninth rule, I cannot help saying that no considerations of speed or convenience can justify courts of admiralty in extending their jurisdiction to non-maritime subjects. The sellers of the coal were entitled to have any claim against them for breach of warranty, express or implied, tried before a jury under the Seventh Amendment to the Constitution of the United States. Proceedings to limit liability are like proceedings in bankruptcy, and not at all analogous. At all events, there was no

express warranty, and I think there was no implied warranty, that the coal would not heat.

It follows that there must be a general average adjustment made, and for this purpose the causes will be referred to a commissioner. The claims, for demurrage, if any, and for dispatch money, if any accruing after the vessels were ready to receive cargo, cannot be determined until after the general average adjustment is made, and thereafter the commissioner may report upon these also, considering for the purpose the proofs already taken in the causes. In these important cases, presenting unusual questions, I should prefer that the parties agree upon a commissioner; but, if they do not, I will appoint one when the interlocutory decrees are entered.

The petitions under the fifty-ninth rule (29 Sup. Ct. xlv) as to the sellers of the coal will be dismissed, with costs.

PORTER et al. v. LEDERER, Internal Revenue Collector.

(District Court, E. D. Pennsylvania. July 27, 1920.)

No. 6420.

1. Internal revenue ⌘7—"Capital" defined.

The word "capital" is used in Internal Revenue Act, § 209 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336%j), providing for excess profits tax on a trade or business "having no invested capital or not more than a nominal capital," as meaning money or property, as distinguished from labor or personal service.

2. Internal revenue ⌘7—Excess profits tax; "business having no invested capital."

Act Oct. 3, 1917, § 209 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336%j), providing that, "in the case of a trade or business having no invested capital or not more than a nominal capital," an excess profits tax of 8 per cent. shall be levied on the net income, after allowing certain deductions, in lieu of the tax imposed by section 201 (sec. 6336%b), is intended to include any trade or business in which the return does not come in any substantial part from money or property invested.

3. Internal revenue ⌘7—Excess profits tax; commission firm taxable as business without invested capital.

A partnership engaged in the commission business, in which capital was not required nor used, *held* taxable on excess profits, under Act Oct. 3, 1917, § 209 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6336%j), and not under section 201 (section 6336%b), although in isolated transactions growing out of war conditions they bought and sold.

4. Internal revenue ⌘7—Excess profits tax; undrawn profits not capital.

The fact that the profits of a business having no capital are not wholly withdrawn, but are allowed to accumulate, does not make such profits a capital fund, where they are not employed in the business.

At Law. Action by T. J. Porter and others, copartners as T. J. Porter & Sons, against Ephraim Lederer, Collector of Internal Revenue. Trial without jury. Judgment for plaintiffs.

Prichard, Saul, Bayard & Evans, of Philadelphia, Pa., for plaintiffs.
Charles D. McAvoy, U. S. Atty., of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case, in its general features, is the usual one of a trial without the intervention of a jury and waiver of the right of a jury trial, brought for the purpose of having determined the legality of the tax payment exacted of the plaintiff. The only issue in the cause is the lawfulness of the tax.

[1] The real point involved is whether the assessment of the tax should have been under section 209 of the Revenue Act of October 3, 1917, or under section 201 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 6336³/_{8j}, 6336³/_{8b}). More particularly, the turning point is whether the plaintiffs come under the designation of those who carry on a "business having no invested capital or not more than a nominal capital," or whether they are possessed of "invested capital." The issue raised is in consequence to be determined by a finding of fact, and the acceptance of a definition of "capital" within the meaning of this tax law. This general term is one employed in the discussion of certain phases of the general subject of economics. It is also used as a technical term in practical business and as part of the terminology of the law. As in the case of many words and expressions encountered in the science of economics and in practical business, it has so many different meanings or shades of meaning that its sense can be gathered only from its context.

We must therefore confine our attention to this act of Congress to discover what Congress meant to be expressed by the use of the word. Congress was dealing with the general subject of income, earnings, or, more emphatically, profits. There is a clear line of difference between the source of the return which comes from any of the business activities of life. One such source is the return which flows from the labors of man, either physical or mental, or a combination of both, and that which flows to him because, not of what he is or what he himself does, but because of something of which he is previously possessed. It is an intelligible expression to say of a man that his capacity for labor, or what is called his brains, is his capital; but it is clear that Congress has used this word in no such sense. On the other hand, the situation is an easily conceivable one in which a man has laid out money or other form of property, from which he receives a return without any personal participation on his part in the activities which in the end yield that return. There can be no doubt that such a situation would clearly present the thought of capital in the sense in which Congress has used the term. It is just as easy to grasp the thought of a man making use of both of these two means of receiving something in return. He may mingle or mix the two things together, by both investing capital in an enterprise and loaning to its activities what he himself can supply, aside from his money or other possessions.

[2] We think it to be sufficiently clear that the tax is to be measured by the return, if this element of money or other property is part of the source from which the return comes, and that the lesser rate of assessment is to be followed only in those cases in which money or property plays no part in the source of the income, or such small part as to be practically negligible. This gives us a working idea of what Congress meant by "trade or business having no invested capital or not more than

a nominal capital." The quoted phrase is taken from section 209 of the act.

[3] Our finding is that the trade or business of the plaintiffs is the kind of trade or business which Congress had in mind and described by the phrase we have quoted. Primarily and strictly, the trade or business of the plaintiffs was that of a commission house. They had no capital in any real sense, nor did they require any. If their activities had been confined exclusively to the commission business, we take it for granted that the question now raised would not have arisen. In point of fact the engagement of the plaintiffs with their principals, for whom they sold on commission, exacted of them that they devote their energies exclusively to the service of those for whom they were commission agents. Incidentally and wholly because of the business exigencies presented by and arising out of war conditions, they took up with more or less isolated transactions in which they bought and sold. It could not be said with substantial truth that these transactions were conducted by them as part of any trade or business, although the aggregate of the values involved in these transactions was by no means an inconsiderable sum.

The tax assessed is essentially an excise tax; also in a very substantial sense it is the consideration for the exercise of the privilege of the carrying on of a trade or business. It is not a tax assessed upon or because the party was engaged in one or more transactions of a trading or business character, which are short of justifying the finding that the transactions reached the dignity of carrying on a trade or business; but it is a tax which is assessed because the party is carrying on a trade or business, and is measured by the volume of the business or of the profits resulting therefrom, and, in addition to this, no tax can be assessed under the act of Congress in question, if the transactions or the trade or business were had or carried on without the employment of capital. In the economic sense credit is capital, and in the economic sense it may not be even possible for a person to have transactions of the character of those in which the plaintiffs were engaged without the employment of capital in some form in this broader sense of the term. The fact is, however, and is so found, that in the words of section 209 what they did and the conditions under which they did it present "the case of a trade or business having no invested capital or no more than a nominal capital." The source of the funds constituting the capital is of no importance. Such funds may be available by the profits which have accrued being left to accumulate. If left for the purpose of being used as capital, and being so used, such funds are capital. It is not an uncommon thing for the capital employed in a business to be thus acquired or increased. It was one of the purposes of Congress to reach cases of this kind.

[4] Thus far we are in accord with the argument advanced by defendant. The mere fact, however, that the profits of a business having no capital are not wholly withdrawn, does not make of such undrawn profits a capital fund. Congress has given a clear definition of such capital, or capital derived from this source. When, in addition to profits being left undrawn, the fund thus accumulated is "used or em-

ployed in the business," it is capital within the meaning of the tax law; otherwise, it is not. The profits of the commission business in which plaintiffs were engaged piled up until the fund reached the sum of about \$36,000. This fund, however, was in fact not "used or employed in the business," but, on the contrary, was held and kept intact as the money of the partners.

As we understand this case as presented, it is determined by the findings just made. Judgment is accordingly entered in favor of the plaintiffs and against the defendant, with costs. In order that there may be a definite date of the entry of the judgment for appellate purposes, judgment is not now entered; but the plaintiff has leave to enter judgment for the amount of the tax paid, with interest from date of payment, and costs, we retaining jurisdiction of the cause for the purpose of entering formal judgment, in case of failure of counsel to agree upon the amount of the judgment to be entered in accordance herewith.

The points submitted are answered as in the paper filed herewith.

WELLS et al. v. HONIGMANN.

(Court of Appeals of District of Columbia. Submitted March 12, 1920. Decided June 2, 1920.)

No. 1257.

1. Patents ⚡110—Party held not estopped from making claim by reason of disclaimer.

Parties filing a renewal application after forfeiture of original application were not estopped from making claims in issue by a disclaimer of claims on the original application, where the public or third persons had not come into possession of invention.

2. Patents ⚡87—No abandonment shown.

In an interference proceeding, where a renewal application was filed, held, that there was no proof adduced from which an abandonment, after forfeiture of the original application, could be inferred.

3. Patents ⚡83—Mere issuance of patent during period of forfeiture raises no presumption of abandonment.

The mere issuance of a patent to another will not interfere with the rights of an inventor during the period of forfeiture provided by Rev. St. § 4897 (Comp. St. § 9443), except on the single ground of abandonment as a matter of fact.

Appeal from a Decision of the Commissioner of Patents.

Interference proceeding between Pierson L. Wells and another and Hans Honigmann. From a decision of the Commissioner, awarding priority of invention to the latter, the former appeal. Reversed.

Melville Church, of Washington, D. C., for appellants.

A. S. Pattison, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This appeal is from the decision of the Commissioner of Patents awarding priority of invention to appellee Honigmann. The counts involved in the appeal relate to certain improvements in printing presses. It is unnecessary to set out the counts or explain the invention, since the appeal turns upon questions of law.

The application here involved was filed September 2, 1914, by Frederick W. Hunter and the estate of Pierson L. Wells, deceased. It is a renewal of an application filed by Wells and Hunter December 16, 1907, and allowed September 28, 1912, but which became forfeited March 28, 1913. On December 1, 1914, the Patent Office called to the attention of Wells and Hunter certain claims of a patent issued to Honigmann on October 7, 1913. Wells and Hunter promptly adopted the claims, and the present interference was declared.

Honigmann's alleged date of conception was subsequent to the date of the original Wells and Hunter application. Hence he was ordered to show cause why priority should not be awarded Wells and Hunter on the face of the record. Honigmann responded with a motion to dissolve the interference, on the ground that Wells and Hunter could not make the claims. This motion was denied by the Law Examiner, and, upon final hearing before the Examiner of Interferences, priority was awarded to Wells and Hunter.

An appeal was taken to the Board of Examiners in Chief. But

after argument, and before decision was reached, Honigmann filed a motion for reargument. The case had been submitted upon the single ground of the right of Wells and Hunter to make the claims, but the motion contested their right to make the claims, in view of a disclaimer filed February 8, 1910, of certain claims in the original application, and on the further grounds of abandonment, because the Wells and Hunter application had remained in a forfeited condition for 23 months, and laches, in that Wells and Hunter did not adopt the claims of the Honigmann patent until more than a year had elapsed after the issue of the patent. Reargument was granted, and the board held that Wells and Hunter had a right to make the claims, and that such right was not affected by the disclaimer. On the grounds of abandonment and laches the holding was in favor of Honigmann. On motion of Wells and Hunter, the Commissioner of Patents remanded the case to the Examiner of Interferences to take testimony on the questions of abandonment and laches.

The examiner, on the testimony taken, decided the case adversely to Wells and Hunter on the issues of abandonment and laches. On appeal, the Board of Examiners in chief reaffirmed their previous decision, holding that Wells and Hunter had the right to make the claims and were not barred by the disclaimer or guilty of laches, but affirmed the examiner on the ground that there had been an abandonment between the forfeiture of Wells and Hunter's original application and the filing of the renewal.

On appeal, the Commissioner held that the issuance of the Honigmann patent during the time the Wells and Hunter application remained forfeited amounted to abandonment of their right to give the renewal application the benefit of the filing date of the original application as a date of constructive reduction to practice, and further that they were guilty of laches in not making the claims of the Honigmann patent until 17 months after its issue.

[1] We agree with the tribunals below in holding that Wells and Hunter have a right to make the claims in issue, and that they are not estopped from making the claims of the present issue by the disclaimer of February 8, 1910. The Commissioner, holding the disclaimed claims broader than the counts of the issue, and therefore not a bar, declared:

That the "disclaimed matter is in broader terms than the counts, and although this broad invention might have been made by Wells alone, that does not negative the proposition that the more specific subject of the issue was invented by Wells and Hunter jointly; but, even if the disclaimer had covered the identical invention, that would not prevent Wells and Hunter from recalling and canceling the disclaimer, provided it was done before the public or a third party came into possession of the invention, and as pointed out by the Examiners in Chief Wells and Hunter in filing their preliminary statement, as well as in their act of making these claims, would have set aside the effect of this disclaimer, even if the disclaimer had reached to the subject-matter of the counts, which it did not for reasons before pointed out."

We come now to the more difficult question of forfeiture or abandonment. It appears that Wells and Hunter permitted their application to become forfeited on March 28, 1913. A renewal application was filed September 2, 1914, about 23 months from the date of

the allowance of the original application. Abandonment is predicated upon the delay in filing the renewal, and also upon the fact that the Honigmann patent was issued during the period when the Wells and Hunter application remained forfeited. Section 4897, Rev. Stat. U. S. (Comp. St. § 9443), provides:

"Any person who has an interest in an invention or discovery, whether as inventor, discoverer, or assignee, for which a patent was ordered to issue upon the payment of the final fee, but who fails to make payment thereof within six months from the time at which it was passed and allowed, and notice thereof was sent to the applicant or his agent, shall have a right to make an application for a patent for such invention or discovery the same as in the case of an original application. But such second application must be made within two years after the allowance of the original application. But no person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent was ordered to issue under such renewed application prior to the issue of the patent. And upon the hearing of renewed applications preferred under this section, abandonment shall be considered as a question of fact."

[2] It is clear that Wells and Hunter had 2 years from the date of the allowance of the original application to file a renewal, subject to the single condition of abandonment, which, however, can only "be considered as a question of fact." It is not seriously contended that the evidence discloses any intention on the part of Wells and Hunter to abandon their invention. The original application was forfeited upon the advice of counsel, and during the period of forfeiture one Merrick, who contracted with Hunter and the Wells estate for an interest in the patents to be secured, was engaged in bringing the machine into marketable form. Though Merrick seems to have made slow progress, Hunter and one Watson, on behalf of the Wells estate, were constantly urging Merrick to speedier action. No proof has been adduced from which the intention of abandonment can be inferred.

[3] The tribunals below also based their finding of abandonment upon the fact that during the period of forfeiture Honigmann's patent was issued. Wells and Hunter are here standing upon an affirmative statutory right, of which they cannot be divested, except in a way provided in the statute. In *Cutler v. Leonard*, 31 App. D. C. 297, this court, considering the rights conferred by section 4897, said:

"This right can be taken away only by a finding of abandonment, which, the statute ordains, must be determined as a question of fact. Where an affirmative right is conferred by law, we think a finding of abandonment must be predicated [upon] facts and circumstances warranting such a finding, and not upon mere presumption."

Speaking generally of the rights conferred by Congress upon inventors through the patent statutes, the court, in *United States v. Telephone Co.*, 167 U. S. 224, 17 Sup. Ct. 809, 42 L. Ed. 144, said:

"A party seeking a right under the patent statutes may avail himself of all their provisions, and the courts may not deny him the benefit of a single one. These are questions not of natural but of purely statutory right. Congress, instead of fixing 17, had the power to fix 30, years as the life of a patent. No court can disregard any statutory provisions in respect to these matters on the ground that in its judgment they are unwise or prejudicial to the interests of the public."

This is not the case of a secreted invention brought to light by the issuance of a patent to another, as in *Mason v. Hepburn*, 13 App. D. C. 86. There the first inventor was not protected by an express statutory period, as in the present case. The mere issuance of a patent to another will not interfere with the rights of an inventor during the period of forfeiture provided by section 4897, except upon the single ground of abandonment as matter of fact, which does not appear in this case.

But the Commissioner held Wells and Hunter estopped under our decisions in *Rowntree v. Sloan*, 45 App. D. C. 207, and *Wintroath v. Chapman*, 47 App. D. C. 428. Our position in these cases has been rejected by the Supreme Court in the recent case of *Chapman v. Wintroath*, 252 U. S. 126, 40 Sup. Ct. 234, 64 L. Ed. 491. In these cases we held that, where an original application discloses, but does not claim, matter contained in a later patent, the time for filing a divisional application should be limited to one year by analogy to the time fixed for filing amendments. R. S. U. S. § 4894 (Comp. St. § 9438). This time was extended to 2 years by the higher court, by analogy to other statutes which were regarded as more pertinent.

There was, however, no basis here for the application of the *Rowntree Case*, since the statute (section 4897) expressly gives 2 years within which a renewal application may be filed. Hence there is no room for the rule of analogy. At the date of filing the renewal, less than 2 years had elapsed from the allowance of the original application, and, as abandonment in fact has not been established, Wells and Hunter were well within their statutory rights.

The decision of the Commissioner of Patents is reversed, and the clerk is directed to certify these proceedings as by law required.

Reversed.

FIDELITY & DEPOSIT CO. OF MARYLAND et al. v. N. O. NELSON MFG. CO.

(Court of Appeals of District of Columbia. Submitted March 4, 1920. Decided June 2, 1920.)

No. 3321.

1. Judgment ☞17(1)—No personal judgment on substituted service.

A personal judgment cannot be obtained on substituted service.

2. Equity ☞418—Decree pro confesso on bill for injunction not authorized on service by publication.

A bill by a contractor's sureties against a subcontractor, to restrain defendant from prosecuting an action on the bond pending plaintiffs' suit against the contractor for discovery, sought only personal relief, and decree pro confesso was not authorized on service by publication.

Appeal from the Supreme Court of District of Columbia.

Suit by the Fidelity & Deposit Company of Maryland and others against the N. O. Nelson Manufacturing Company and others. From an order dismissing the bill as to the named defendant, the plaintiffs and a cross-plaintiff appeal. Affirmed.

C. N. Merillat, of Washington, D. C., for appellants.

E. A. Chase, of Washington, D. C., for appellee.

SMYTH, Chief Justice. This appeal turns on the sufficiency of the service of process upon the appellee, N. O. Nelson Manufacturing Company, hereafter referred to as the Nelson Company.

William Dall, one of the appellants, made a contract with the District of Columbia to construct for it a high school, and gave a surety bond for the faithful performance of the contract. In addition to other things, the contract provided that he should pay all persons who furnished him labor or material in the prosecution of the work. Certain parties became subcontractors under him, and secured material and labor from many persons who have not been paid therefor. Among them is the Nelson Company and Standard Regulator Company. The latter commenced an action at law against Dall on his bond for the amount due it. Other actions of a similar nature were begun. Thereupon all those who are appellants here, except Dall, who later became a cross-plaintiff, instituted this suit against Dall, the Standard Company, Nelson Company, and others, and in their bill alleged, on information and belief, that Dall was solvent and entirely able to pay all claims properly chargeable against him on his contract; that their liability was secondary to his, and that they were advised that they had a right to compel him to pay the claims against him. Further, they said that under an act of Congress (28 Stat. 278, as amended by 33 Stat. 811 [Comp. St. § 6923]), which they said governed the case, all matters in controversy should be settled in one suit. They prayed for discovery by Dall; that he be required to pay all claims justly due from him; that the Standard Company, which had commenced suit, be restrained pending the adjudication of this cause from prosecuting further its action at law; and that all the other defendants, including the Nelson Company, be restrained during the same time from instituting similar actions.

An order was passed for service of process by publication on the Nelson Company, and the publication was made. The company did not appear, and a decree pro confesso was entered against it. Later a motion to set aside the order for publication and to quash the service was made and sustained. Thereupon, on its own motion, the court dismissed the bill as to the Nelson Company.

[1, 2] There is no question of a lien on property or of title to property in custodia legis presented by the bill. The relief sought thereby against the Nelson Company is purely personal. It is rudimentary that a personal judgment cannot be obtained legally on substituted service. Speaking of such service, the Supreme Court of the United States has said that it may be sufficient where property has been taken into the custody of the court, or where the object of the action is to reach and dispose of property by enforcing a contract or a lien respecting it, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose.

"In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to

determine the personal rights and obligations of the defendants—that is, where the suit is merely in personam—constructive service in this form upon a non-resident is ineffectual for any purpose.” *Pennoyer v. Neff*, 95 U. S. 714, 727 (24 L. Ed. 565).

Supporting the same proposition are *Grannis v. Ordean*, 234 U. S. 385, 392, 34 Sup. Ct. 779, 58 L. Ed. 1363, *New York Life Ins. Co. v. Dunlevy*, 241 U. S. 516, 521, 36 Sup. Ct. 613, 60 L. Ed. 1140, *Baker v. Baker, Eccles & Co.*, 242 U. S. 394, 403, 37 Sup. Ct. 152, 61 L. Ed. 386, *McDonald v. Mabey*, 243 U. S. 90, 92, 37 Sup. Ct. 343, 61 L. Ed. 608, *L. R. A. 1917F, 458*, *Dexter v. Lichliter*, 24 App. D. C. 222, *Jordan v. Landram*, 35 App. D. C. 89, and *Winfree v. Bagley*, 102 N. C. 515, 517, 9 S. E. 198. No further discussion of the question is necessary.

The judgment of the lower court is right, and is affirmed.

Affirmed.

H. KUHN & SONS, Inc., v. LETTS.

(Court of Appeals of District of Columbia. Submitted May 17, 1920. Decided June 2, 1920.)

No. 1320.

1. Trade-marks and trade-names ⇨43—Intestate “use” contemplated by registration act, is personal use.

The use contemplated by Trade-Mark Act, § 2 (Comp. St. § 9487), providing that an applicant for registration accompany his application by a written declaration that such trade-mark is used in commerce among the several states, is a use by the applicant himself, or by one for him, and not an independent or an incidental use by a third party.

2. Trade-marks and trade-names ⇨43—No interstate trade shown; “interstate business.”

Where parties outside a state wrote to friends in the state and had them purchase clothing from a department store and send it to them, the proprietor of the store was not engaged in interstate business, so as to entitle him to a registration of a trade-mark used on his clothing, under Trade-Mark Act, § 2 (Comp. St. § 9487).

Appeal from the Commissioner of Patents.

Trade-mark interference proceedings between H. Kuhn & Sons, Incorporated, and Arthur Letts. From an adverse decision of the Commissioner of Patents, the former appeals. Reversed and remanded.

Harlan Moore, of New York City, and Wm. F. Hall, of Washington, D. C., for appellant.

C. J. O'Neill, of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a decision of the Commissioner of Patents in a trade-mark interference proceeding involving the mark “American Boy.” Appellant was granted registration of the mark in 1917, on an application filed in 1915, and its use of the mark commenced just prior to the filing of its application.

Appellee is the proprietor of a department store in Los Angeles, Cal., and the testimony clearly shows local use of “American Boy” as a trade-mark long prior to the earliest date claimed by appellant. The

sole question is whether an interstate use has been shown. The evidence on this point tended to show that parties outside California had written to friends or relatives in Los Angeles, and through them had purchased "American Boy" clothing, and that those purchases were shipped by such friends or relatives to their ultimate destination. Aside from vague and unsatisfactory testimony by a representative of appellee's firm, this was the evidence upon which appellee depended to show interstate use.

[1, 2] The Trade-Mark Act (33 Stat. 724, § 2 [Comp. St. § 9487]) requires an applicant for registration to accompany his application "by a written declaration, verified by the applicant, * * * that such trade-mark is used in commerce among the several states, or with foreign nations, or with Indian tribes. * * *" Applicant complied with this provision in the present case by declaring under oath "that said trade-mark is used by him in commerce among the several states of the United States."

Clearly the use contemplated by the statute is a use by the applicant himself, or by some one for him, and not an independent or incidental use by a third party; the reason being that before an applicant is entitled to registration he must show that his business extends beyond the boundaries of his own state or into the territory of an Indian tribe. Appellee's business, so far as the present record shows, was local. That persons outside the state procured appellee's goods in California and had them sent outside that state is beside the question, for appellee was in no way responsible for, and hence could not benefit by, such a transaction. The sale was local, and not interstate. Appellee evidently appreciated the difficulty, for in the Patent Office he requested an opportunity to introduce further testimony "to prove interstate commerce"; but the Commissioner, being of the view that appellee had "fairly proven the interstate use" of the mark, did not deem it necessary to reopen the case.

The decision must be reversed, but in the circumstances, the case will be remanded, with directions to permit appellee to introduce further testimony on the question of interstate use.

Reversed and remanded.

R. H. MACY & CO. v. NEW YORK GROCERY CO.

(Court of Appeals of District of Columbia. Submitted May 17, 1920. Decided June 2, 1920.)

No. 1317.

Trade-marks and trade-names ⇨21—Trade-mark "White Lily," for coffee, canceled on petition of one using mark "Lily White" for tea.

One using "Lily White" as a trade-mark for tea and a large line of groceries was entitled to cancellation of a trade-mark "White Lily," used by defendant for coffee; tea and coffee being used for the same purpose, and the marks being so similar as to be likely to lead to confusion.

Smyth, Chief Justice, dissenting.

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from the Commissioner of Patents.

Proceeding by R. H. Macy & Co. against the New York Grocery Company for the cancellation of a trade-mark. Decision for defendant, and plaintiffs appeal. Reversed.

E. W. Bradford, of Washington, D. C., for appellants.

Benj. P. Fishburne, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This is an appeal from the decision of the Commissioner of Patents, denying the petition of appellants for cancellation of the trade-mark "White Lily" for coffee, registered by appellee company September 18, 1917. Appellants have used "Lily White" as a trade-mark for tea and a large line of groceries since 1895.

The marks are so similar as to be likely to lead to confusion, and the goods, while different in themselves, are used for the same purpose. The case must therefore be reversed, upon the authority of *Walter Baker & Co. v. Harrison*, 32 App. D. C. 272.

The decision of the Commissioner of Patents is reversed, and the clerk is directed to certify these proceedings as by law required.

Reversed.

SMYTH, Chief Justice (dissenting). The single question in this case, as I view it, is whether coffee and tea possess the same descriptive properties. Both tribunals of the Patent Office held that they did not. If Macy & Co. had originated the mark, they undoubtedly would be entitled to the exclusive use of it, because tea and coffee belong to the same general class; but they did not originate it, and therefore, to succeed, they must establish that the articles possess the same descriptive properties. The mere fact that confusion might result, or that the goods are used for the same purpose, is immaterial under the statute. It is only when the marks are "appropriated to merchandise of the same descriptive properties" that the matter of probable confusion becomes important. If the fact that they are used for the same purpose is controlling, then the mark could be extended to milk, or lemonade, or even wine and beer, if they were still on the market. They, as coffee and tea, are beverages. Besides, the statute says nothing about the use to which articles are put, and the court should follow the statute.

Tea, as it appears in the container to which the mark is applied, is a dried, rolled leaf. Coffee is a dried seed or berry. The appearance, taste, and odor of the articles are markedly different. Tea is strongly astringent; coffee is not. The properties by which the one may be described are not the same as those by which the other may be identified. The fact that, in the *Walter Baker Co. Case*, 32 App. D. C. 272, it was held that cocoa and coffee possessed like descriptive properties, does not establish that tea and coffee do.

I think the Patent Office was right, and hence I dissent.

DANIEL v. DRURY.

(Court of Appeals of District of Columbia. Submitted February 6, 1920.
Decided June 2, 1920.)

No. 3303.

1. Brokers §61 (1)—Right to commission for furnishing lender not affected by defective condition of title.

One employed to secure a loan on certain property is entitled to compensation, where he has furnished one ready, able, and willing to make a loan, although no loan is made by reason of the defective condition of the title to the property.

2. Limitation of actions §46 (7)—Statute does not run against broker until proposed lender was furnished.

Statute of limitations did not begin to run against a broker, so as to bar a right of action for compensation, at the date of his contract for services, but at the date of his furnishing a person ready, able, and willing to make a loan as provided by the contract.

Appeal from the Supreme Court of the District of Columbia.

Action by D. H. Roland Drury against T. Cushing Daniel. Judgment for plaintiff, and defendant appeals. Affirmed.

P. H. Marshall and C. H. Merillat, both of Washington, D. C., for appellant.

Webster Ballinger, of Washington, D. C., for appellee.

SIDDONS, Justice (sitting in the place of Associate Justice Robb). This is an action at law brought by the appellee, Drury, against Daniel, the appellant, to recover a commission of \$375 for procuring a loan of \$7,500 to be secured upon certain real estate in the District of Columbia; the claim arising out of the alleged performance by the appellee of certain terms of a written contract, a copy of which is attached to and made a part of the declaration filed by the appellee.

To the first count of the declaration, the appellant pleaded non assumpsit, nil debet, and the statute of limitations; the first count declaring on an express assumpsit. To the second count, which contains the common counts, the appellant pleaded in the same way. Issue was joined on these pleas and the case was tried to a jury.

The record discloses that there was evidence from which the jury would be warranted in finding, as it did: (1) That appellant's brother was authorized by him to enter into the written contract with the appellee, out of which the cause of action arose; (2) that within the time prescribed by that contract the appellee found a person ready, able, and willing to make the loan to the appellant which was the object of the agreement, and so notified the appellant through his brother, the agent, within a week of the date of the contract, which was February 18, 1913; (3) that through said brother of the appellant, he ordered, shortly after February 24, 1913, a title company to examine the title to the property that the appellant was to give as security for the loan as required by the said contract; (4) that on May 7, 1913, the brother

notified the appellee that a good title to the property could not be furnished, and thereupon the proposed lender made other investments of the funds that until then had remained in bank for use in making the loan to the appellant.

[1] This evidence showed performance by the appellee of the stipulations of the contract, on his part to be performed, and entitled him to receive from the appellant payment of the agreed commission, to recover which the present action was brought.

Although ten errors were assigned according to the record half this number only are urged in appellant's brief, and the case was submitted without argument. Of the five discussed in the brief, we deem it necessary to consider but one; the remainder having, we think, no merit. This one, however may be treated as included in assigned errors 1 and 9, and presents the defense of the statute of limitations which was properly pleaded.

[2] These alleged errors rest upon the theory that the appellee's cause of action arose on February 18, 1913, the date of the contract between the parties, and, if this were so, the appellant's motion for a directed verdict should have been granted. But the premise of this contention is plainly a mistaken one, as a cursory examination of the contract clearly shows. That contract is executory in its nature, and required the appellee to procure the loan desired, and notice of the fact to the appellant, within 15 days from its date, and the appellee was then, in the language of the contract, to "cause the title to be examined and for your services thus far in this behalf I agree to pay you a commission of 5 per cent. upon the amount of loan above mentioned." We have already pointed out that there was evidence from which the jury were warranted in finding that the appellee did the things required of him, thus earning the stipulated commission, within the time limit of the contract, and understanding that the action was instituted on February 19, 1916, it was commenced in time by at least five days and probably longer. The defense of limitations thus fails.

Of course, the appellee was not responsible for the defective condition of the title to appellant's property offered as security for the proposed loan, as disclosed by the title company's report, and his right to be paid for the services rendered by him pursuant to the contract was not affected thereby.

The remaining errors pressed upon our attention by the appellant's brief all proceed upon the theory that there was no competent evidence from which a jury should have been permitted to find that the appellee produced a person ready, able, and willing to make the loan desired by the appellant. We have examined the record with care, and find no reversible error in the action of the trial court in these respects, and the judgment appealed from must therefore be affirmed, with costs to the appellee.

Affirmed.

TUPPELA v. CHICHAGOFF MINING CO.

(Circuit Court of Appeals, Ninth Circuit. July 6, 1920. Rehearing Denied September 7, 1920.)

No. 3474.

1. Courts ⚡433—Jurisdiction of Alaskan commissioner in matters of probate and guardianship limited.

The jurisdiction of a commissioner appointed under the laws of Alaska in matters of probate and guardianship is strictly limited, and compliance with all the requirements of the statute is essential to the validity of his acts.

2. Insane persons ⚡65—Sale of property by guardian void.

An attempted sale and conveyance of mining claims owned by an insane person by his guardian appointed under the laws of Alaska, *held* void where the petition for appointment of the guardian was not verified as required by Comp. Laws Alaska 1913, § 1597, no citation was issued and served on filing of the petition for sale of the property, no oath was taken and subscribed by the guardian before sale as required by sections 1756, 1757, and 1760, and other provisions of the statute were not complied with.

3. Insane persons ⚡65—Sale of property without notice void.

No valid order for the sale of property of an insane person can be made *ex parte*, and the fact that the owner is insane is no reason for dispensing with notice, but rather the contrary.

4. Mines and minerals ⚡38(16)—Evidence held to establish ownership of claims.

Evidence *held* to sustain the allegation of a complaint that complainant was owner of a mining claim and of a half interest in other claims claimed by defendant, and entitled to a decree therefor and an accounting for ore taken therefrom by defendant.

5. Mines and minerals ⚡97—Grubstake contract need not specify interest of each party.

It is not essential to the validity of a grubstake contract that it should specifically state the interest of each party thereto, the presumption being, in the absence of provision to the contrary, that the interests of the parties are equal.

Appeal from the District Court of the United States for Division No. 1 of the District of Alaska; Robert W. Jennings, Judge.

Suit in equity by John Tuppele against the Chichagoff Mining Company. Decree for defendant, and complainant appeals. Reversed.

Certiorari denied 254 U. S. —, 41 Sup. Ct. 61, 65 L. Ed. —.

The proper disposition of this appeal necessitates a somewhat full statement of the pleadings and proceedings in the court below. The appellant, who was plaintiff there, by his amended complaint alleged, in substance, that in the year 1914 he and the defendant corporation (appellee here) were co-owners, each owning an undivided half interest, in certain described lode mining claims on the west side of Chichagodd Island, in the Sitka Mining District of the territory of Alaska, known as "Over the Hill," "Rising Sun" "Pacific," and "Golden West," the first of which claims had been patented, and that in the same year the plaintiff was the sole owner of another lode claim similarly situated, called "Porphyry"; that at the same time, and for about five years preceding, the defendant was the owner of a group of mining claims adjoining those above described, through which there ran lodes or veins of gold-bearing quartz of a high grade, which it had been working extensively and

at great profit, and that about the early part of the year mentioned it became known that ore bodies of similar richness and extent extended into and through the claims of the plaintiff; that thereupon the defendant, acting through certain specified agents, for the purpose of defrauding the plaintiff out of his said property, procured its attorney to file, on June 13, 1914, an unverified petition in the probate court at Sitka, Alaska, alleging that the plaintiff had been committed to the asylum for the insane, and praying that some suitable person be appointed guardian of his estate; that the said court fixed June 24, 1914, as the time for hearing the petition and on that day, without any notice whatever of said hearing or proceeding having been served upon the plaintiff, or otherwise as required by law, made a pretended order appointing one Mills as such guardian, which order the plaintiff alleged was wholly void for lack of jurisdiction of the court to make it, and for the reason that the petition therefor was not verified, failed to state jurisdictional facts, and that no notice of the hearing of such petition was ever served upon the plaintiff; that about June 1, 1914, the defendant took exclusive possession of the said alleged property of the plaintiff, in connection with its mining operations, and performed thereon the annual assessment work required by law for holding the same; that the plaintiff from and after June 11, 1914, was an inmate of the Morning Side Asylum, to which he had been committed by an order of the United States commissioner's court, Sitka precinct, during which time the alleged guardian purposely refrained from having any work done on the said mining claims in behalf of the plaintiff, and that thereafter, to wit, during the month of January, 1915, the defendant, through certain named agents, caused to be published a pretended notice to the plaintiff that it had expended \$100 upon each of the said Over the Hill, Rising Sun, Golden West, and Pacific lode claims during the year 1914, and that if the plaintiff, within 90 days after said notice of publication, failed to pay his portion thereof as a co-owner, his interest would become the property of the defendant company; that the said notice was published only 60 days, and that no other or further service of such notice was made; that thereafter the defendant made claim to the entire ownership of the said four lode claims, notwithstanding that the said notice was fraudulent, insufficient in law, and void; that thereafter, and about May 1, 1915, the defendant according to the information and belief of the plaintiff, was advised by its attorney that its pretended claim of title to the plaintiff's half interest in the said claims was void; that thereafter, and in pursuance of the alleged scheme to defraud the plaintiff out of his said property, the defendant procured the plaintiff's said alleged guardian to apply, on or about May 19, 1915, to the said probate court of Alaska, at Sitka, for a license to sell the plaintiff's interests in the said four lode mining claims; that no notice of the hearing of the said application was given as required by law, and that the said alleged guardian had not qualified as such by giving a bond as so required, notwithstanding all which the said court pretended to make, June 28, 1915, an order licensing the said alleged guardian to sell the plaintiff's interest in the said four mining claims, reciting the same to be an undivided half interest therein, and also the plaintiff's entire interest in the said Porphyry lode claim, although no petition had been made for any license to sell the said Porphyry claim; that thereafter, and on October 19, 1915, without giving any bond as required by law, the said alleged guardian pretended to sell at public outcry and strike off to the defendant company for one lump bid of \$1,000 the undivided half interest of the plaintiff in the said Over the Hill, Rising Sun, Golden West, and Pacific lode claims, and the whole interest of the plaintiff in the said Porphyry lode claim; that, as the plaintiff is informed and believes, the said pretended sale was conducted clandestinely before the hour of 9 o'clock in the morning, and pursuant to a previous agreement between the defendant company and the said alleged guardian that the defendant company should acquire the said property for the said sum of \$1,000, and that thereafter, on the said 19th day of October, 1915, the said alleged guardian made a pretended deed, purporting to convey all of the said property of the plaintiff to the defendant company in consideration of the sum of \$1,000, which sum the defendant and the said

alleged guardian well knew was a wholly inadequate consideration for the said property, which was then well worth more than 500 times that sum, as the defendant company and the said alleged guardian then well knew, for all of which reasons the said pretended sale was and is wholly void notwithstanding which the defendant has ever since excluded the plaintiff from the possession and use of his said property, claiming the same under said proceedings, thereby casting a cloud upon the plaintiff's title thereto; that thereafter, and on the 3d day of January, 1919, the defendant procured a patent to be issued by the government to the said Over the Hill lode claim in its own corporate name, the title to which, so conveyed, it holds in trust to the extent of an undivided one-half for the plaintiff.

The amended complaint further alleged that some time prior to the year 1915, the exact time being to the plaintiff unknown, the defendant had driven its main working tunnel through its own claim and into the claims owned by the plaintiff, as alleged, and ever since has been, and is now, engaged in extracting therefrom many thousands of tons of rich, gold-bearing ores, reducing the same in its plant and appropriating to its own use the proceeds thereof, and threatening and intending to continue so to do unless restrained by the court; that the ores so being mined and extracted from the claims of the plaintiff are being mined and extracted by means of a tunnel having its portal on its own ground, but which penetrates into plaintiff's ground about 5,000 feet from the portal, and at great depth, the facts concerning which are only fully known to the defendant, but that, according to the information and belief of the plaintiff, the gold extracted from such ores and appropriated by the defendant exceeds \$5,000 per day in value; that the defendant has no other property than the said mine, and that as soon as the same is exhausted it will be without any property out of which a judgment against it can be collected. The prayer was for injunctive and other appropriate relief.

The amended answer of the defendant to the amended complaint, in addition to various admissions, denied that the plaintiff owned any interest in the Over the Hill, Pacific, Rising Sun, or Golden West claims, and denied that the plaintiff owned in 1914 any interest in the Porphyry lode claim. It put in issue all of the allegations of fraud on the part of the defendant made by the plaintiff, and while admitting that the probate court at Sitka appointed W. P. Mills guardian of the plaintiff's estate on June 24, 1914, denied that the court was without jurisdiction to make the order, and alleged that notice of the hearing of the petition therefor was duly given according to law. The answer admitted the performance by the defendant of the annual assessment work required by law upon the Over the Hill, Rising Sun, Golden West, and Pacific lode claims during the year 1914, and admitted that the defendant published the notice required by law to the plaintiff and all others interested in the property, that it had expended the sum of \$100 upon each of those claims during the year mentioned. It denied that it procured the guardian to apply to the probate court for a license to sell any of the plaintiff's property, and denied that the guardian intentionally refrained from having work done on the said Over the Hill, Rising Sun, Golden West, and Pacific lode claims on plaintiff's behalf. It alleged that the said guardian duly applied to the probate court at Sitka in June, 1915, for an order to sell all of the property belonging to the plaintiff, and that the said property was sold at public auction in the manner prescribed by law on October 19, 1915, at which sale the defendant bid and paid the sum of \$1,000 for all of the interest of the plaintiff in each of those claims. It denied that the sale was conducted clandestinely and before the hour of 9 o'clock in the morning, or that the defendant had any understanding regarding the price of the property, admitted the making of a valid and sufficient deed by the guardian to the defendant of all of the interest of the plaintiff in each of the said claims in consideration of the sum of \$1,000 paid therefor, which the defendant denies was inadequate, and admitted that ever since that time the defendant has excluded the plaintiff from the possession or use of the Pacific, Rising Sun, and Over the Hill claims, and that for the Over the Hill claim it procured a patent in its own corporate name, and of which claim it alleges it was the sole owner. The answer also

put in issue the allegations of the amended complaint respecting the driving of any tunnel into any claim owned by the plaintiff, or the extraction or appropriation of any gold or gold-bearing ores from any property of the plaintiff, and respecting any threats of the defendant so to do.

And as a first affirmative defense the defendant alleged, among other things, that the Pacific lode claim was located by William R. Hanlon October 24, 1907, and the Golden West claim July 22, 1910; that the Over the Hill claim was located in March, 1906, by H. A. Bauer, and the Rising Sun claim by the plaintiff July 22, 1910. As to the Golden West and the Porphyry claims, the defendant disclaimed any interest, but alleged that on February 12, 1913, Hanlon, for a valuable consideration, sold his interest in the Pacific claim to the defendant, since which time the defendant has been the sole owner thereof and in the sole and undisturbed possession of it; that on December 9, 1915, Bauer, who was then the sole owner of the Over the Hill claim, sold all of his interest therein to the defendant, since which time the defendant has been the sole owner of the claim and in the sole and undisturbed possession thereof, and for which it subsequently procured a patent from the United States; that prior to June 14, 1914, the plaintiff was adjudged insane by the probate court of Sitka precinct, territory of Alaska, by which court W. P. Mills was, on the 24th day of June, 1914, duly and regularly appointed guardian of the estate of the plaintiff, and duly qualified as such, and that the interest of the plaintiff in the Rising Sun claim thereby became lawfully vested, on October 19, 1915, in Mills as such guardian, on which last-mentioned day, pursuant to an order of sale duly and regularly made by that court, Mills, as such guardian, sold and conveyed all the interest of the plaintiff in the Rising Sun and Porphyry lode claims to the defendant, which sale was on the same day duly confirmed by the court, since which time the defendant has been the sole owner and in the exclusive possession of the said Rising Sun and Porphyry claims.

As further affirmative defenses the defendant alleged, among other things, that at the time of the conveyances from Hanlon, Bauer, and the guardian the Over the Hill claim was considered of no value, but that 18 months after the execution of the deed by the guardian the defendant, at great cost, discovered a body of ore in it, which the defendant since December, 1917, has paid out large sums in developing and mining; that on the day last mentioned the plaintiff, having been fully cured and having regained his reason, was discharged from the asylum, at which time, and for a long time prior thereto, he knew and understood that Mills, as guardian of his estate, had sold and conveyed all of his interest in the Over the Hill claim to the defendant, and that the defendant was expending large sums of money in the development thereof, notwithstanding which knowledge the plaintiff failed and neglected to assert any right in the Over the Hill claim, but purposely waited for a period of 17 months before bringing the present suit or asserting any claim to the property, which delay was for the sole purpose of inducing the defendant to expend large sums of money in the development of the property, thereby estopping the plaintiff from claiming any right or interest therein.

Replying to the first affirmative defense, the plaintiff admitted that the Pacific and Golden West claims were located by Hanlon and the Rising Sun by the plaintiff at the respective dates alleged by the defendant, but denied that the Over the Hill claim was located by Bauer, and alleged that it was located by the plaintiff, Charles Peterson, and W. R. Hanlon on the 26th day of March, 1908; admitted that on February 12, 1913, Hanlon sold all his interest in the Pacific claim to the defendant, but denied that the latter since that date or at any other time has been or is the sole owner of the Pacific claim, or of any greater interest than an undivided one-half interest thereof; it denied that Bauer was on December 9, 1915, the sole owner of the Over the Hill claim, or any interest therein, although admitting that on December 9, 1915, Bauer executed a quitclaim deed of the Over the Hill claim to the defendant.

For further reply to the affirmative defense of the defendant the plaintiff alleged that prior to 1911 he acquired from Hanlon an undivided interest in the Pacific claim and that during the years 1911 and 1912 and to February

12, 1913, Hanlon and the plaintiff were in the joint possession and jointly claimed it and maintained their right of possession thereto; that in 1912 Hanlon failed to perform his part of the assessment work thereon, which, however, was performed by the plaintiff; that thereafter, and prior to February, 1913, the plaintiff notified Hanlon of that fact, and that unless he contributed his part thereof his interest in the claim would be forfeited to the plaintiff; that Hanlon failed to contribute his part of such assessment work, and that his interest in the claim would have become forfeited to the plaintiff, but that the defendant, as successor in interest of Hanlon, in March, 1913, paid the amount due from him to the plaintiff; that the Over the Hill claim was located March 26, 1906, by the plaintiff, Hanlon, and Peterson, who were on that day prospecting together under a "grubstake" agreement with Bauer to jointly and equally share all locations made by either; that plaintiff, Peterson, and Hanlon jointly made discovery upon the Over the Hill claim, and jointly marked the boundaries thereof, but at the request of Hanlon the location notice was posted thereon in the name of Bauer, but with the distinct agreement that the claim should be owned by the plaintiff, Hanlon, Peterson, and Bauer in the proportion of one-fourth each, which agreement was ratified and approved by Bauer; that thereafter, to wit, January 10, 1907, Peterson sold and conveyed his quarter interest to Bauer, who thereupon became the owner of one-half of said claim, but continued to hold the remaining one-half in trust for Hanlon and the plaintiff; that the plaintiff and Hanlon for the years 1909, 1910, and 1911 performed all the assessment work upon the said claim, Hanlon performing one-fourth thereof, the plaintiff performing the remaining three-fourths, the said Bauer failing and refusing to perform any of the said assessment work or to contribute to the same; that in the year 1912 Hanlon and the plaintiff gave due notice to Bauer of the performance of the said work on the Over the Hill claim, and that unless he paid his part thereof within 90 days his interest therein would be forfeited to his co-owners; that Bauer refused to pay, admitted and acquiesced in such forfeiture, and abandoned all further claim to the Over the Hill claim, and during the years 1912, 1913, 1914, and 1915 failed and neglected to perform or offer to perform, or to pay or offer to pay, any part of the assessment work on said claim, well knowing during all of that time that his former interest was being claimed under the said forfeiture proceeding, and that his successors in interest thereunder were on the faith thereof performing the assessment work necessary to hold and maintain the claim, by reason of which Bauer and the defendant are estopped to assert any claim to that property adverse to the title obtained by the plaintiff and Hanlon under the said forfeiture proceedings; that on February 12, 1913, Hanlon quitclaimed to the defendant an undivided half interest in and to the Pacific, Over the Hill, Rising Sun, and Golden West claims, and that as soon as the plaintiff learned of that quitclaim deed, to wit, in March, 1913, he informed the defendant of all of the facts above stated, and that Hanlon did not own an undivided half interest in the Over the Hill claim, and never at any time owned a half interest therein, and that he owned no interest in the Rising Sun claim, but that because of the confusion and uncertainty of the record title of some of the said claims, and to avoid litigation, it was then and there agreed between the plaintiff and the defendant that the said Over the Hill, Pacific, Rising Sun, and Golden West claims should thereafter be held and owned in common by the plaintiff and the defendant, in the proportion of one-half each, and that during that year, and until June 4, 1914, the plaintiff and the defendant were in the joint possession of the said claims, claiming and holding the same as equal co-owners, and that no other person had or asserted any interest therein; that during the said year the defendant performed the assessment work upon the Pacific claim, for the joint use and benefit of the plaintiff and the defendant, and at the special request of the defendant the plaintiff performed the annual assessment work upon the Over the Hill, Rising Sun, and Golden West claims for the joint use and benefit of the plaintiff and the defendant, and that the defendant is now estopped from asserting and claiming that the plaintiff was not a co-owner with the defendant in and to said claims during the years 1913 and 1914.

In his reply the plaintiff further alleged that he is an uneducated prospector, not familiar with the laws relating to the acquisition of title to mining claims, and did not suppose it was necessary in order to perfect his right to obtain a quitclaim deed or other conveyance from Bauer at the time he expressly acquiesced in the forfeiture alleged; that on December 9, 1915, the defendant, being desirous of applying for a patent to the Over the Hill claim, and knowing the condition of the record title thereto, obtained from Bauer a quitclaim deed therefor for a nominal consideration, well knowing that Bauer had no interest therein, which deed was, as a matter of law, obtained for the joint use and benefit of the plaintiff and the defendant, the actual and real owners of the said claim; that from the dates of the respective locations of the Over the Hill, Pacific, and Golden West claims until February 12, 1913, the plaintiff was in joint possession thereof with the persons in whose names said claims were located, claiming the interest therein specifically set out: that his ownership of such interest was at all times recognized and admitted, and that during all of said times plaintiff duly performed his part of the annual work necessary to preserve their possessory rights under the mining laws; that from February 12, 1913, until October, 1915, he was in joint possession of the said claims with the defendant, the latter recognizing and admitting his right and title as an equal co-owner, and accepting the benefit of his labor thereon for the purpose of holding the said claims and preserving the possessory rights thereto under the mining laws, until he was sent to the asylum in June, 1914; that the defendant never asserted any right adverse to the plaintiff's half interest in and to the said claims until it made the pretended purchase from his guardian in October, 1915, by reason of all which the defendant is estopped from asserting or claiming that the plaintiff was not such co-owner with it in the said claims from and after February 12, 1913, to October, 1915.

In his reply the plaintiff admitted that at least as early as April, 1917, the defendant discovered a large body of ore in the Over the Hill claim, since which time it has been mining the same, and alleged that whatever moneys defendant may have expended in developing said claims and in procuring patents therefor have long since been fully repaid out of the gold extracted therefrom, and that there is due and owing the plaintiff from the defendant upon an accounting therefor a sum exceeding \$500,000, after allowing it all proper charges for its expenditures. The reply contained other allegations, the substance of some of which has already been stated in the foregoing, the remainder of it being unnecessary to insert.

There was much evidence given in behalf of the respective parties, and four special issues of fact submitted by the court to a jury impaneled in the case, with its answers thereto, followed by findings of fact made by the court, upon which a decree was entered dismissing the bill of complaint, with costs to the defendant.

John H. Cobb and John R. Winn, both of Juneau, Alaska, for appellant.

Overton G. Ellis and Robert E. Evans, both of Tacoma, Wash., and H. L. Faulkner, of Juneau, Alaska, for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] For a number of reasons we are of the opinion that upon the record it is impossible to sustain the decree appealed from, first, because the attempted sale and purchase of the complainant's property under and by virtue of the guardianship proceedings was wholly null and void. Chapter 79 of the Compiled Laws of the Territory of Alaska (1913) contains certain general provisions respecting the administration of estates, among which is section 1595, which is in part as follows:

"The commissioners appointed in pursuance of this act and other laws of the United States have jurisdiction within their respective precincts, subject to the supervision of the district judge, in all testamentary and probate matters; that is—

"First. To take proof of wills.

"Second. To grant and revoke letters testamentary, of administration, and of guardianship.

"Third. To direct and control the conduct and settle the accounts of executors, administrators, and guardians. * * *

"Seventh. To take the care and custody of the person and estate of a lunatic or habitual drunkard and to appoint and remove guardians therefor; to direct and control the conduct of such guardians and to settle their accounts. * * *

Sections 1596 and 1597 of the same chapter are as follows.

"Sec. 1596. There are no particular pleadings or forms thereof in proceedings before commissioners when exercising the jurisdiction of probate matters, as specified in the section last preceding, other than as provided in this chapter.

"Sec. 1597. The mode of proceeding is in the nature of a suit in equity as distinguished from an action at law. The proceedings are in writing, and are had upon the application of a party or the order of the court. The court exercises its powers by means of—

"First. A citation to the party;

"Second. An affidavit or the verified petition or statement of a party;

"Third. A subpoena to a witness;

"Fourth. Orders, judgments, and decrees;

"Fifth. An execution of warrant to enforce them."

In chapter 88 of the same Laws, under the title "Of Guardians and Wards," is section 1720, which reads as follows:

"The commissioner for each precinct, when it shall appear to him necessary or convenient, may appoint guardians to minors and others being inhabitants or residents in such precinct, and also such as shall reside without the district and have any estate within the same."

The section last quoted is the same as section 888 of Carter's Ann. Code Civ. Proc., upon which the decision of this court in the case of *Martin et al. v. White*, 146 Fed. 461, 76 C. C. A. 671, was largely based.

By section 1723 of chapter 88 every such guardian is required to give bond, with surety or sureties, to the United States, in such sum as the commissioner may order, with certain specified conditions, including the requirement that he should make a true inventory of all of the real and personal property of the ward that should come to his possession or knowledge, and return the same to the commissioner within a stated time, and should dispose of and manage all of such estate according to law and the best interests of the ward, and should render an account under oath of all such property, and of his management and disposition thereof, within a prescribed time, and at the expiration of his trust should settle his accounts with the commissioner and pay over the amounts remaining in his hands to the person or persons adjudged entitled thereto.

By section 1734 it is provided that every guardian appointed under the provisions of chapter 88 shall pay all just debts due from his ward out of his personal estate if sufficient, and, if not, then out of his real estate, upon obtaining a license for the sale thereof as provided by law; and, by the next section, that, in the event the income and profits from

the estate of the ward be insufficient for his comfortable and suitable maintenance and that of his family, the guardian may sell the real estate upon obtaining a license therefor, as provided by law.

By section 1755 it is declared that—

"In order to obtain a license for such sale the guardian shall present to the commissioner of the precinct in which he was appointed guardian a petition therefor, setting forth the condition of the estate of his ward and the facts and circumstances under which it is founded, tending to show the necessity or expediency of such a sale which petition shall be verified by the oath of the petitioner."

Sections 1756, 1757, 1758, 1760, and 1761 are as follows:

"Sec. 1756. If it shall appear to the commissioner from such petition that it is necessary or would be beneficial to the ward that such real estate or some part of it should be sold, he shall thereupon make an order directing the next of kin of the ward and all persons interested in the estate to appear before him at a time and place to be therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why a license should not be granted for the sale of such estate.

"Sec. 1757. A copy of such order shall be personally served on the next of kin of such ward, and on all persons interested in the estate, at least ten days before the hearing of the petition, or shall be published at least three successive weeks in a newspaper circulating in the district, to be specified by the commissioner.

"Sec. 1758. No such license shall be granted for the sale of any real estate of a ward, excepting that of a minor, unless the commissioner of the precinct of which the ward is an inhabitant shall certify in writing his approbation of the proposed sale."

"Sec. 1760. Such guardian shall also, before fixing on the time and place of sale, take and subscribe an oath before the commissioner or some other officer competent to administer the same, in substance as follows: That in disposing of the estate which he is licensed to sell he will use his best judgment in fixing the time and place of sale, and that he will exert his utmost endeavors to dispose of the same in such manner as will be most for the advantage of all persons interested therein.

"Sec. 1761. He shall also give public notice of the time and place of sale and shall proceed therein in like manner as is prescribed for executors and administrators; and the evidence of giving such notice may be perpetuated in the same manner and with the same effect as is provided in the case of sales of real estate by executors and administrators."

That the court of the commissioner is one of limited jurisdiction, and a compliance with the requirements of the statute is essential to vest any jurisdiction in it, was expressly held by this court in the similar case of *Martin et al. v. White*, supra, decided June 20, 1906. See the numerous authorities there referred to, which it is unnecessary to again cite.

In principle, an apt illustration will be found in the decision of the Supreme Court of California in 1882, in the case of *Stevenson v. Superior Court of City and County of San Francisco*, 62 Cal. 60, where the question was whether the court in which was had administration upon the estate of a man supposed to have been dead, but who subsequently and after the administration had been closed appeared and moved the entry of an order vacating and annulling the proceedings, rightly granted the motion and entered the order. In sustaining that action of the trial court the Supreme Court of the state held that while it is true that the court of probate, before issuing letters of administra-

tion, must first determine affirmatively the question of death, the subsequent showing of the fact that the man was all along alive established the nullity of the entire proceedings because of the lack of the essential "subject-matter" for the jurisdiction of any court; citing among other cases that of *Griffith v. Frazier*, 8 Cranch, 23, 3 L. Ed. 471, where Chief Justice Marshall said:

"Suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction."

Mr. Justice McKee in his concurring opinion in *Stevenson v. Superior Court*, after making reference to a number of decisions not mentioned in the principal opinion, continued on page 65 of 62 Cal.:

"I know of no case opposed to the doctrine of those cases except it be the case of *Roderigas v. East River Savings Institution*, 63 N. Y. 460. In that case the Supreme Court of New York held that money paid to the administrator of a supposed decedent could not be recovered back although it appeared that at the time of issuing the letters of administration the party was not dead. But in *Lavin v. The Emigrant Industrial Savings Bank*, 18 Blatch. 1, in the Circuit Court of the United States for the state of New York, it was decided that that case had no support elsewhere in the authorities of the English or American courts. A living person, says the court, cannot be concluded by a surrogate's decision that he is dead. As to him, such a decree is absolutely void, and he may claim his property as taken from him 'without due process of law.'"

[2] Applying the law as declared by this court in the case of *Martin et al. v. White*, supra, and in the other cases above referred to, the essential point of all of which is that there must be a subject-matter for the exercise of jurisdiction, and a substantial compliance with the provisions of the statute in order to deprive any one of his property by virtue of it, we think it perfectly clear that the proceedings under which Mills, as guardian of the appellant, Tuppela, undertook to sell and convey his interest in the Over the Hill, Rising Sun, Pacific, Golden West, and Porphyry claims, were absolutely void. As to the one last mentioned, the petition did not even ask for its sale or make any reference to it.

As has been shown, section 1597 of the Code of Alaska expressly requires the petition for the appointment of a guardian to be verified and all of the proceedings to be in writing.

Turning to the record, it is seen that the fundamental step in those proceedings—the petition for the appointment of a guardian—lacked the essential verification required by the statute. Furthermore, the record shows that the only attempt of the petitioner to comply with one of the first requirements of the statute authorizing the court to exercise

the power conferred upon it, to wit, the giving of "a citation to the party," was the following:

"In the Matter of the Appointment of a Guardian for John Tuppela, an Insane Person—Notice of Hearing.

"The petition of A. G. Shoup, guardian ad litem for said John Tuppela, an insane person, having been heretofore filed in this court, notice is hereby given that hearing will be had in the said matter in the office of the commissioner at Sitka, Alaska, at the hour of ten o'clock in the forenoon of the 24th day of June, 1914.

"Dated at Sitka, Alaska, this 13th day of June, 1914.

"[Signed] R. W. De Armond, Commissioner and Ex Officio Probate Judge."

It is true that on the trial it was admitted that the appellant was duly and regularly adjudged insane on the 4th day of June, 1914, by the same commissioner, and that at the time of the application for the appointment of a guardian of his estate he was confined in the Morning-side Hospital for the Insane at the city of Portland, state of Oregon. But we think it is too plain for argument that those facts have no bearing whatever upon the question as to the lack of the essential verification of the petition for the appointment of a guardian of his estate.

[3] Moreover, while the statute does not in terms provide for notice of the petition, the proceedings are, as said by the Supreme Court of Indiana in the case of *Martin v. Motsinger*, 130 Ind. 555, 558, 30 N. E. 523, 524, cited with approval by this court in *Martin v. White*, 146 Fed. 466, 76 C. C. A. 676, of "such a character that they cannot be ex parte and be valid. If the statute was to be construed as authorizing proceedings of an ex parte character, it would be, to that extent, in conflict with the Constitution of the United States and void."

It is not pretended that prior to the making of the order appointing Mills guardian of the appellant, or prior to the making by him of the attempted sale in question, nor, indeed, prior to November 15, 1919 (more than five months after the commencement of the present suit), was there any order of record, or any order even in writing directing the service upon the appellant, or upon any one else, of notice of the application for the appointment of Mills as such guardian. But the record shows that on the day last mentioned, to wit, November 15, 1919, the commissioner entered an order as of date June 13, 1914, directing that notice of the hearing of the application for the appointment of a guardian of the estate of appellant "be given by posting three copies of notice of hearing, signed by said commissioner and ex officio probate judge, in three conspicuous places in the town of Sitka, for a period of 10 consecutive days next prior to said date of hearing," to wit, June 24, 1914, at 10 a. m., at the office of the commissioner and ex officio probate judge in Sitka. But since that nunc pro tunc order shows upon its face, and, indeed, embodies an express finding of fact to the effect that the order directing the service of such notice was an *oral* order, which the statute, as has been shown, expressly required to be *in writing*, nothing more need be said to show that it was wholly ineffectual to remedy a second fatal defect existing in the first and fundamental step in the proceedings in question.

Other fatal defects in those proceedings may be briefly referred to.

They are a failure to show a compliance with the provisions of section 1756 of the statute, which, as has been seen, provides that should it appear from the petition that it is necessary or would be beneficial to sell the whole or part of the real estate of the ward, the commissioner, by an order, should direct the next of kin and all persons interested in the estate to appear before him at a specified time and place, not less than four nor more than eight weeks from the time of making the order, to show cause why a license for such sale should not be granted; with the provision of section 1757, requiring such order to be personally served on the next of kin and all persons interested at least 10 days before the hearing of the petition, or published in a prescribed way; with the provision of section 1758, expressly declaring that no such license shall be granted unless the commissioner shall certify in writing his approbation of the proposed sale; with the provision of section 1760, declaring that the guardian before fixing the time and place of sale shall take and subscribe an oath in substance that he will use his best judgment in fixing the time and place of sale, and will exert his utmost endeavors to dispose of the property to the best advantage of all persons interested; and with the provision of section 1761, declaring that he shall give public notice of the time and place of sale, and proceed otherwise as is prescribed for executors and administrators.

It cannot be doubted that the appellant was at least one of the persons interested in his own estate. The suggestion that because he was then insane no benefit to him could result from giving him notice is well answered by the Supreme Judicial Court of Massachusetts in the case of *Allis v. Morton* and another, 4 Gray's Rep. 63, 64, where that court said:

"To say one is insane, and therefore need not be notified, is to decide the question before it is tried. Nor would the existence of insanity be a good reason for dispensing with the notice. A man may be insane so as to be a fit subject for guardianship, and yet have a sensible opinion and strong feeling upon the question who that guardian shall be. And that opinion and feeling it would be the duty as well as the pleasure of the court anxiously to consult, as the happiness of the ward and his restoration to health might depend upon it. But if the party is wholly demented, yet there are always friends interested in the question, and whom the notice might reach; and the very fact of his incapacity to take care of himself furnishes a sound reason for caution and publicity in all the steps taken."

[4] The appellee having by its answer disclaimed any interest in both the Porphyry and Golden West claims, it is only necessary to inquire into the proof regarding the interest of the appellant in the Pacific, Rising Sun, and Over the Hill claims.

The evidence shows without conflict that the Pacific claim was located by one Hanlon October 24, 1907, who thereafter, and prior to February 12, 1913, conveyed an undivided one-half thereof to the appellant, and on the day last mentioned conveyed the other undivided one-half to the appellee, leaving the appellant and the appellee the owners in equal parts of the whole of that claim.

The evidence also shows without conflict that the Rising Sun claim was located by the appellant July 22, 1910, and that he performed the assessment work thereon for the years 1911, 1912, and 1913, an undi-

vided one-half of which claim Mills undertook as guardian to sell and convey to the appellee by his deed of October 16, 1915, as part of the void proceedings above referred to.

The ninth finding of fact made by the court respecting that claim is as follows:

"That the Rising Sun lode mining claim was discovered, staked, and located by the plaintiff, John Tuppela, on July 22, 1910, and location notice in the sole name of John Tuppela was duly filed and recorded according to law, and the said John Tuppela was the sole owner of said claim until October 16, 1915; and that he now is the owner of an undivided one-half interest in said Rising Sun claim, which said one-half interest was not embraced in the property conveyed by said guardian."

The conclusion of law drawn by the court based upon its findings of fact (hereinafter more specifically referred to) is as follows:

"That plaintiff has no right, title, or interest in or to any of the claims named in said complaint save and except an undivided one-half interest in the claim known as the Rising Sun, which said half interest was not involved in this case, and is not entitled to any equitable relief, and that the complaint be dismissed, with costs."

It therefore appears that the court itself found the fact to be that the plaintiff was the owner of the entire interest in the Rising Sun claim if the attempted conveyance by the guardian of the undivided half thereof to the appellee company was void and of no effect. Erroneously holding it valid, the court drew the further erroneous conclusion that the other undivided half of the claim was not involved in the suit.

Regarding the remaining claim—the Over the Hill—it is undisputed that it was located March 26, 1906, in the name of H. A. Bauer; but it was and is contended by the appellant that the location was made under and in pursuance of what is commonly known among miners as a "grubstake" agreement for the equal benefit of Bauer, W. R. Hanlon, Charles Peterson, and the appellant, Tuppela. The record shows the notice of location to have been signed thus:

"Locators:

"H. A. Bauer,

"Per agent, Wm. R. Hanlon.

"Wm. R. Hanlon,

"Agent for H. A. Bauer.

"Witnesses:

"Chas. Peterson."

Evidence having been given on that controverted question, the trial court submitted to a jury four certain issues of fact bearing on it, which, together with the answers of the jury thereto, are as follows:

"Question No. 1: Did Tuppela have a meeting with Bauer and Hanlon on the steamer 'Cottage City' in the fall or winter of 1905, as testified to by him and denied by Bauer and Hanlon?

"Answer: Yes.

"Question No. 2: What, if anything, was said or done by Bauer at that meeting, or in Bauer's presence, which would lead a reasonable man to believe that Tuppela was to have any particular, i. e., specific interest in what might be located?

"Answer: Grubstake understanding arrived at.

"Question No. 3: What interest was Tuppela to have in mining claims located pursuant to the terms agreed upon at such meeting?

"Answer: Unable to answer.

"Question No. 4: Did Tuppela, pursuant to such terms, assist in the discovery and location of the Over the Hill claim?

"Answer: Yes.

"(Be sure to answer question No. 1, but, if you answer question No. 1 in the negative, you need not answer questions Nos. 2, 3, or 4.)

"T. E. P. Keegan, Foreman."

The verdict of the jury upon the issues submitted to it does not appear from the record to have been expressly set aside, but was disregarded, and the facts found to be otherwise in the following subsequent and further findings of fact made and filed by the court:

"III. That thereafter (to wit after appellee's attempted purchase from the guardian), learning that H. A. Bauer claimed to own the mining claim known as the Over the Hill, defendant, for a valuable consideration, obtained the said Bauer's title, or supposed title, as hereinafter stated, and thereafter, believing it had acquired all adverse interests, or supposed adverse interests, duly and regularly applied for, and on January 3, 1919, obtained, a patent from the United States for the said Over the Hill claim. Said Bauer's title to said claim was as set forth in finding IV immediately succeeding.

"IV. That in the winter of 1905-1906 one W. R. Hanlon was employed by the said H. A. Bauer to prospect for, discover, and locate lode mining claims for, and in the name of, said Bauer, said Bauer undertaking to pay the wages of said Hanlon and his necessary assistants to be selected by Hanlon and all other costs and expenses of said undertaking; that, in pursuance of said employment, the mining claim called the Over the Hill was duly discovered and located by the said Hanlon for and in the name of said Bauer, and the location notice of said claim was duly and regularly recorded; the ground embraced in said Over the Hill claim is substantially the same mining ground as that embraced in the Sea Foam, which had been previously discovered, staked, located, and recorded by the said Hanlon for and in the name of one Bernard Hirst, who had abandoned the same; that there was no agreement of any kind by which plaintiff, or any one except Bauer, was to have any interest in, or aliquot part of, said Over the Hill claim, and that as a matter of fact plaintiff never did have any interest whatsoever in or to said claim, but that he, nevertheless, claimed to have an interest therein; that said mining claim was of a purely speculative value, and said Bauer, being a mining promoter and desiring to promote a corporation for the purpose of placing upon the market said claim and other claims of which he was the owner, took from plaintiff the power of attorney marked 'Exhibit G' in this case, not intending, however, thereby to acknowledge, and not thereby acknowledging, that said plaintiff did in fact have any interest in said claim to convey or deal with.

"V. That, in ignorance of the true state of the title of said claim, defendant paid to said W. R. Hanlon a certain consideration for a supposed half interest therein, and was informed that plaintiff herein was the owner of the other half interest, which said other half interest, or supposed half interest, defendant acquired, or attempted to acquire, at the guardian's sale heretofore mentioned.

"VI. That on the 9th day of December, 1915, said H. A. Bauer, for a valuable consideration, sold, set over, transferred, and assigned unto the defendant all his right, title, and interest in and to said Over the Hill claim. Said purchase was made in aid of the said purchase or supposed purchase, at guardian's sale, and was not for the protection of any tenancy in common, or supposed tenancy in common."

In the opinion accompanying the findings of the court it is stated that, assuming the plaintiff's testimony regarding the making of the

"grubstake" agreement to be true, it "lacked the fundamental requirement which must exist before what is called a 'grubstake' agreement can be enforced as a resulting trust, to wit, an agreement for a specific aliquot part."

And again the judge says in his opinion:

"I cannot find that the evidence even preponderates (to say nothing of being 'clear and convincing') in the direction that there ever existed any such contract as would in law give rise to a resulting trust. Before such trust 'results' two essentials are requisite: (1) The agreement must have existed at the time of the payment or the doing of the work; (2) such agreement must be for a specific aliquot part."

[5] The court was clearly in error in holding it essential to the validity of a grubstake contract that it should specifically state the interest of each party thereto. *Morrow v. Matthews et al.*, 10 Idaho, 423, 79 Pac. 196. Even in the case of an ordinary conveyance of lands to two or more persons as joint tenants or tenants in common, such a specification of interest is not essential. In such cases, *prima facie*, the interest of each is equal, although the contrary may of course be shown. *Markoe v. Wakeman*, 107 Ill. 251; *Shiels v. Stark*, 14 Ga. 429; *Jackson v. Moore*, 94 App. Div. 504, 87 N. Y. Supp. 1101.

The contention of the plaintiff in the court below in respect to the Over the Hill claim was, as stated in the opinion of that court, based upon an alleged agreement between Bauer, Hanlon, and himself, by which Bauer was to furnish the "grub," etc., and the plaintiff and Hanlon were to do the work of prospecting and locating the contemplated claims; Peterson being subsequently joined with Hanlon and the plaintiff by consent of Bauer given through his agent Hanlon.

In finding as a fact, as the court did contrary to the finding of the jury upon that issue, that no such contract was ever entered into, the court relied in part upon the testimony of Hanlon to the effect that he located the Over the Hill claim for Bauer and in his name, and that, although he had hired the plaintiff and Peterson to assist generally in making locations for Bauer, and that Bauer paid them for their services, yet that in regard to the Over the Hill claim he (Hanlon) was the only one who made any discovery thereon or took any part in making the location thereof, testifying particularly, as the court below said in its opinion, that the plaintiff took no part in its location and never had any interest in that claim. The court, however, proceeded to say in its opinion:

"On cross-examination this witness was impeached by the showing that many of his statements were at variance with statements made by him in the pleadings and at the trial of a suit which he himself had previously brought against the defendant company to recover an interest in the Over the Hill for himself. He lost that suit. As to many matters testified to by Hanlon he was evidently falsifying at one trial or the other, and was considerably embarrassed; but I think it more likely that he was falsifying at that trial, where his interests were at stake, than at this trial, in whose outcome he is not shown to have any interest whatsoever."

It is thus made clear that Hanlon committed perjury either in the present case or in the suit brought by him against the present appellee to recover for himself an undivided interest in the Over the Hill claim.

The court below concluded that he perjured himself in his own case and told the truth in the present one, and, as has already been shown, found the fact to be, contrary to the finding of the jury, that the alleged contract between the plaintiff, Bauer, and Hanlon was never made. Yet the record in the present case shows that Bauer was also a witness in the case brought by Hanlon against the Chichagoff Mining Company to recover an undivided one-fourth interest in the Over the Hill claim, when the following questions were asked, and the following testimony given by Bauer:

"Q. Didn't the judge ask you this question: 'When Mr. Hanlon went out to locate the claims, did you or did you not—I am not talking about any particular claims, but when he went out to locate some claims there—did you or did you not have any agreement with him by which he was to do certain things and you were to do certain things?' Do you remember that question being asked you? A. I believe so; yes.

"Q. And you answered it: 'I did; yes.' A. I thing so; yes.

"Q. And did he ask you this question: 'What was that agreement?' Do you remember that question? A. I believe I do; yes.

"Q. 'A. He was to do the locating and work, and I was to furnish the money.' Did you answer it that way? A. I think so.

"Q. 'When was that agreement made?' Remember being asked that? A. I think I do.

"Q. 'A. Just after the strike was made at Chichagoff.' Did you so answer? A. I think I did.

"Q. He then asked you this question: 'After the strike was made, but before any of these claims were located, is that it?' And your answer was: 'Yes, sir.' Did you so testify? A. Just read that over again.

"Q. The judge asked you this question: 'After the strike was made, but before any of these claims were located?' And you answered: 'Yes, sir.' A. I probably did not exactly understand that question at the time, you know.

"Q. Did you so testify? A. I think I did; yes, sir.

"Q. And then was this question asked you: 'About when was it?' And you answered: 'That was about'—then you paused—'I think June, 1906.' Did you so testify? A. I might have testified to that. I wasn't familiar with the dates, or anything of that kind, you know—it was so long ago.

"Q. Was this question asked you then by the judge: 'Now, what claims did he locate under that agreement?' Do you remember that question? A. I think so; yes, sir.

"Q. And your answer was: 'He located the Golden Wedge, that is the placer, the Over the Hill claim, I think was one, and I think the Porphyry, and one other; I don't remember exactly what the name of it was.' Did you so testify? A. I think so; yes."

The plaintiff testified, in substance, that in the winter of 1905-1906 he and Hanlon met Bauer on the steamer "Cottage City" at the wharf in Sitka, upon which steamer Bauer was leaving for Seattle, and that they then and there agreed that in the spring the plaintiff and Hanlon should go to Chichagoff, where a discovery of gold had then been recently made, and prospect and locate claims, the supplies to be furnished by Bauer from Mills' store in Sitka, and all claims located to be shared equally between the three; that about the middle of March, 1906, Hanlon got the necessary supplies at Mills' store, but, finding that the boat in which they were to go required three men to handle, Peterson was procured to join the party, with the agreement that the locations made should be shared in the proportion of one-fourth

each; that the plaintiff, Hanlon, and Peterson then proceeded to Chichagoff, and on March 26 located the Over the Hill claim in the name of H. A. Bauer, by W. R. Hanlon, agent, the names of the plaintiff and Peterson being signed as witnesses—all of which names, as has been hereinbefore shown, being preceded by the word "locators," not "locator."

The plaintiff further testified in substance that the next day they located a claim called "Mystery," in his name and that of Peterson; and in April three other claims, named "Aurated," "Authentic," and "Cablegram," respectively, were located, one in the names of Peterson and the plaintiff, and the other two in the names of H. A. Bauer, W. R. Hanlon, Charles Peterson, and John Tuppela; that those five claims were the only ones located on that trip, and that Bauer never objected to the joining of Peterson in the work and locations, and never claimed but one-quarter of the claims. Peterson, by deposition, corroborated the testimony of the plaintiff in so far as it related to himself and his actions; and the record further shows that subsequently Bauer, to wit, on the 10th day of January, 1907, bought from Peterson his one-quarter interest in the five claims so located, taking his conveyance thereof, in consideration of which he deeded to Peterson a house and lot in Sitka; and that on the same day that he bought Peterson's quarter interest he drew and obtained from the plaintiff and Hanlon powers of attorney from them to sell their interest in the said five claims. The evidence shows further that the assessment work for 1908 upon the Over the Hill claim was done by the plaintiff, and that Bauer paid to the plaintiff \$50 for his part thereof; that the annual labor on said Over the Hill claim for the years 1909, 1910, and 1911 was done by the plaintiff and W. R. Hanlon as part owners, and in January, 1912, they began the publication of a notice to forfeit Bauer's interest in the claim for his failure to perform or pay for his part of the annual labor for those three years, which publication appeared at least once a week for 90 days and was seen and read by Bauer; that the annual labor upon the said Over the Hill claim for the year 1912 was performed by the plaintiff alone as part owner, and that in January, 1913, the plaintiff published a notice to forfeit Hanlon's interest therein for his failure to perform or pay for his part of the annual labor for 1912, after which Hanlon sold his interest therein to the defendant Chichagoff Mining Company, which company paid the plaintiff, and thereby saved the forfeiture.

Enough has been pointed out, we think, to show that the findings of fact made by the court contrary to the findings made by the jury are unsupported by, and contrary to, the evidence in the case, and that the decree must be reversed, with directions to the court below to enter a decree adjudging the appellant to be the owner as against the defendant to the suit of the whole of the Rising Sun lode mining claim, and of an undivided one-half interest in the Over the Hill and Pacific lode mining claims, and directing a conveyance to him by the defendant to the suit of the legal title to the undivided one-half interest in the said Over the Hill claim conveyed to it by the government patent, and for an accounting of all ore extracted by the defendant from the

said Over the Hill claim, and for judgment in favor of the appellant for one-half of the value thereof, less one-half of the legitimate expenses of mining, extracting, and reducing such ore, and for an accounting of the whole of the value of the ore extracted by the defendant from the said Rising Sun claim, and for judgment therefor, less the legitimate expenses of mining, extracting, and reducing such last-mentioned ore, and for costs of suit.

Ordered accordingly.

HOLMES COUNTY, MISS., v. BURTON CONST. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. June 18, 1920. Rehearing Denied August 3, 1920.)

No. 3486.

1. Counties ☞213—Failure to act on claim equivalent to disallowance for purpose of suit.

Under Code Miss. 1906, § 311 (Hemingway's Code, § 684), providing that a claim against a county must first be presented to the board of supervisors, and that on refusal of the board to allow it suit may be brought thereon, failure of the board to act on a claim presented within a reasonable time is equivalent to its disallowance for purpose of suit.

2. Counties ☞21½—Can be bound only by action of governing board entered on minutes.

A county can only be bound to the extent and within the limitations which its regularly constituted authorities have bound it, and having contracted by an order of its governing board entered on its minutes, no additional burden or obligation can be imposed on it, except by an order duly entered on the minutes of the board.

3. Highways ☞113(4)—Direction of verdict for contractor for excess work held error.

Direction of a verdict for a contractor with a county for road work, for excess work done as extra work, *held* error, where the contract expressly provided that excess work of the same kind as that specified should not be considered extra work, but be paid for at contract price, while extra work was to be paid for on a different basis.

4. Highways ☞113(4)—Engineer in charge of work not authorized to determine legal effect of unambiguous terms of contract.

An engineer in charge of work done under a contract for making roads is not authorized to determine the legal effect of plain and unambiguous terms of the contract, which is the duty of the courts, but his authority extends only to the application of his engineering judgment to matters of fact in controversy.

5. Highways ☞113(4)—Breach of contract by county not authorizing abandonment and recovery of prospective profits.

Failure of a county to furnish gravel to road contractors as required by the contract *held* not to authorize the contractors to abandon the contract and recover their prospective profits.

6. Damages ☞40(2)—To warrant recovery of profits, breach must relate to essential part of contract.

To warrant the recovery of profits for the uncompleted portion of a contract, the breach relied upon must be in such an essential part of the contract as that it makes the fulfillment of the contract impossible; there being a clear distinction between acts which might justify a contractor in abandoning his contract with recovery for work already done, and

☞For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

those which would justify him in abandoning the contract and recovering for prospective profits.

7. Damages \S 124 (3)—Measure of prospective profits recoverable on breach.

A contractor who has abandoned his work for an alleged breach by the other party, even where entitled to recover prospective profits, may not select the more valuable portion of the contract and recover on that portion, without balancing against it losses and expenses which completion of the entire contract would have entailed.

In Error to the District Court of the United States for the Southern District of Mississippi; Robert T. Ervin, Judge.

Action by the Burton Construction Company and W. F. Allen against Holmes County, Miss. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

E. F. Noel, of Lexington, Miss., and N. T. Currie, Asst. Atty. Gen., and James A. Alexander, of Jackson, Miss., for plaintiff in error.

James G. Holmes, of Yazoo City, Miss., for defendants in error.

Before WALKER, Circuit Judge, and CALL and HUTCHESON, District Judges.

HUTCHESON, District Judge. This is a writ of error from a verdict and judgment in favor of the defendants in error, plaintiffs below, who will hereafter be referred to as plaintiffs, against the plaintiff in error, hereinafter called the defendant. As correctly stated by the defendant in error in its brief, this is a simple suit on contract, and the rights of the parties must be measured by their contract.

The plaintiffs were road contractors, and the contract out of which this controversy arose was a contract between plaintiffs and defendant for the construction of certain roads in the Fifth district in Holmes county, Miss. Plaintiffs claimed in their pleadings that the defendant breached the contract in three different particulars: (1) That it failed to furnish gravel when and as it should have done; (2) that it failed to furnish pipe when and as it had agreed; and (3) it required plaintiffs to do extra work, and refused to pay them for it—and that because of the breach in these particulars the plaintiffs had been unable to complete the contract. They sued for the 15 per cent. retained by the county out of previous estimates, for the profits they would have made on hauling the gravel, if it had been furnished, and for the amount claimed to be due them for the extra work.

[1] The defendant contended: (1) That plaintiffs had no standing in court, because they did not first obtain final action on their claim at the hands of the board of supervisors, and (2) that the claimed "extra" work was not in fact extra, but was provided for in the contract to be paid for at contract prices; that the defendant quit, not because of the failure to furnish gravel or pipe, but because of the refusal of the engineer to comply with their unwarranted demand that the unit mile instead of the average mile basis should be adopted in the payment for hauling the gravel; and, finally, that the plaintiffs had suffered no loss of profits, but had visited heavy losses on the county by abandoning the work before completion.

The statutes of Mississippi, where this contract was made and performed in part, provide as follows:

Sec. 311, Mississippi Code 1906 (Hemingway's Code, § 3684): "A person having a just claim against any county shall first present the same to the board of supervisors thereof for allowance; and, if the board shall refuse to allow it, may appeal the judgment of the board to the circuit court, or may bring suit against the county; and, in either case, if such person recover judgment, the board of supervisors shall allow the same, and a warrant shall be issued therefor."

The plaintiffs, on, to wit the ——— day of November, 1917, and prior to the November meeting of the board of supervisors, made out and filed with the board of supervisors the following claim on which this suit is based.

To 15 per cent. retained on estimates.....	\$ 2,492.81
Extra excavations of 26,414 cubic yards of dirt, which exceeded the estimated amount, plus 30 per cent., and on which the engineer agreed to pay 5 cents per yard additional.....	1,320.70
Profits on hauling gravel under said contract, which would have amounted to	7,500.00
Amount for hauling gravel.....	181.50
	<hr/>
	\$11,495.01

No action was taken by the board, either to approve or disapprove the claim at that meeting, or at any of its subsequent monthly meetings; the consideration of the claim being postponed, sometimes for reasons stated, and sometimes on a mere order of postponement. The claim not having been approved at the December meeting of the board, suit was brought in the District Court of the United States in cause No. 6,736, and thereafter, the board still not having approved the claim, the declaration was amended setting up that fact.

To this declaration a demurrer that the suit was premature, because the declaration showed on its face that the board of supervisors had not taken action on the claim, was sustained, and plaintiff thereafter filed an amendment, claiming that the board still had failed to approve the claim, and after the August meeting of the board filed another suit in the same court, substantially setting up the same facts, and alleging that up to that date the supervisors had refused to allow the claim. The two suits were consolidated, and, defendant's demurrers having been overruled, the cause went to the jury on the issues, first, as to whether the board of supervisors had had a reasonable time to act on the claim before suit was filed; and, second, whether or not the county had breached the contract, and what amount plaintiffs were entitled to recover on their claim.

As to the first matter, the necessity for an affirmative refusal of the claim by the board before suit could be brought, we think it clear that neither the terms of the statute nor the decisions of the courts of Mississippi relied upon by defendant supports the contention which it makes. Reason and the considerations which underlie the enactment of such statutes do not give to the word "refuse" the meaning defendant asserts. The failure to allow, after a reasonable time, is

equivalent, for the purposes of suit on a claim, to an actual denial. The purpose of the presentation is to give the county an opportunity to examine and consider the claim on its merits before being subjected to a suit. It is not the purpose of the statute, nor can it be given the effect, to permit the board to defeat a claim by nonaction. Such a construction would amount to lodging with the board the power to deny suitors access to the courts. We are therefore satisfied that plaintiffs' suit was not prematurely brought, and no error was committed by the court in that regard.

We think it equally clear, however, that the court below erred to the prejudice of the defendant, and that the cause must be reversed. In view of the fact that the cause will be remanded, and many of the errors assigned will almost certainly not occur upon another trial, we shall discuss only the two which are fundamental, and which underlie the whole course and result of the trial.

As we have taken occasion to say, this is a simple suit on contract, and the ordinary and simple rules which involve suits on contracts apply. One of the most definite and unalterable of these rules is that, "as a man binds himself, so shall he be bound," or, stating it otherwise, the provisions of a contract, when unambiguous and plain, must measure the rights and obligations of the parties to it.

[2] We think it can be stated as a general proposition of law that a public body can only be bound to the extent and within the limitations which its regularly constituted authorities have bound it. Text-books and cases are uniform on that point, and it needs no citation of authorities to support the rule that no contractual rights can spring against a municipality, except in strict accordance with the law, and the corollary is equally well established that a municipality must act by order entered on its minutes with reference to its contract, and, having contracted, no additional burden or obligation can be imposed upon it, except by an order duly entered upon the minutes of the board.

It is equally clear that, where the relations are fixed by written contract, it is the duty of the court to construe the meaning of the unambiguous words of the contract. The obligations of the respective parties under this contract may be briefly stated as follows:

Unless prevented by fault or breach on the part of the defendant, it was the duty of the contractor to perform and complete the work in accordance with the terms of the contract, under the supervision of the engineer; the engineer having authority as follows:

"All work done or material furnished are to be subject to the acceptance or rejection of the engineer, who shall in all cases determine the amount, quality, fitness, and acceptability of the work and materials to be paid for, and decide finally and conclusively all questions of differences of opinion that may arise as to the interpretation of the plans and specifications or the fulfillment of the terms of this contract."

In addition, the specifications further provided:

"All payments are to be made in cash. * * * If the work progresses according to contract, the contractor will be paid monthly 85 per cent. of the contract price of the work done and materials furnished. * * *

"As soon as the engineer is notified of the completion of the work, and can

assure himself by tests, inspection, or otherwise that all the provisions of the contract have been carried out, he will make a final estimate of the quantities and value of the work done under the contract and deduct previous payments. He will report this estimate to the commission, together with deficiency therein. Within thirty days after the approval of this estimate and report by the commission and the engineer, the amount of the estimate will be paid, less any charges or damages herein specified."

"Quantities.—The quantities of work and material as given herein are approximate only. The right is expressly reserved for the engineer to increase or decrease the quantities to such an extent, within 30 per cent. of the original, as he may find necessary for the proper completion of the roads, or from the limits of the appropriation; if such alterations increase the quantities, the added work or materials will be paid for along with the original, at the rate stipulated in the contract; the change in quantities shall not warrant any claim for damages, or for anticipated profits on the work or materials dispensed with, the contract rates being paid for the actual quantities used."

"Extra Work.—Quantities of work or materials in excess of those named in the proposal, and of the same kind, are not to be considered as extra work; and such excess, when ordered by the engineer, will be paid for at contract rates, as hereinbefore specified.

"The price for extra work will be either (1) a price agreed upon by the contractor and the engineer; or, if no agreement can be made, (2) cost plus 10 per cent.

"Contractor's Damages.—Any claim by the contractor for damages sustained by act of the commission or its agents shall be fully stated in writing to the engineer within five days from the date thereof. Within thirty days from the date thereof an itemized statement of the nature and amount of this damage shall be filed with the engineer, so as to be considered by the commission at their next meeting; otherwise, the claim shall lapse by default."

The contract provided:

"The parties of the first part further agree to do, in the manner stipulated in the specifications, any extra work required by the written order of the engineer, for the proper completion of the item or items comprised herein."

There was no evidence of any written order from the engineer requiring plaintiffs to do the additional excavation as extra work, and it appears to be undisputed that, while the extra excavation for which plaintiffs sued was more than 30 per cent. in excess of the original estimate of quantities, it was of the same kind of work as the excavations figured on in the bids. Eight estimates were issued by the engineer during the progress of the work, and accepted by the plaintiffs, though plaintiffs claim that they protested that the estimates were not sufficient. No written claim was ever filed with the engineer, setting out the plaintiffs' damage; no final estimate was ever made by the engineer, nor final voucher issued.

[3] The court instructed the jury peremptorily to find for the plaintiffs for the extra excavation, and, if they believed the defendant had breached the contract, to find such profits as they would have made on the hauling of the gravel. In both of these particulars the court erred. As to the matter of extra excavation, the contract on its face, in plain and unambiguous language, prohibited payment as extra for work of the same kind described in the proposals, and the undisputed proof showed that this excavation claimed for as extra work, was of that kind.

[4] It was contended by plaintiffs, and in this the trial court erred, that the jury should be peremptorily charged to find for the plaintiffs on this issue, because the engineer had construed the work to be extra work, and his construction, under the contract, was binding. This contention will not do, for in the first place the court did not submit to the jury as an issue of fact whether the engineer had construed the work to be extra, though there was positive testimony from the engineer that he did not so construe it, and all his estimates were made upon the contrary construction; and in the second place the engineer could not in any event make contracts for the county.

The duty of construing doubtful clauses of a contract for work and labor does not authorize an engineer to determine the legal effect of plain and unambiguous terms. His authority extends only to the application of his engineering judgment to matters of fact in controversy. The court alone has the right, and is charged with the duty, to construe the legal effect of plain and unambiguous terms, and he should have charged the jury for the defendant on this issue.

[5] Nor is there any theory upon which the recovery by plaintiffs of profits lost by reason of the failure of the county to furnish gravel can be sustained. The general rules of law governing the recovery of profits on the uncompleted portion of a contract are thus laid down in 17 Corpus Juris, p. 855:

"Where without fault on his part one party to a contract, who is willing to perform it, is by the other party prevented from so doing, the primary measure of damages is the amount of his loss, or, as it has been otherwise expressed, the value of his contract."

"To warrant the abandonment of the work and a recovery of prospective profits, the breach upon the part of the other party must be such as to make performance of the contract impracticable, and the accomplishment of the object impossible. Acts which might justify the contractor in abandoning his contract, and enable him to recover for work already done, are not necessarily sufficient to allow him to recover for prospective profits."

In *Harris v. Faris-Kesl Const. Co.*, 13 Idaho, 211, 89 Pac. 760, a case similar to this, where the plaintiff abandoned the work because of the failure of defendants to furnish certain material, and sued for prospective profits, the court held that, while he was entitled to recover the value of the work already done, he was disentitled to recover for prospective profits saying:

"We understand the correct rule to be, in a case like the one at bar, that when an action is brought by the contractor before the completion of the work, to authorize a recovery for prospective profits, a willingness on his part to complete the work and a refusal by the other party to be further bound by the contract, or an abandonment of it by him, must appear. * * * The inability of the appellant to deliver the necessary additional lumber at the Plowman flume when demanded by the respondent did not authorize him to terminate his employment and recover all the prospective profits, as it is not the breach of every covenant of a contract that may operate as a discharge of the adversary party."

In *U. S. v. Speed*, 8 Wall. 77, 19 L. Ed. 449, the measure of damages in this character of case was stated as follows:

In a case where a party has been prevented from completing his work, the measure of damages is "the difference between the cost of doing the work and

what the claimants were to receive for it, making reasonable deduction for the less time engaged, and for the release from the care, trouble, risk, and responsibility attending a full execution of the contract."

Plaintiffs' proof in this case on the issue of profits has squared with none of these requirements. The rules require that they show a breach by the defendant of its contract. The proof shows no breach; for, while the pleadings allege that plaintiffs abandoned the contract because of the county's failure to furnish pipe and gravel, the fact is they abandoned it because of the engineer's refusal to accede to their unwarranted demands, first, that they be paid for excess yardage as extra, and second, that they be paid for the gravel haul on the basis of the unit mile, rather than the average mile haul.

The engineer construed the contract as providing for payment on an average mile basis, and so made his estimates, and the plaintiffs in their suit in this case accepted his construction and stated their damages on the same basis. As to these matters there is no dispute. As Burton himself testified:

"Allen [his partner] abandoned the work because they would not pay for the excess yardage and the unit mile. I continued the work until he refused to pay the proper amount for the gravel. * * * I left because I was not paid according to the contract basis and agreement."

[6] The law required further that, even if there had been a breach by the county, in order for the plaintiffs to recover profits for the uncompleted portion, it must appear that they were ready and willing to perform the contract, but that the breach was in such an essential part of it as that it made fulfillment impossible. That this was not the case appears from plaintiffs' proof. The plaintiff Burton testified:

"I promised to complete this work if the commissioners would pay the agreed price"

—showing conclusively that, even if the county had breached, so as to give the plaintiffs the right to cease performance on their part, there was not such a breach as entitled plaintiffs to refuse to perform and then claim damages for the unperformed portion.

Finally, the rule requires that, if such a breach exists as to entitle the recovery of profits, the measure of damages shall be the loss of the plaintiffs, measured by the value of the entire contract, whereas neither plaintiffs' pleadings nor their proof supported such a measure.

[7] Plaintiffs pitched their demand upon their supposed right to segregate from the entire contract the valuable portion of it, to wit, the gravel haul, and sought to recover the profits on this, without balancing against it the losses and expenses which the completion of the contract would have entailed. This they could not do.

For the reason that the court below erred in the particulars noted, the judgment will be reversed, and the cause remanded.

BALTIMORE & O. R. CO. v. LAMBERT RUN COAL CO.*

(Circuit Court of Appeals, Fourth Circuit. August 11, 1920.)

No. 1846.

1. Commerce ⚡85—Under power to suspend rules and regulations, Interstate Commerce Commission cannot suspend statute fixing car distribution.

Under the power given by Transportation Act Feb. 28, 1920, § 402(15), to suspend the operation of rules, regulations, or practices, the Interstate Commerce Commission cannot, in a period of car shortage, suspend the rule prescribed by section 12 as to distribution of cars among coal mines; the expression "rules and regulations" referring to rules, etc., adopted by the commission or railroads, which may be suspended in an emergency.

2. Commerce ⚡85—In emergency Interstate Commerce Commission may provide for car distribution contrary to statutory rule.

Under Transportation Act Feb. 28, 1920, § 402(15), providing that, when the Interstate Commerce Commission is of the opinion that a shortage of equipment or congestion of traffic requires immediate action, etc., it may give directions for priority in transportation, embargoes, etc., the commission, in case of an emergency arising out of shortage of cars, may suspend the rule for distribution of cars to coal mines prescribed by section 12; coal being a necessity, and Congress having vested in the commission the power to suspend, in time of emergency, the rule to be followed in case of ordinary long shortage of equipment.

3. Commerce ⚡98—Courts may not annul order of Interstate Commerce Commission on ground it was unwise.

Where the Interstate Commerce Commission determined that an emergency existed, and under the authority of Transportation Act, § 402(15), suspended the rule prescribed by subdivision 12 for distribution of cars among coal mines, the courts cannot annul the order on the ground that the power conferred upon the commission was unwisely or improvidently exercised.

4. Constitutional law ⚡43(2)—One claiming benefit of Transportation Act cannot assert unconstitutionality of limitations.

Coal company, claiming the benefit of Transportation Act, § 402(12), providing for distribution to mines of cars in time of scarcity, cannot, at the same time, question other provisions of the act giving the Interstate Commerce Commission power in an emergency to suspend the statutory rule without a hearing.

5. Courts ⚡101—Order of Interstate Commerce Commission can be enjoined only by three judges.

Under Act Oct. 22, 1913, Comp. St. § 998, an order of the Interstate Commerce Commission annulling in an emergency the provision of Transportation Act, § 402(12), for distribution of coal cars, can be enjoined only by three judges, one of them being a Circuit Judge, after notice to the commission and to the Attorney General; consequently an injunction against such an order, issued by a District Judge alone, was invalid.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi.

Bill by the Lambert Run Coal Company against the Baltimore & Ohio Railroad Company. From a decree for complainant, defendant appeals. Reversed.

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 148, 65 L. Ed. —.

Herbert R. Preston, of Baltimore, Md., and George M. Hoffheimer, of Clarksburg, W. Va. (A. Hunter Boyd, Jr., of Baltimore, Md., on the brief), for appellant.

John A. Howard, of Wheeling, W. Va., and Rush C. Butler and Frank E. Harkness, both of Chicago, Ill., for appellee.

Blackburn Esterline, Sp. Asst. Atty. Gen., and P. J. Farrell, Chief Counsel of Interstate Commerce Commission, of Washington, D. C., amici curiæ.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The complainant, a coal mine served by the defendant railroad company, set out in its bill filed in the circuit court of Marion county, W. Va., that it was suffering continuous loss and damage by reason of the refusal of the defendant in a period of shortage of coal cars to comply with the following provision of section 402, Transportation Act of 1920:

"(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of \$100 for each offense which may be recovered in a civil action brought by the United States."

Loss and injury was alleged as the result of not counting against mines in the distribution of cars according to the mine ratings all cars to be loaded with railroad fuel coal, thus giving to mines furnishing coal for railroad fuel a preference or priority in the number of cars supplied to the disadvantage of plaintiff's mine and other mines not furnishing railroad fuel coal, or furnishing a less quantity of railroad fuel coal. The resulting disadvantages and losses to the plaintiff are set out in detail in the bill and in affidavits attached thereto. The cars to be thus used for railroad fuel are described as assigned cars.

The plaintiff asked that the defendant be enjoined from continuing its alleged illegal method of distributing coal cars to the mines according to their ratings, without counting against the mine each and every car, including railroad coal cars. The cause was removed to the United States District Court for the Northern District of West Virginia. On the merits, the defense set up in the answer is that the rule and practice of the defendant is authorized and required by the following rules of the Interstate Commerce Commission:

"8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in Railroad Commission of Ohio et al. v. H. V. Ry. Co., 12 I. C. C. 398, and Traer v. Chicago & Alton Railroad Co. et al., 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned cars.'

"9. If the number of assigned cars placed at a mine during any period, as

provided in rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply prorated to the other mines, based on a revised percentage by reason of such elimination.

"10. If the number of assigned cars placed at a mine during any period, as provided in rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

It appears from both bill and answer that the United States Railroad Administration abolished the assigned car rule by order of July 6, 1918. After the passage of the Transportation Act on February 28, 1920, the Interstate Commerce Commission continued the order of July 6, 1918, in force, until April 15, 1920, when it restored the assigned car practice, by amending rule 8 and promulgating it in the amended form above quoted.

The amended rule 8, construed in connection with rule 9, is not a reinstatement of the assigned car rule that once existed, namely, that cars assigned for railroad fuel coal were not counted at all, and the mines to which they were assigned received in addition the same number of unassigned cars, according to their rating, as if they had received no assigned cars. It does mean, however, that a mine may receive any number of cars assigned for railroad fuel, although in excess of the number of cars due according to its rating, taking all cars into account, and if the assigned cars so received equal or exceed its pro rata share under its rating it receives no unassigned cars. But the assigned cars so received are eliminated from the entire car supply. This reduction of the number of cars to be prorated manifestly results in not counting each and every car against the mine which receives more cars for railroad fuel than it would be entitled to if all the cars were included in the number to be distributed.

In the order or notice to carriers and shippers promulgating the amended rule, the commission states that in its opinion an emergency existed by reason of the continued shortage of coal cars, the cessation of government control, and the importance of meeting railroad fuel requirements, without the necessity of carriers resorting to confiscation of commercial coal. As authority for this order the commission relies on section 1 of the Interstate Commerce Act, as amended by section 402 of Transportation Act of February 28, 1920. The relevant portions of the statute are:

"(15) Whenever the commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine: (a) *To suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission;* (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people,

upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; and (d) *to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them.*"

Attached to the answer is an elaborate written response of the commission to a Senate resolution directing the commission to inform the Senate upon what authority, if any, its order or notice of April 13, 1920, was issued. Therein the commission relied particularly for its authority on the provisions of subdivision 15 which we have italicized.

At the time of the application for the injunction a motion was made to dismiss the bill on the uncontroverted facts appearing in the bill and answer. The motion was denied. The defendant then took the position that, since it appeared that the application was really for an injunction restraining the execution of an order of the Interstate Commerce Commission, it could be heard and determined only by three judges, of whom one at least should be a circuit judge, after five days' notice to the Interstate Commerce Commission and to the Attorney General. This position was also overruled, and the District Judge made an order enjoining the defendant, in any period of coal car shortage, from distributing cars, except in precise accordance with subdivision 12, counting each and every car furnished to a mine against that mine. By its terms this order was limited in its operation to the jurisdiction of the District Court for the Northern District of West Virginia.

[1] We cannot doubt that by subdivision 12 of section 402 the Congress clearly expressed the intention to abolish all preference to mines furnishing railroad fuel coal under the assigned car rule in periods of ordinary car shortage. The count of each and every car required is not a mere independent futile enumeration, but a count of each and every car furnished or used against the mine, to the end that there should be proportional distribution of all available coal cars, resulting in fair and equal opportunity to each mine on the basis of its rating. Before the enactment of the statute the matter had been controlled by rules, regulations, and practices made by railroads, or the government railroad administration, which had been the subject of much controversy. Evidently the Congress, having in view this controversy, after full consideration settled the matter by an imperative enactment against the assigned car rule in times of ordinary coal car shortage. Thus it appears to us the rules of the Interstate Commerce Commission above set out are not in accord with subdivision 12 of the Transportation Act of 1920, standing alone.

The authority given to the commission by (a) subdivision 15 in cases of emergency "to suspend the operation of any or all rules, regulations or practices then established with respect to car service" does not ex-

tend to the suspension of a positive and definite enactment of the statute covering the subject. Rules, regulations, and practices mean the rules, regulations, and practices adopted by the commission or by the railroads in conformity to the act, or not forbidden by it, in contradistinction to the definite enactments of the statute. This appears from subdivisions 11 and 14 of the same section and other portions of the statute. If, therefore, the order of the commission had no other basis than the authority conferred to suspend rules, regulations, and practices it would be without support. *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267; *United States v. United Verde Copper Co.*, 196 U. S. 207, 25 Sup. Ct. 222, 49 L. Ed. 49; *Williamson v. United States*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278; *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563.

[2] The Congress has not, however, conferred on coal mines equality among themselves—the right of each mine in time of coal car shortage to be furnished cars in proportion to mine ratings, without regard to the public welfare and safety. Coal is a public necessity. From many causes crises and emergencies may arise in mine operation, transportation, and unexpected needs of the public, which cannot be anticipated and justly provided for by inelastic legislative enactment. It would be strange indeed if the Congress had guarded the private interests of the mines by an inflexible exactment of equality, lodging nowhere the power to relieve the public against unforeseen conditions which would make rigid proportionate distribution of cars disastrous to the country or to some portion of it. This would be to confer benefits on individuals at the sacrifice of the public safety and welfare.

We think the Congress has clearly conferred on the commission the power to grant relief in such conditions, by providing that—

"Whenever the commission is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country the commission shall have and is hereby given authority * * * (d) to give directions for preference or priority in transportation, embargoes or movement of traffic under permits at such time and for such periods as it may determine and to modify, change, suspend or annul them."

The true construction required by the spirit and the letter of the statute is this: Subdivision 12 provides for equality among coal mines in proportion to ratings, in time of the usual long-existing car shortage. But, recognizing the necessity of a degree of flexibility, the Congress conferred upon the commission power, in case of a car shortage which in their opinion was so much beyond the usual as to constitute an emergency, to supplant or modify equality among the mines according to ratings, with preference and priority to such extent as will in its opinion meet the emergency.

All the specific provisions of the statute for equality among designated classes is thus modified by the general provision for their suspension by the commission when they find an emergency requiring it. Our conclusion is that the making and promulgation of rule 8 as amended was clearly within the power of the commission.

[3] The commission having based their order on their opinion that an emergency such as was contemplated by the statute existed, it is

not within the power of the court to annul their order on the ground that the administrative power conferred on the commission was unwisely or improvidently exercised. *Interstate Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452, 478, 30 Sup. Ct. 155, 54 L. Ed. 280; *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075.

[4] The plaintiff's right to equality in the distribution of coal cars was conferred by the statute. The Congress, in conferring the right, could place upon it any limitations or conditions it saw fit, including the limitation that the right might be suspended by the Interstate Commerce Commission in its discretion without a hearing. The plaintiff, claiming the benefits of the statute cannot assert the unconstitutionality of its limitations. *Daniels v. Tearney*, 102 U. S. 415, 26 L. Ed. 187; *Grand Rapids & Indiana Ry. Co. v. Osborn*, 193 U. S. 17, 24 Sup. Ct. 310, 48 L. Ed. 598. For these reasons the motion to dismiss the bill should have been granted.

[5] Even if the District Court had been right in refusing the motion to dismiss the bill, the order of injunction could not stand, because the execution of the order of the Interstate Commerce Commission could be enjoined only by three judges, one of them being a Circuit Judge, after notice to the commission and to the Attorney General. Act Oct. 22, 1913, Compiled Statutes, § 998.

A decree will be entered, dissolving the injunction and dismissing the bill.

Reversed.

MOXHAM v. SHERWOOD CO. OF WEST VIRGINIA.

(Circuit Court of Appeals, Fourth Circuit. July 6, 1920.)

No. 1802.

1. Mines and minerals ⚡59—Lease held not conditioned on finding iron ore.

A lease of a large tract of land, at a fixed royalty on iron ore extracted therefrom and the customary royalty on other minerals taken therefrom, with a fixed minimum royalty, is not impliedly conditioned on the existence of iron ore in commercial quantities on the land, even though the mining of iron ore was the lessee's principal purpose, so that the lessee cannot have the lease set aside merely because of failure to find iron ore.

2. Mines and minerals ⚡59—Lease held not to be set aside because of mutual mistake as to existence of ore.

A lease for a royalty on ores produced from the land, with a fixed minimum, cannot be set aside for mutual mistake as to the existence of ore, where the evidence showed that the lessee had caused his engineer to examine the property and signed the lease on the engineer's report showing the existence of ore.

3. Evidence ⚡433(5)—Parol evidence of negotiations admissible against party attacking lease for mutual mistake.

Where plaintiff was seeking to set aside a lease for mutual mistake, parol evidence as to the situation of the parties and the negotiations leading to the lease is admissible against him.

4. Mines and minerals — 70 (2) — Minimum royalty under lease held payable until lessor terminated lease.

Under a lease for royalty on ores produced, with a stated minimum, for 20 years, unless sooner terminated under its provisions, which gave the lessee no option to terminate the lease, except by purchase of the property, but did give the lessor the option to terminate at the end of 5 years, or to extend for 15 years, the lessor was not bound at the end of 5 years to terminate or extend, but could allow the lease to continue, and collect the minimum royalty thereunder after the expiration of the 5 years, until he did elect to terminate the lease.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Suit by A. J. Moxham against the Sherwood Company of West Virginia. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Connor Hall and D. C. T. Davis, Jr., both of Charleston, W. Va. (Davis, Davis & Hall, of Charleston, W. Va., on the brief), for appellant.

Joseph C. France, of Baltimore, Md., Francis T. Homer, of New York City, and Malcolm Jackson, of Charleston, W. Va. (Angus W. McDonald and Brown, Jackson & Knight, all of Charleston, W. Va., George H. Olney, of New York City, and Willis & Willis, of Baltimore, Md., on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

KNAPP, Circuit Judge. Plaintiff appeals from a decree of the court below, entered November 4, 1919, which dismisses his bill of complaint and orders judgment against him for \$269,965.59, with interest from that date. The case comes here on a record of over 1,200 pages, with briefs of counsel aggregating 500 more, but a comparatively short statement will disclose the questions to be decided.

The suit is brought to rescind and cancel a lease of certain lands in Greenbrier and Pocahontas counties, W. Va., amounting in all to some 74,500 acres. The lease is dated December 31, 1907, and recites, among other things, that defendant owns, or is able to acquire and transfer title to, approximately 40,525 $\frac{3}{4}$ acres, of which it owns about 32,500 acres in fee, and in the remainder of which it owns or controls the mineral rights; that it also owns or controls some 34,000 acres additional, "which as now supposed do not contain minerals, but which may contain such minerals"; that plaintiff is desirous of leasing said lands and acquiring all mineral rights therein, "for the purpose of mining and removing the minerals therefrom"; and that he is also desirous of obtaining an option to purchase the lands, or the mineral rights therein, "as hereinafter more particularly described." Following these recitals the lease demises to plaintiff the lands mentioned, "to have and to hold the said lands and the said mineral rights unto the said lessee, his executors, administrators, and assigns, for the purpose of mining and removing therefrom all minerals," for the term named.

The lessee agrees to pay the lessor, "as rent for the hereinbefore

more particularly referred to and described lands and mineral rights," a royalty of 20 cents per long ton of 2,240 pounds for all iron ore mined upon or from the property, and "the usual and customary rate of royalty in the state of West Virginia" for all other minerals, such as coal, oil, gas, limestone, and the like. The lessee also agrees that the minimum payment of royalty for any one year shall equal the sum of \$20,000, and further agrees that, if at the end of any calendar year the royalty paid does not equal that sum, he will pay the lessor a sufficient amount to make up the difference, with a proviso not now material. The provision for a minimum royalty of \$20,000 was to be in effect for 5 years, at the end of which time the lessee could elect to continue the lease for 15 years more, but only on condition of paying a minimum royalty of \$100,000 a year; the lessor also had the option, at the end of the 5-year period, of extending the lease for the further term of 15 years, in which case, however, the minimum royalty was to remain at \$20,000 a year; and the lessee is given the option of purchasing the property for \$2,000,000 at any time during the 5-year period.

The bill of complaint, filed in November, 1908, alleges in substance that plaintiff entered into the lease by reason of his belief that the lands contained iron ore in workable quantities; that such belief was largely induced by reports of defendant's geologist, advising and estimating that there was a large amount of ore on the property, which reports were exhibited to him before the lease was executed; that he had prospected the lands in a thorough manner, and endeavored in good faith to find deposits of ore that could be profitably mined; and that ore in workable amount was not to be found on the property. There is no charge of fraud or deceit on the part of defendant; the right to relief being predicated on the mutual mistake of the parties as to the existence of large quantities of ore on the lands demised. The answer of defendant admits that both parties supposed the lands to contain ore in workable amount, but denies that plaintiff's tests have been suitable or sufficient, and avers that in any event he committed himself to the venture with full understanding of the risk and knowingly engaged in a contract of hazard. A supplemental answer sets up a counterclaim for the sums due under the terms of the lease. Exceptions to the answer were overruled, depositions of witnesses taken, and a final hearing had, which resulted in dismissal of the complaint, and judgment for defendant on its counterclaim in the amount above stated.

For the purpose of deciding the appeal, we shall assume, without reviewing the evidence, that plaintiff made every effort that could reasonably be required of him to discover ore in workable quantities, and that he failed of success because the ore was not there to be discovered. This resolves in his favor the dispute to which much of the testimony was directed, and brings us at once to the question whether on that assumption he has shown himself entitled to any relief.

[1] It is first contended that the lease on its face carries the implication that payment thereunder was dependent on the finding of ore deposits of commercial value. Does it call for that construction?

Contracts of the class to which the lease belongs have been the frequent subject of litigation, and numerous decisions, not all of them in harmony, are found in the reports. In the briefs before us more than 80 cases are cited. We shall not attempt to add to or repeat the discussion, since it seems clear to us that plaintiff's contention in this regard should be rejected. In terms the contract is absolute. It purports to impose an unqualified obligation; and the presumption is that it means what it says. The burden of showing that it implies a condition not expressed in its provisions is therefore cast upon plaintiff, and in our opinion that burden has not been met.

Undoubtedly the main object of plaintiff was to obtain iron ore in paying quantities. But that does not appear from the lease itself. The grant covers all minerals and mineral rights, besides including an extensive tract of land not supposed to contain any mineral deposits. Nowhere does its language indicate that the mining of iron ore was the lessee's sole purpose, even if it be inferable that this was his principal purpose, and much less does it imply that failure to find such ore in workable amount would enable him to avoid the obligation. In our judgment, the decided weight of authority, and especially of federal authority, is to the effect that such a contract may not be set aside on the ground of implied condition. A few citations will suffice.

In *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665, 672, 14 Sup. Ct. 219, 221 (37 L. Ed. 1215), which seems directly in point, the Supreme Court says:

"Looking at all the provisions of the lease, it is clear that the defendant engaged to pay, as rent in each year, the royalties fixed in the lease, and if in any year the royalties fell below the sum of \$1,000, it was to make up the deficit, so that the latter sum should, in any event, be paid annually as rent. The defendant took the chance of a failure to find ore in sufficient quantities to justify working the mines, and the plaintiffs took the chance of not obtaining more than \$1,000, annually, during the existence of the lease, for the use of buildings and fixtures that had cost them more than \$60,000. To secure the payment, annually, of at least \$1,000, the right was reserved to the plaintiffs to terminate the lease if the company failed in any year to pay that sum as rent; and that the company might get the advantage of any developments indicating that the leased premises were of substantial value, the exclusive privilege was reserved to it of purchasing them at any time while the lease remained in force for the price of \$125,000."

In the recent case of *Berg v. Erickson*, 234 Fed. 817, 148 C. C. A. 415, L. R. A. 1917A, 648, in which the subject is discussed at some length and numerous authorities cited, Judge Sanborn (234 Fed. at page 821, 148 C. C. A. 419 [L. R. A. 1917A, 648]) states the following as "the rule adopted by the Supreme Court":

"It is that, although general words, which cannot be reasonably supposed to have been used with reference to the possibility of an event, may not be held to bind one, yet where one, at the time of making his contract, must have known or could have reasonably anticipated, and in his contract could have guarded against, the possible happening of the event causing the impossibility of his performance, and nevertheless he makes an unqualified undertaking to perform, he must do so or pay the damages for his failure."

Among many others of equally decisive import are the cases of *Abbott v. Smith*, 19 D. C. 600; *Berwind-White Coal Mining Co. v. Mar-*

tin, 124 Fed. 313, 60 C. C. A. 17; McDowell v. Hendrix, 67 Ind. 513; Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. 937; N. Y. Coal Co. v. New Pittsburgh Coal Co., 86 Ohio St. 140, 99 N. E. 198; and Lawson v. Williamson Coal & Coke Co., 61 W. Va. 669, 57 S. E. 258.

It is enough to add, and the record warrants the observation, that plaintiff himself appears to have lacked somewhat of confidence in the contention here examined, since he framed his bill to set aside the lease, and has tried the case, not on the theory of implied condition, but distinctly on the theory of mutual mistake.

[2] Is the lease invalid by reason of a mutual mistake of the parties as to the existence of a large amount of ore on the property, or did plaintiff knowingly and avowedly assume the risk in that regard? Related to this issue, and having an important bearing thereon, is a question of evidence which will presently be considered.

We need not review in detail the testimony on the issue of mutual mistake, but some of its more salient features may be briefly noticed. The execution of this lease, and the incidents immediately preceding, were not the beginning of plaintiff's connection with these lands. His attention had been called to them in April, 1907, eight months before, and not long afterwards he began negotiations for their purchase. Early in the following month a verbal agreement appears to have been reached for an option, until December 1st, to buy the property outright for \$2,000,000, provided notice of election to do so were given defendant by the 15th of November. The complete agreement, however, was not reduced to writing and signed by the parties until the 24th of June. But by the middle of May plaintiff had his own mining engineer on the ground and the work of prospecting started.

It will thus be seen that plaintiff had been in possession of the property, with full opportunity to make any investigation he desired, for some 6 months before he was called upon to decide whether or not he would avail himself of the option. When the time for election arrived he was not prepared to purchase, either because he still had some doubt as to the extent and value of the ore deposits or because, as defendant suggests, the prevailing conditions made it difficult to finance the enterprise, or for reasons less apparent. On the other hand, he was plainly unwilling to relinquish control of the property, and thereby forego the great gains which there appeared highly probable, if not practically certain, to say nothing of losing the money already expended. It therefore seems but reasonable to infer that his immediate desire was to get additional time in which to make his election, and that the minimum royalty fixed by the lease was the price he offered for a 5 year further option. However this may be, we think the facts here referred to tend strongly to show that plaintiff entered into the new contract with the definite intention of running the risk.

And here it may be mentioned as of some significance that on the 21st of December, 10 days before the lease was executed, the mining engineer employed by plaintiff submitted to him an elaborate report in writing, covering an examination of 7 months, in which it was estimated that the property contained upwards of 72,000,000 tons of ore.

(It appears, by the way, that defendant had no knowledge of this report until the fact was brought out at the trial.) Obviously, on the basis of this expert's estimate, or anything near it, the lands were worth several times, and even many times, the \$2,000,000, for which they could be bought under the option clause of the contract; and it may well be believed that plaintiff, in the confident expectation of millions of profit, was more than content to hazard the chance of possible failure.

But more persuasive than anything else are the declarations and admissions of plaintiff himself, in various letters and as a witness in his own behalf. Among other things, he says frankly that those who spoke for defendant were known by him to be without experience in mining operations; that no representations were made or assurances given by them; that he solicited the lease and proposed a minimum royalty of \$20,000 a year; that he was unacquainted with defendant's geologist, Lehman; that it is true "that I stated that, regardless of anything that the reports from others might show, I would be guided by the examination of my own experts into the property"; that he had received the report of his mining engineer, above mentioned, before he executed the lease; that defendant knew nothing of that report; and that "at the time the lease was entered into it was my firm conviction, based on the opinion of Mr. Fulton, that a very large quantity of ore existed on the property."

In short, it seems to us that plaintiff's own testimony, especially when viewed in the light of the situation existing when the lease was signed, and in connection with the previous happenings, forces the conclusion that he deliberately and knowingly, and with full appreciation of what he was doing, took upon himself a contract of hazard. Not only has he failed to carry the burden of this issue, which concededly rests upon him, but in our judgment the decided preponderance of proof is against his contention.

[3] It is argued, however, that this testimony was improperly received and considered, because in violation of the rule that parol proof may not contradict or vary a written instrument. The argument is without merit. It is refuted by the very nature of the controversy. Defendant is not seeking to alter or amend in any respect the agreement set forth in the writing, but, on the contrary, stands for its observance and enforcement to the letter. It is plaintiff who seeks its modification, the reading into it of an unexpressed condition, in order that he may escape the liability of its plain provisions. By the allegations of his bill and the evidence offered by him at the trial, he tendered the issue of a mutual mistake of fact, quite apart from the lease itself, and that tender opened the door of invitation to everything that passed between the parties before and when the contract was executed. The testimony in question was clearly admissible, and rightfully taken into account.

[4] Plaintiff makes the point that in no case can he be held liable for minimum royalties for more than 5 years, because he vacated the lands and gave notice of his surrender thereof in October, 1908, and because defendant did not at the end of the 5-year period give

written notice of its election to continue the lease for the further term of 15 years at the minimum royalty provided in that case. We agree with the court below that the point is not well taken. The habendum clause of the lease declares that it is to run "from the 1st day of January, 1908, for and during the term of 20 years thereafter next ensuing, that is, until the 1st day of January, 1928, unless the said term shall be sooner terminated by the purchase of said lands and premises and mineral rights as hereinafter provided, or by certain other provisions of this agreement." But there is no provision under which plaintiff could shorten the term by abandonment and notice of surrender, either during the 5-year period or afterwards. He could not in that way bring the contract to an end and relieve himself of further liability.

Defendant had the option, when the 5 years expired, if plaintiff had not elected to purchase, of terminating the lease within the next 6 months, on specified conditions, or of extending it for the balance of the 20-year term at the minimum of \$20,000 a year. But if it took the latter course it would lose for fifteen years the right to terminate the agreement and regain possession of its lands; and we think it could not have been intended that defendant should be put to that alternative by the failure of plaintiff either to buy the property or to agree to pay the higher minimum. On the contrary, as we read the contract, defendant was not required, at the end of five years, to give a notice which would bind it for 15 years more, but could reserve the right to terminate the lease at an earlier date, if it so desired, and as it did by the notice of September 20, 1917. It follows that plaintiff's obligation continued until the expiration of the 10 days named in that notice.

It is of course unfortunate for plaintiff that he should be compelled to pay such a large sum for something he did not get; but we are convinced, after careful study of the record, that he bound himself with intention and understanding to a contract of chance, and therefore cannot justly complain because it turned out that he made a bad bargain.

Affirmed.

HOUK MFG. CO., Inc., v. COWEN CO.

(Circuit Court of Appeals, Second Circuit. June 9, 1920.)

No. 226.

1. Trial ⚡109—Verdict may be directed on opening statement of counsel.

Direction of a verdict may be justified by the opening statement of counsel for either plaintiff or defendant.

2. Trial ⚡109—Direction of verdict warranted by statement of counsel.

In an action on a written contract, under which plaintiff alleged it had rendered services and incurred expenditures for defendant, where the answer was a general denial, but counsel for defendant in his opening statement admitted the contract and claimed only that as to certain of the work it had been modified by parol, on his refusal to amend by pleading the modified contract, the court *held* warranted in directing a verdict

for plaintiff; the amount due under the contract pleaded not being in dispute.

In Error to the District Court of the United States for the Southern District of New York.

Action at law by the Cowen Company against the Houk Manufacturing Company, Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 249 Fed. 285.

The plaintiff in error was defendant below and is hereinafter referred to as defendant. The defendant in error was plaintiff below and is hereinafter referred to as plaintiff. The plaintiff is a corporation organized and existing under the laws of the state of Massachusetts, and is regularly engaged in business in the borough of Manhattan, in the city of New York in which place it maintains an office. The defendant is a corporation organized and existing under the laws of the state of New York.

The complaint alleges that the plaintiff rendered certain services to defendant at the latter's special instance and request on or about October 1, 1915, and on or about February 5, 1916. It also declares that in connection with the said services and at defendant's request the plaintiff paid out or incurred obligations in various sums, aggregating the sum of \$5,538.58, all of which sum the defendant promised to pay to the plaintiff. It then declares the services rendered were reasonably worth, and defendant agreed to pay therefor, a sum equal to 15 per cent. of the aggregate sum above stated, which 15 per cent. amounted to \$822.57, and that defendant has been given credit for various sums, aggregating \$120.51. Judgment was asked in the sum of \$6,240.64, with interest.

The answer set up that the amount due from defendant was only \$4,048.82, and that before action was brought defendant tendered that amount, and that plaintiff refused to accept it, and has hitherto refused to receive it, although defendant has ever since remained willing and ready to pay it. By subsequent stipulation this separate alleged defense was withdrawn at the trial. The allegation of tender, of course, was not a defense, but an admission of liability, and tender could only affect the question of interest and costs. The answer avers, in paragraph V, that the plaintiff is a foreign corporation, and had not procured from the secretary of the state of New York a certificate that it had complied with the requirements of the law to authorize it to do business in the state of New York, and that at the times alleged in the complaint it had not paid to the state treasurer of the state of New York the license fee required under section 181 of chapter 908 of the Laws of 1896 and the acts amendatory thereof. No mention of this defense was made at the argument.

The defendant stated in paragraph VI that by reason of the facts set forth in paragraph V of the answer "the plaintiff ought not to maintain this action," and it accordingly demanded judgment and that complaint be dismissed, with costs. Thereupon plaintiff filed a demurrer on the ground that defendant's answer was insufficient in law. The demurrer was sustained, and the court ordered that such defense be stricken from the answer.

By direction of the court a verdict was rendered for the plaintiff for \$6,107.84 and interest from March 30, 1916, and judgment was entered in the sum of \$7,529.61.

John Thomas Smith, of New York City (Frank A. Gaynor, of New York City, of counsel), for plaintiff in error.

S. Michael Cohen, of New York City, for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The plaintiff conducts an advertising agency, and claims to have rendered

services for defendant under an agreement that it would render bills to defendant at what the services cost the plaintiff, and that its compensation would be 15 per cent. of those net prices. The defendant, in opening the case to the jury, stated that there was a disputed item, or "job," as it was called, involved in the plaintiff's claim, and that it was not within the general agreement above referred to, but was governed by a special agreement, which fixed a specific price to be paid for it. When this statement was made by defendant's counsel in his statement to the jury at the beginning of the trial, plaintiff's counsel interrupted, and said that he thought—

"this is the time that the defendant should amend his pleadings, so that he may prove what he is now stating to the jury he is going to prove."

The court ruled that he would allow the case to be tried under the pleadings as they stood, and referred to the decision of this court when this case was here before. The opinion in that case is found in 249 Fed. 285, 161 C. C. A. 221, and must now be referred to in order to understand what occurred in the court below at the second trial now under review.

The facts in that first trial were that the plaintiff had proved a written agreement governing the advertising to be done by plaintiff for defendant. That defendant admitted in court liability on all the bills rendered by plaintiff, except two, and that one of these the plaintiff withdrew. As to the one remaining, which was the largest bill (and which is the same bill in dispute in this the second trial), the defendant offered to prove, and was permitted so to do, a new and separate oral agreement which covered the disputed item. This defense had not been stated nor suggested in the answer. The plaintiff had asked the court to instruct the jury that the burden of proving modification of the original contract was on the defendant, which the court declined to do. The jury were instructed instead that the burden was on the plaintiff. The plaintiff then asked the court to instruct the jury that, if defendant relied upon a separate contract, the burden was upon defendant to prove that separate contract. To that request the court replied:

"The burden never shifts. The burden remains on the plaintiff through the case, because the plaintiff brings the lawsuit."

This court held that in an action on a contract, where defendant at the trial set up a new and separate agreement alleged to have been orally made, and to have modified the original contract, instead of the denial pleaded in the answer, the burden of proving the oral agreement was on defendant, and that instructions that such burden never shifted, and that the burden of proving the original contract was on the plaintiff were erroneous and misleading. We accordingly reversed the judgment and ordered a new trial. In commenting on the fact that the pleadings as drawn were totally irresponsible to the issues actually made at the trial, and that defendant had totally abandoned the answer it had put in, this court said:

"The trial court would have been justified in withdrawing a juror, and compelling an amendment in order that defendant might plead according to

its statement in open court, and in a manner technically justifying the proof it proceeded to offer."

The pleadings at the second trial of the case were exactly the same as at the first trial, with the exception already referred to that by stipulation of counsel the allegation of tender as a defense had been stricken out of the answer. At the second trial, the court having ruled, as before stated, that he would allow the case to be tried under the pleadings as they stood, the defendant's counsel resumed his argument and said:

"The situation, as we shall endeavor to set before you and prove to your satisfaction, is that there was a special job, which, as I say, is the only job in dispute, which was very different in its nature from most of the work that had been done for the Houk Company, by the Cowen Company, and that the agreement as to what was to be paid for that job was made, as to price and as to details of the work to be performed, between Mr. Leathers, who represented the Cowen Company, and Mr. George Houk, who was president of the Houk Manufacturing Company, there being at the same time only one other person, Mr. Ralph, present; that the agreement as to the price of this job was made in Buffalo on the 4th day of December, and if we can prove that to your satisfaction, why, of course, we are going to have to pay the amount that we can show was agreed at that time. If the other side can show that this came under the terms of their general agreement, we will have to pay the amount under that agreement."

Counsel was at this point interrupted by the court's stating that he had a great deal of doubt, after all, as to proceeding in this way. Then occurred the following colloquy:

"The Court: Did you raise this objection before?

"Mr. Cohen: Precisely the same.

"The Court: At the beginning of the trial?

"Mr. Cohen: No, not at the beginning.

"The Court: What point did you raise?

"Mr. Cohen: It was raised on a request for charge to the jury. It was further raised—

"The Court: It wasn't raised before that time?

"Mr. Cohen: It was raised, I think, indirectly in objections to testimony, where I objected it was not proper cross-examination, because I had not developed the issue, and that it was up to the defendant to develop it.

"The Court: But you did not distinctly raise the objection that it was not pleaded?

"Mr. Cohen: No, sir; I did not."

There was some further colloquy between court and counsel; the court saying:

"Now, there (in the first trial) they did not take the objections you have here at the beginning of the trial. You do not expect substantially to vary the nature of your proof on this trial?

"Mr. Lockwood: No, sir.

"The Court: In other words, the same issues will be tried out here as were tried out, or were sought to be tried out, on the first trial."

The court then stated he would direct a verdict for the plaintiff, unless defendant amended his answer, and that defendant might amend if it desired; there being no objection thereto by the plaintiff, who expressly stated that he had no objection. The defendant's counsel, however, refused to amend, saying:

"We will have to respectfully refuse to amend on the ground that we believe our general denial is sufficient to enable us to give the same proof, and offer the same proof in evidence here as we would if the amendment were made."

Thereupon the court ordered a verdict found for the plaintiff in the amount before mentioned. Defendant moved to set the verdict aside and for a new trial. This was refused, and an exception was taken. The record discloses that in the court below counsel for defendant admitted to the court that the proof at the second trial was to be the same as at the first trial. Then the court asked as to the interest due and the date for computation. It was stated by counsel for plaintiff. Then the following occurred:

"The Court: I would ask defendant's counsel if that is correct as to the date from which interest runs?

"Mr. Lockwood: Yes, sir; that is satisfactory; 1916, March 30th."

[1] The direction of a verdict may be justified by the opening address of counsel. In *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539, the court held that a verdict might be directed for the defendant upon the opening statement of counsel for the plaintiff. And, following that, this court, in *New York Evening Post Co. v. Chaloner*, 265 Fed. 204, acted on the admissions of counsel for defendant made on his argument in this court that a committee of the person and property of one alleged to be insane appointed by the Supreme Court of the state of New York had been vacated by that court after the decision below, and that the committee had been discharged pending the appeal in this court. And in *Smith v. Standard Sanitary Manufacturing Co.*, 254 Fed. 427, 166 C. C. A. 59, this court had previously affirmed a judgment where the court below had dismissed the complaint before any testimony had been taken, because of admissions made by plaintiff's counsel in his opening.

[2] It is, however, argued in this court, though the objection was not raised in the court below, that as the facts stood at the stage of the trial when the verdict was directed it was error to direct the verdict. No evidence or testimony at that time had been given. The general agreement in writing, which the plaintiff claimed included the disputed item, had not yet been produced before the court. It is true plaintiff at that time had not proved its case. But plaintiff was in court with its witnesses, and prepared to present the same proof it had given on the first trial. The defendant's counsel by his admissions conceded the plaintiff's case, except as to the one disputed item. The item it proposed to show under the general denial of its answer was not within the general agreement upon which the plaintiff relied, but was within a special contract not pleaded. This we had already decided the defendant was not entitled to do, and that decision established the law of the case, and we have no disposition now to review it. In view of the admissions made by counsel, there was no necessity for plaintiff's introducing his evidence; and the evidence upon which defendant relied could not be introduced under a general denial.

Judgment affirmed.

DIMMITT v. BREakey.

(Circuit Court of Appeals, Fifth Circuit. July 10, 1920. Rehearing Denied August 9, 1920.)

No. 3466.

1. Assault and battery ⚡10—Attempt by plaintiff to evade draft law no defense to civil action.

That plaintiff acquired possession of land for the fraudulent purpose of obtaining a deferred classification under the Draft Law as an agriculturist *held* not to warrant his dispossession by defendant, a stranger to the title, nor to constitute a defense to an action for assault and battery committed in attempting plaintiff's ejection.

2. Appeal and error ⚡1031(1)—Where judgment is substantially just, prejudicial error must be shown.

It is incumbent on a party, appealing from a judgment substantially just, to point out not merely that there was technical error in the admission or rejection of evidence, but that it was of such a nature that prejudice might reasonably have resulted therefrom.

In Error to the District Court of the United States for the Northern District of Texas; James C. Wilson, Judge.

Action at law by Glenn L. Breakey against J. J. Dimmitt. Judgment for plaintiff, and defendant brings error. Affirmed.

Certiorari denied 254 U. S. —, 41 Sup. Ct. 13, 65 L. Ed. —.

M. M. Crane, of Dallas, Tex., W. H. Kimbrough, of Amarillo, Tex., Edward Crane, of Dallas, Tex., M. J. R. Jackson and R. E. Underwood, both of Amarillo, Tex., and M. M. Crane, Jr., of Dallas, Tex. (Crane & Crane, of Dallas, Tex., and Kimbrough, Underwood, Jackson & Simpson, of Amarillo, Tex., of counsel), for plaintiff in error.

S. H. Madden and F. M. Ryburn, both of Amarillo, Tex. (V. H. Grinstead, of Liberal, Kan., W. I. Gamewell, of Dalhart, Tex., and Madden, Trulove, Ryburn & Pipkin, of Amarillo, Tex., of counsel), for defendant in error.

Before WALKER, Circuit Judge, and CALL and HUTCHESON, District Judges.

HUTCHESON, District Judge. Plaintiff in error prosecutes this writ from a verdict and judgment against him in a suit for damages awarded plaintiff, defendant in error here, for \$10,000 actual and \$1,000 exemplary damages.

This suit, which resulted in such verdict and judgment, was an action by the plaintiff, alleging unjustified assault and battery committed on plaintiff by defendant while on the premises occupied by him and his father. The defendant denied generally, and specially denied that he had entered into any conspiracy, that he had done or said any of the things which plaintiff charged, and that he had in any manner injured plaintiff. He further alleged that the plaintiff was a slacker; that is, a person derelict in the performance of his duty toward his country in the recent war with Germany; that plaintiff and his father had no right upon the premises, for that the defendant himself was in

lawful possession of the property at the time of the injury; and that the plaintiff had fenced the property and premises in question willfully and maliciously.

To these allegations defendant added that at the time of the claimed injury he was making merely a peaceful visit, for the purpose of adjusting matters between himself and plaintiff, and that while there did nothing of any kind on his account, or in aid of others, to injure plaintiff. Defendant also asserted damages by cross-action, resulting to his cattle from the fencing, and to himself from fright and fear, due to the actions of the plaintiff at the time alleged.

The cause was submitted to the jury on a written charge which correctly advised the jury as to the rights of the plaintiff and the measure of his damages, if any, and fairly and fully presented all of the issues presented by the pleadings and the evidence, except the issue made by the defendant that plaintiff was not entitled to recover because the defendant had a right to eject plaintiffs from the premises, first, because plaintiff had no contract or other right to be there, and, second, because plaintiff was a slacker, and any contract or right acquired by him to use the premises was void, because acquired in aid of his slackerism, in pursuance of a scheme to claim fraudulent exemption upon an agricultural classification.

As to this issue, the court peremptorily instructed the jury that the plaintiff had a right to be where he was, and, while he admitted a great deal of testimony on the issue of slackerism, especially instructed the jury that the testimony was only admissible as bearing, not upon the right of the plaintiff to recover, but upon the measure of damages. The jury returned a verdict for \$10,000 actual and \$1,000 exemplary damages, and under the instructions of the court found against defendant on his cross-action.

There was ample evidence to support the charge of conspiracy and the theory of plaintiff that the defendant had made a wanton and unprovoked assault upon the plaintiff, and as to the cross-action there was no warrant in law for the claim of defendant for damages growing out of the fact that his cattle were, as he claimed, fenced off from water on plaintiff's own land, or land to which plaintiff had rightful possession, and there was no evidence upon the part of defendant showing that he had sustained any damage from fright or fear, upon which that phase of the issue could have gone to the jury. If, therefore, the issues of slackerism and with whom lay the rightful possession constituted no defense to this suit, and if there was no material error committed by the court in the matter of ruling upon the evidence, the judgment must be affirmed.

While defendant did plead, and did also offer some evidence in support of it, that his mission to the premises where the difficulty occurred was peaceful, and that plaintiff and not the defendant was the aggressor, the real reliance of defendant was placed upon the proposition that he had a right to go to plaintiff and use what force was reasonably necessary to eject plaintiff from the premises, and that for his action in that regard he could not be liable.

[1] This contention was based in part upon the want of a strict

legal transfer to the plaintiff of the title and possession of the premises, and in greater part upon the ingenious theory that, if plaintiff had acquired the tract as a basis for a false affidavit in connection with his claim for agricultural exemption from military service, the plaintiff could not be heard to either claim possession, or resist the efforts of other persons, not connected with the title, to oust him therefrom.

As to the first contention, it is sufficient to say that the evidence is undisputed that the plaintiffs were in possession of the premises by arrangement with the owner, and had inchoate rights therein as contract purchasers, which they could maintain against the defendant, as well as any other person; and as to the second proposition, whatever may be the effect in the moral field of the matters claimed by the defendant to make plaintiff an Ishmael, such would not be their effect in the field of law, and by no correct process of reasoning could the conclusion be arrived at that the fraud of plaintiff, if proven, would confer upon the defendant, or any one else, the right, without legal process, to lay hands upon the plaintiff or eject him from the premises.

The Scripture hath it: "Vengeance is mine; I will repay," saith the Lord." The Constitution and laws of the United States provide a form of trial for parties accused of offenses against the government, and if there has been any wrong done in this matter upon which defendant so vigorously relies for his compurgation from the wrongs charged against him, that must be determined at a different time, in a different way, and before a different tribunal. It is evident, therefore, that as to the feature of the case which the defendant denominates "slackerism" the error of the court below was not against the defendant, but against the plaintiff in permitting the evidence to be introduced, and later to be received upon the issue of damages.

[2] As to the claimed errors in the matter of the admission of evidence, whatever may have been the rule in the past, the English rule that, where it appears that substantial justice has been done, no reversal will be had on account of the erroneous admission or rejection of evidence, especially where it appears that adding to or subtracting from the evidence in question should not alter the result, now prevails, not only in the appellate courts of the United States, but in many of the states, and it is incumbent upon one who appeals from a judgment, otherwise just, to point out, not merely a technical errancy in the admission or rejection of evidence, but that it is of such a nature that prejudice might reasonably result therefrom. The examination of the numerous specifications of error on the admission and rejection of evidence, in the light of this principle, discloses only a few which present even technical error, and none which can lay claim to substance.

As to all the specifications which call in question the action of the court in admitting in evidence a full account of the acts and sayings of the defendant and his companions and the other participants in the struggle on the night in question, they are all clearly admissible for the purpose, outlined by the court in his charge, of throwing light upon the state of mind of the defendant, and determining the issue of whether or not he came, as he claimed in his pleadings, for the purpose of

having a peaceful discussion, or came with temper and anger in his heart.

Nor was there any prejudicial error committed by the court in his rulings upon the evidence on the issue of the rightful possession by the plaintiff or the defendant of the premises in question. It is equally plain that the specifications attacking the action of the court in admitting in evidence the statements of L. I. Breakey, as to why he went to Mason's house, and why he did not go home, do not, in any view, raise or present an error which could have had any bearing upon the result.

As to the specifications charging error in the admission in evidence of letters from Breakey to Langer, it is sufficient to say that if, in any view, these letters were subject to the technical objection of hearsay and self-serving declarations, no reversal should result from their admission, because the same matters are in evidence on the examination of the defendant, without objection, and the exclusion of these letters would cause no substantial change in the record, and besides, in view of the very full evidence on the disputed points in the case, and the fact that the persons whose letters are made the subject of these exceptions themselves testified, and were subjected to the fullest cross-examination, no prejudicial error could possibly have arisen from this admission, if it was technically erroneous.

In reference to the assignment that plaintiff was permitted to elicit from Roy Guffey, witness for defendant, on cross-examination, that he had been indicted and found guilty of cattle theft it is sufficient to say that, while we think it clear that there was a technical errancy in the court's ruling, it is equally clear that whatever prejudicial effect the introduction of this evidence had was removed by the instruction of the court, prior to the conclusion of the argument, withdrawing this issue from the jury.

Finding no reversible error in the record, the judgment of the court below will be affirmed.

HALL v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. July 16, 1920.)

No. 3482.

1. Appeal and error ⇐717—Opinion of trial court may be considered.

The opinion of the trial court may be considered by an appellate court, although not made a part of the record.

2. Druggists ⇐5—Food ⇐15—To determine whether there is misbranding, language should be given ordinary meaning.

In determining whether a drug product or article of food is misbranded, within Food and Drugs Act, § 8, as amended (Comp. St. § 8724), the language used on the label or package is to be given the meaning ordinarily conveyed by it to those to whom it is addressed.

3. Druggists ⇐5—Drug product "misbranded" by misrepresentation of curative effect.

A drug product shipped in interstate commerce in bottles contained in cartons, the labels and cartons bearing statements representing that it

was an effective medicine for treatment of certain ailments named, whereas it contained no ingredient which could possibly have any remedial or beneficial effect in treatment of such ailments, as was known to the shipper, who was the manufacturer, held "misbranded," within Food and Drugs Act, § 8(3), as amended (Comp. St. § 8724[3]).

[Ed. Note.—For other definitions see Words and Phrases, Second Series, Misbrand.]

4. Appeal and error ⇐1054(1)—Admission of misleading evidence in trial to court not prejudicial.

Where issues of fact are tried by the court without a jury, and there is other evidence which supports the judgment, the admission of evidence which might be subject to objection as tending to mislead a jury is not ground for reversal.

In Error to the District Court of the United States for the Southern District of Texas; Joseph C. Hutcheson, Jr., Judge.

Libel by the United States against 141 bottles, more or less, of drug products; E. W. Hall, claimant. Judgment of condemnation, and claimant brings error. Affirmed.

Ben Campbell, of Houston, Tex. (Chester H. Krum, of St. Louis, Mo., on the brief), for plaintiff in error.

D. E. Simmons, U. S. Atty., of Houston, Tex. (V. Simonton, Sp. Asst. U. S. Atty., on the brief), for the United States.

Before WALKER, Circuit Judge, and FOSTER and CALL, District Judges.

WALKER, Circuit Judge. This was a libel by the United States, praying that 141 bottles, more or less, of described drug products or medicine, be seized for condemnation, and be condemned and sold or destroyed. The libel contained allegations to the following effect:

Each bottle mentioned was encased by a carton with the following printing or label thereon, to wit:

"A Texas Wonder. Hall's Great Discovery. Contains 43% alcohol before diluted. 5% after diluted. The Texas Wonder. Hall's Great Discovery, for Kidney and Bladder Troubles, Diabetes, Weak and Lame Backs, Rheumatism, Gravel, Regulates Bladder Trouble in Children. One small bottle is 2 months treatment. Price \$1.25 per bottle. E. W. Hall, Sole Manufacturer, St. Louis, Mo."

There was inclosed in each of the cartons a circular containing the following:

"Louis A. Portner * * * testified he began using the Texas Wonder for stone in the kidneys * * * and tuberculosis of the kidneys as diagnosed by his physicians. * * * He was still using the medicine with wonderful results, and his weight had increased."

That said label and the said carton, and the circular contained in each of said cartons, regarding the curative or therapeutic effect of the said drug or medicine are false and fraudulent, in that the said drug or medicine contains no ingredient or combination of ingredients capable of producing the curative or therapeutic effects claimed for it as set forth by the printed matter on said carton, and thereby the said

products are misbranded, in violation of paragraph 3 of section 8 of the Food and Drugs Act of June 30, 1906, and the amendments thereof (Comp. St. § 8724). Said bottles were shipped in interstate commerce in a way described, and as a result of such shipment were, at the time of the filing of the libel, in the possession of a named party in the district in which the proceeding was instituted.

The plaintiff in error intervened, claimed the bottles proceeded against, and by answer put in issue material averments of the libel. Pursuant to a stipulation of the parties waiving a trial by jury, the case was tried by the court without the intervention of a jury. The court made findings of fact to the effect that the articles libeled were transported in interstate commerce in cartons labeled as alleged, that every claim made for the medicine on the carton was false, and that the medicine as compounded has not and could not have the curative properties claimed for it; that the defendant intervener made the claims shown on the carton recklessly and without a sincere belief in their truth, and that he had actual knowledge that the claims as made were false; and that, in so far as the question of false and fraudulent misbranding is a question of fact, the medicine as distributed was misbranded falsely and fraudulently. Based upon such findings of fact the court concluded, as a matter of law, that the bottles of medicine libeled were falsely and fraudulently misbranded within the meaning of the statute, and because thereof were subject to forfeiture and condemnation. There was a judgment in pursuance of such findings of fact and conclusion of law. The case is here on exceptions to the last-mentioned action of the court, and to rulings on objections to evidence in the course of the trial.

[1] Counsel for plaintiff in error in argument made objection to the consideration by this court of the part of the opinion rendered in the case by the District Judge, which was quoted in the brief filed by the counsel for the defendant in error. This objection is based, not on a claim that there was any inaccuracy in the quotation, but on the ground that the opinion of the trial judge is not properly a part of the record to be considered by this court. If a provision of a rule of this court (rule 14 [150 Fed. lxxix, 79 C. C. A. lxxix]), had been complied with, a copy of that opinion would have been a part of the record before us. The objection on the ground stated is without merit. Certainly it is not an obstacle to a proper consideration of a case by an appellate court for it to be authentically informed by an opinion of the trial judge of the manner in which the evidence adduced was considered by him, and of the reasons relied on to support the conclusions he reached.

[2, 3] Language used in the label is to be given the meaning ordinarily conveyed by it to those to whom it was addressed. When so read and construed, it amounted to an assertion that the article referred to, if used as directed, might be expected to have a curative or alleviating effect on the classes of ailments mentioned. There was no indication of an intention to except any ailment embraced in those classes. Evidence adduced showed what were the ingredients of the article called "A Texas Wonder," and that those ingredients could not, singly

or in combination, have any remedial or beneficial effect on any ailment of the kinds mentioned in the label. The plaintiff in error, the claimant below, the manufacturer and distributor of the article, was a witness in his own behalf. Admissions made by him showed that he was fully aware that his product did not, and could not, have any remedial effect on certain well-known kinds of kidney trouble. Evidence disclosed that it was bought and used as a remedy for ailments as to which admittedly it was wholly ineffective. It cannot with any plausibility be contended that there was an absence of evidence to support a finding that the plaintiff in error put the articles in question into the channels of interstate trade, labeled as a cure or remedy for stated classes of ailments, when he knew that it was ineffective as to an ailment or ailments embraced in those classes, and that this was done with actual intent to deceive buyers and users of the article. Such a finding was enough to support the further conclusion that the alleged label contained a statement as to the curative or therapeutic effect of the article referred to which was false and fraudulent, within the meaning of the statute. 37 Stat. 416 (Comp. St. § 8724); *Seven Cases v. United States*, 239 U. S. 510, 36 Sup. Ct. 190, 60 L. Ed. 411, L. R. A. 1916D, 164.

[4] It is urged in argument that there should be a reversal because of the overruling of objections to the following questions propounded by the court to a physician who was a witness for the claimant:

"I will ask you whether or not such a combination as has been read to you as contained in this bottle is recognized by the medical profession generally, or any portion of it, as a specific for either kidney or bladder troubles, diabetes, weak and lame back, rheumatism or gravel?"

"I will ask you whether any physician that you know of would advise, and I am not speaking with reference to any particular person, but whether the medical opinion crystallized, by discussion and exchange of views, would recommend for treatment to a person afflicted with kidney trouble, as a great discovery or solvent of that trouble, this thing?"

"Would it be considered good or bad practice for a physician to give it to a man—from the standpoint of protecting a man's health?"

The asking of the first-quoted question was justifiable by the circumstance that the witness, at a preceding stage of his examination, had made a statement to the effect that the combination of ingredients which evidence had showed constituted the article in question would have a definite and specific effect on the various organs of the body. Certainly it was not improper for the court to seek to ascertain from the witness what he meant by that statement. The negative answer given by the witness to the question made it plain that he was not to be understood as asserting that the combination in question was regarded as a specific for the class of ailments for which the label suggested its use; in other words, that it was specially adapted to have a beneficial effect with reference to such ailments.

The action of the court in overruling objections to the other questions above set out was treated in argument in behalf of the plaintiff in error as showing or indicating that the case was tried on the erroneous theory that condemnation of the articles proceeded against could be based on opinions of physicians that those articles did not

possess the remedial qualities claimed for them. That the court, in asking the questions and in overruling objections to them, was not influenced by any such erroneous theory, is made plain by the opinion rendered. That opinion discloses that it was recognized that the condemnation sought could not be adjudged unless the evidence adduced proved (1) that the label's statement in regard to curative or therapeutic effect was false; and (2) that such statement was fraudulently made. Falsity in the label's statement of remedial effect being one of the elements required to be proved, it was not improper to admit expert evidence on that issue. On such an issue the opinions of persons whose occupation, training, and experience are such as to make them acquainted with the qualities of the ingredients of the article in question is admissible; and it is permissible to prove that those comprising such a class generally regard the ingredients of an article in question as ineffective, singly or in combination, in the treatment of ailments mentioned, and would in practice refrain from using it in such treatment because of the recognized futility of doing so.

It may be assumed that, if the issues of fact had been tried by a jury, the objections to one or more of the questions asked might properly have been sustained as a means of keeping the jury from being confused or misled into basing their verdict on legally insufficient evidence. But when the issues were tried by the court without a jury, and there was evidence tending to prove all that was required to be proved to support the judgment rendered, and findings were made in pursuance of such evidence, and it is disclosed that the court correctly apprehended what was required to be found to support its judgment, that judgment is not to be disturbed, in the absence of the record clearly showing erroneous action prejudicially affecting the substantial rights of the party seeking a reversal. The conclusion is that the record does not show any reversible error.

The judgment is affirmed.

CHICAGO, R. I. & P. RY. CO. v. CALLICOTTE.*

(Circuit Court of Appeals, Eighth Circuit. June 1, 1920.)

No. 5195.

1. Judgment ◀444—Fraud warranting equitable relief against.

Where plaintiff, in an action for personal injury, feigned total paralysis of his legs as a result of his injury, falsely testifying, and causing others to testify, that it had continued from the time of the injury to that of the trial, six months later, and through conspiracy with others fabricated a history of the case showing such continuance, and caused to be produced a temporary paralysis at the times of examination by medical experts, which could not be detected by ordinary medical tests, upon which history and examinations the experts based their testimony that the paralysis was permanent, and such facts were not known to, or discoverable by, the defendant until after judgment, against which it had no remedy at law, the case *held* to warrant injunction.

◀For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied October 25, 1920.

2. Courts ~~§~~508(3)—Federal court has jurisdiction to enjoin enforcement of judgment of state court.

That a judgment was rendered by a state court does not affect the power of a federal court of equity to enjoin its enforcement, since the injunction acts on the party, and not on the court.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suit in equity by the Chicago, Rock Island & Pacific Railway Company against George A. Callicotte. Decree for defendant, and complainant appeals. Reversed.

John E. Dolman, of St. Joseph, Mo. (Luther Burns, of Topeka, Kan., on the brief), for appellant.

Charles H. Mayer, of St. Joseph, Mo. (K. B. Randolph and Charles F. Strop, both of St. Joseph, Mo., on the brief), for appellee.

Before HOOK, Circuit Judge, and AMIDON and BOOTH, District Judges.

BOOTH, District Judge. This is a suit in equity seeking to enjoin the enforcement of a judgment at law and to set aside the judgment. The judgment was obtained by Callicotte against the railway company in the state circuit court of Buchanan county, Mo., for personal injuries received by him December 28, 1914, while an employé of the railway company. The salient points in the history of the litigation are as follows:

Action was commenced by Callicotte in the state court April 5, 1915. Verdict was rendered and judgment entered in his favor June 23, 1915. On August 7, 1915, a motion for a new trial and a motion in arrest of judgment were made and overruled, and on the same day an appeal was allowed to the state Supreme Court. On December 6, 1916, the bill of complaint in the present case was filed in the District Court for the Western District of Missouri. On July 19, 1917, in the state court in which the personal injury case had been tried, a "motion for an order in the nature of an application for an order for a writ of error coram nobis" was made, by which it was sought to vacate and set aside the judgment of June 23, 1915, on the ground that the judgment had been procured either through fraud or palpable mistake, or upon conjecture. On the same day this motion was overruled, and an appeal taken to the Supreme Court of Missouri from the order overruling the motion. September 25, 1917, upon the trial of the present suit in the United States District Court a decree was entered sustaining a demurrer by the defendant to the plaintiff's evidence, and dismissing the bill. In May, 1918, decisions were rendered in the Supreme Court of the state of Missouri (204 S. W. 528; *Id.*, 204 S. W. 529) affirming the judgment entered June 23, 1915, in the state circuit court of Buchanan county, and also affirming the order of said circuit court in overruling the motion of the railway company for a writ of error coram nobis.

In the complaint in the case at bar plaintiff railway company alleges that Callicotte fraudulently and falsely pretended to receive injuries at the time of the accident which resulted in permanent paralysis

of his lower limbs; that at the time of the trial of the personal injury case in the state court, and prior thereto, Callicotte, being aided by coconspirators, feigned paralysis of his lower limbs, and produced, or caused to be produced, an apparent paralysis of his lower limbs; that said feigned paralysis could not be detected by the usual and ordinary medical tests used for that purpose, although such tests were in fact made by the railway company; that Callicotte testified falsely at the trial that said paralysis was genuine, and the result of personal injuries; that Callicotte after the accident, both before and for some time after the trial, kept himself secreted in his house, so that his true condition should not be ascertained; that during said period he had perfect use of his lower limbs, and made use of them at will; that Callicotte and his coconspirators, by said fraudulent, deceitful, and feigned conduct, caused witnesses to falsely testify at the trial that his lower limbs were paralyzed; that Callicotte and his coconspirators caused him to be fraudulently exhibited to the jury at the trial as a hopeless paralytic; that the court and jury were fraudulently deceived and misled by these fraudulent acts of Callicotte, and by the false testimony of himself and others, who were induced to testify by the false and fraudulent acts of Callicotte; that by reason of the close and watchful care of Callicotte and his coconspirators the railway company was prevented from discovering his real condition, and did not discover it until about January 8, 1916.

The defendant, Callicotte, in his answer in the present suit denied that he had ever feigned paralysis or produced the same; denied that he had conspired to deceive the court, jury, or defendant railway, and denied that he had caused witnesses to testify falsely; denied that there was any false testimony on the trial on the part of himself or his own witnesses; alleged that the question of false testimony and the question of feigned paralysis were issues in the personal injury case tried. He also set up as defense, by way of adjudication, the proceedings by the railway company to obtain a writ of error coram nobis.

At the trial of the present suit in the lower court the plaintiff railway company introduced (1) a complete abstract of record in the personal injury case; (2) a transcript of the evidence given by Callicotte in a case entitled "State of Missouri vs. Callicotte," tried in April, 1916; (3) oral testimony of numerous witnesses. At the close of the plaintiff's case the defendant demurred to the evidence on the ground that the same failed to prove facts sufficient to constitute a cause of action, and, as has already been stated, the demurrer was sustained, and a decree entered dismissing the bill.

It becomes necessary, therefore, to determine (1) what facts were disclosed by the evidence; (2) whether those facts make a case for the equitable relief demanded; (3) whether such relief can be afforded in the federal court.

[1] 1. Among the important facts which are established by the evidence are the following: That on the trial of the personal injury case testimony of plaintiff as to the history of his case was "that since a day or two after the accident, a period of more than six months, he had been completely paralyzed in his lower limbs; that he had no control

over them, or sensation in them"; that before the trial Callicotte had been examined on behalf of the railway company, and also on his own behalf, by several skilled medical men, who made the usual tests to ascertain whether paralysis existed as claimed by Callicotte, and the tests indicated that he had no control over his legs and no sensation in them; that at the time of these several examinations the history of the case up to that time was given to these doctors either by Callicotte or by his regular attending doctor; that this history of the case was a material factor in the conclusions drawn by the expert medical witnesses for Callicotte to the effect that this paralysis would be permanent; that one of Callicotte's own medical witnesses who had testified for him on the trial of the personal injury case testified on the trial of the case at bar on behalf of the railway company to the effect "that if in fact Callicotte walked and otherwise used his legs between the time of the accident and February, 1915, the time when he examined him, it would be his opinion that the paralysis which he found in February, 1915, had been produced by artificial means"; that Callicotte was not paralyzed, as testified by himself, but in fact had the use of his legs, and had actually used them in walking about the house and otherwise, during the whole period from the time of the accident to the time of the trial and thereafter; that it was admitted that Callicotte had had the use of his legs since August 19, 1915, but it was claimed that the paralysis disappeared on that date; that Callicotte, with the aid and understanding of members of his family and his wife's family, kept his true condition concealed from the general public both during the period between the accident and the trial of the personal injury case and thereafter; that he made use of such methods as keeping the blinds of his house drawn and the doors locked when he was up and about, or by making use of a wheel chair; that as late as January, 1916, he was discovered one afternoon disguised in women's clothes, going to a coal shed in his back yard; that he remarked at that time, upon being discovered, that "the jig was up"; that Callicotte threatened to kill one of the members of his wife's family if she ever gave him away; that the discovery of the fraud was not made until long after appeal had been taken from the trial court to the Supreme Court, and that discovery was made possible through a falling-out among the conspirators. The evidence further established that it is possible by the injection of certain drugs to produce and reproduce local temporary paralysis, and that paralysis so produced cannot be distinguished from genuine paralysis, except by observation over an extended period.

We have here, therefore, a conspiracy by Callicotte and others (1) to prevent his true condition and the history of his case being known; (2) to swear falsely as to his condition and the history of his case; (3) to produce a false condition and fabricate a false history of the case as a basis for testimony by witnesses other than himself. This conspiracy was directed against the defendant, the defendant's witnesses, and certain of the plaintiff's own witnesses, and against the court, and jury. Its purpose was not merely to present a false case for plaintiff, but also to prevent the defendant company from putting in its own case in defense.

2. Do the facts warrant the relief demanded? The circumstances under which a court of equity will restrain the enforcement of a judgment on the ground of fraud has been the source of much litigation both in the federal and state courts. The leading case is *U. S. v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, where it was sought to set aside a patent alleged to have been procured by false testimony and a forged instrument of title. The title had been passed upon by a duly constituted board of commissioners in 1853. The decree of that board had been affirmed by the United States District Court, 1856. The bill attacking the title was filed in 1876. Richardson, the original claimant, was dead. His heirs were not made parties to the suit. In that case the court laid down the following rules:

"Where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case; where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and contrives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these and similar cases, which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

But the court said further:

"The acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered."

In applying these rules to the case under consideration the court said:

"The genuineness and validity of the concession * * * produced by complainant was the single question pending before the board of commissioners and the district court for four years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of these tribunals, the very matter which they tried, on the ground of fraud in the document on which the decree was made."

The decree of the lower court sustaining a demurrer to the bill and dismissing it on the merits was affirmed.

Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929, was a suit to set aside a patent and a townsite entry for fraud, consisting of false testimony. A demurrer was sustained to the bill and an appeal taken. In the course of its opinion the court said:

"The operative allegation in this bill is of false testimony only. That testimony Scott had full opportunity of meeting. Rehearings were granted him when the case seemed to require it, and he took all the appeals the law gave. * * * As to the alleged fraud in the description of the compromise line, it is sufficient to say that, according to the bill, this fraud, if it in fact existed, was discovered long before the contest in the land department, and if it had any importance in the case the amplest opportunity was given to show the error and get relief against the agreement."

The Throckmorton Case was cited and followed.

Pacific Railroad Co. v. Missouri Pacific Ry., 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498, was a suit to set aside a decree of foreclosure against the plaintiff railroad, on the ground that no real defense has been made in the foreclosure suit on account of the unfaithful conduct of the solicitor and directors of the plaintiff in carrying out an alleged fraudulent scheme. The lower court had sustained a demurrer to the bill. This was reversed, with directions to overrule the demurrer. The Throckmorton Case was cited with approval.

The case of Moffat v. U. S., 112 U. S. 24, 5 Sup. Ct. 10, 28 L. Ed. 623, was a suit by the United States to cancel two patents for land, on the ground of fraud, the fraud being that the patentees were fictitious persons, and the documents had been fabricated by the register and receiver of the land office. In affirming a decree for the government the court in its opinion said:

"A strenuous effort is made by counsel to bring these cases within the doctrine declared in *U. S. v. Throckmorton*, 98 U. S. 61, and *Vance v. Burbank*, 101 U. S. 514, but without success. * * * Here officers, constituting a special tribunal, entered into a conspiracy; and the frauds consist of documents which they had fabricated, and presented with their judgment to those having appellate and supervisory authority in such matters; and thus a fictitious proceeding was imposed upon the latter as one which had actually taken place. It was a fraud upon the jurisdiction of the officers of the Land Department at Washington, and not the mere presentation to them of doubtful and disputed testimony."

Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630, was a suit attacking an order of sale made by a probate court in the state of Ohio. The sale was alleged to have been fraudulently made by the guardian of an infant. The court below sustained a demurrer to the bill. Counsel for appellees in their brief cited the Throckmorton Case, but the court in its opinion made no mention of it. In its opinion the court said:

"While there are general expressions in some cases apparently asserting a contrary doctrine, the later decisions of this court show that the proper Circuit Court of the United States may, without controlling, supervising, or annulling the proceedings of state courts, give such relief, in a case like the one before us, as is consistent with the principles of equity;" citing *Barrow v. Hunton*, 99 U. S. 80, 25 L. Ed. 407.

Continuing, the court quoted with approval from *Johnson v. Waters*, 111 U. S. 640, 667, 4 Sup. Ct. 619, 634 (28 L. Ed. 547):

"In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it."

The decree of the court was reversed, with directions to overrule the demurrer.

Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, was a suit brought to enjoin the enforcement of certain judgments, on the ground that they had been obtained by false testimony, and by testimony as to the contents of a letter which plaintiff claimed either

never existed or was a forgery. Judgments had been obtained in the state court of Louisiana, and the bill to obtain relief from the judgments was also brought originally in the state court, and a preliminary injunction obtained. Thereafter plaintiff in the suit filed a petition and bond for removal to the federal court. The state court denied the removal, and proceeded to try the case, denying relief to the plaintiff, dissolving the preliminary injunction, and ordering judgment on the bond in favor of the defendant. The plaintiff appealed to the Supreme Court of Louisiana, where the appeal was dismissed for want of jurisdiction. The plaintiff then appealed to the state court of appeals of Louisiana, which affirmed, with certain modification, the judgment of the state district court. The plaintiff then prosecuted a writ of error to the Supreme Court of the United States. The court in its opinion said:

"After the filing of the petition for removal, accompanied by a sufficient bond, and alleging that the controversy was wholly between citizens of different states, the state court was without authority to proceed further if the suit, in its nature, is one of which the Circuit Court of the United States could rightfully take jurisdiction."

The court next held that a Circuit Court of the United States, in the exercise of its equity powers, and where diverse citizenship gives jurisdiction over the parties, may deprive the party of the benefit of a judgment fraudulently obtained by him in the state court if the circumstances are such as would authorize relief by a federal court, if, the judgment had been rendered by it, and not by a state court, as a decree to that effect does not operate upon the state court, but upon the party. In the course of its opinion the court used the following language (141 U. S. 596, 12 Sup. Ct. 64, 35 L. Ed. 870):

"It is the settled doctrine that 'any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery,' " citing numerous cases, and among them the Throckmorton Case

The court further said:

"While the court, upon final hearing, would not permit Mrs. Marshall, being a party to the actions at law, to plead ignorance of the evidence introduced at the trial, it might be that relief could be granted by reason of the fact, distinctly alleged, that some of the necessary proof establishing the forgery of the letter was discovered after the judgments at law were rendered, and after the legal delays within which new trials could have been obtained, and could not have been discovered by her sooner. It was not, however, for the state court to disregard the right of removal upon the ground simply that the averments of the petition were insufficient or too vague to justify a court of equity in granting the relief asked. The suit being, in its general nature, one of which the circuit court of the United States could rightfully take cognizance, it was for that court, after the cause was docketed there, and upon final hearing, to determine whether, under the allegations and proof, a case was made which, according to the established principles of equity, entitled Mrs. Marshall to protection against the judgments alleged to have been fraudulently obtained."

The judgment of the state court was accordingly reversed, and the cause remanded, with directions that the state district court set aside all orders made after filing the petition and bond for removal.

There was at one time a question in the lower courts whether *Marshall v. Holmes* did not overrule or modify the *Throckmorton Case*, and the Circuit Court of Appeals of the Seventh Circuit attempted to certify a question, in the case of *Graver v. Faurot*, to the Supreme Court, for the purpose of having the apparent conflict determined. The Supreme Court, however, dismissed the certificate, on the ground that to answer the question was practically to pass upon the whole case. See *Graver v. Faurot* (C. C.) 64 Fed. 241; *Id.*, 76 Fed. 257, 22 C. C. A. 156; *Id.*, 162 U. S. 435, 16 Sup. Ct. 799, 40 L. Ed. 1030. As to the views of the Circuit Court of Appeals of the Second Circuit, see *U. S. v. Gleeson*, 90 Fed. 778, 33 C. C. A. 272.

That the Supreme Court of the United States does not regard the *Marshall Case* and the *Throckmorton Case* as being in conflict is shown by the fact that each of the cases has been followed with approval by that court in its subsequent decisions. As illustrations, see *U. S. v. Beebe*, 180 U. S. 343, 349, 21 Sup. Ct. 371, 45 L. Ed. 563; *Greenameyer v. Coate*, 212 U. S. 434, 29 Sup. Ct. 345, 53 L. Ed. 587; *Simon v. Ry.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492. And that the rules laid down in the *Throckmorton Case* have been followed by both federal and state courts repeatedly, see *Nelson v. Meehan*, 155 Fed. 1, 83 C. C. A. 597, 12 L. R. A. (N. S.) 374, where the Circuit Court of Appeals of the Ninth Circuit collects and reviews a large number of the cases, both state and federal.

The inquiry, therefore, remains, in the case at bar, whether the facts take it out of the rule announced in the *Throckmorton Case*.

In *Hilton v. Guyot*, 159 U. S. 113, 207, 16 Sup. Ct. 139, 160 (40 L. Ed. 95), a case involving primarily the question of the impeachment of a foreign judgment, the court in its opinion again announced the rule in the *Throckmorton Case*, but in slightly different language, as follows:

"It has often, indeed, been declared by this court that the fraud which entitles a party to impeach the judgment of one of our own tribunals must be fraud extrinsic to the matter tried in the cause, and not merely consist in false and fraudulent documents or testimony submitted to that tribunal, and the truth of which was contested before it and passed upon by it."

From the multitude of cases in which relief has been granted in equity against judgments at law on account of fraud, we cite a few as illustrative:

In the case of *Graver v. Faurot*, *supra*, the fraud which was attacked, and which was held sufficient to justify relief in equity, was the interposition of a false answer, under oath, in a suit in equity, which had caused the plaintiff to go no further with the suit, which had been dismissed at the instance of the defendant upon introducing the sworn answer in evidence.

In *Lehman v. Graham*, 135 Fed. 39, 67 C. C. A. 513, the fraud consisted in a conspiracy by which judgment had been taken against *Graham* on a note given by him as collateral, though he had theretofore paid the original debt in full.

In *Pickens v. Merriam*, 242 Fed. 363, 155 C. C. A. 139, the fraud consisted in deliberate omissions of assets from the inventory and accounts on the part of an administrator in a probate proceeding which had gone to final decree. The court in its opinion, after citing the *Throckmorton Case*, said:

"Because of the conduct of the defendants in concealing the facts concerning the estate, it appears that there has been no adversary trial or decision upon these issues; and we find nothing in the proceedings or decree of the superior court of Los Angeles county, as set up in the bill of complaint, to estop the complainants from having these matters inquired into, and the question of the alleged fraud determined by the court."

An interesting early case is that of *Ocean Insurance Co. v. Fields*, 2 Story, 59, Fed. Cas. No. 10406. That was a case where suit was brought to set aside a judgment obtained upon a policy of insurance on a ship, it being claimed that the judgment had been obtained by fraud. It appeared from the bill that the defense of fraud had been set up in the action at law, but it also appeared that the fraud set up and tried was fraud in "casting away the ship," where as the new fraud alleged in the bill was in "boring holes in her bottom," and it was alleged that the latter fraud was not known until after the judgment. Demurrer to the bill was overruled by Justice Story.

In *Young v. Sigler* (C. C.) 48 Fed. 182, the fraud consisted of a conspiracy by plaintiff and one of two joint trespassers against him, by which a judgment should be obtained for the benefit of both conspirators against the remaining joint trespasser. A settlement had been made by the plaintiff with one of the joint trespassers, and this had been concealed until after judgment had been obtained against the other.

In *Daniels v. Benedict* (C. C.) 50 Fed. 347, the fraud consisted in a conspiracy on the part of certain agents of the husband, Daniels, by which his wife was induced to agree to the entry of a decree of divorce, on the ground of desertion; but the decree, in fact, was obtained on the ground of adultery, testimony being introduced in the absence of the wife.

In *Graves v. Graves*, 132 Iowa, 199, 109 N. W. 707, 10 L. R. A. (N. S.) 216, 10 Ann. Cas. 1104, the fraud consisted in concealment of assets and false swearing in relation to property owned by the husband, in the trial of a divorce case.

In *Nugent v. Railway*, 46 App. Div. 105, 61 N. Y. Supp. 476, the fraud consisted in a conspiracy between plaintiff's attorney and certain witnesses, by which they were induced to commit perjury, in testifying that they were eyewitnesses to a certain accident resulting in a personal injury suit.

In *Taylor v. Railroad*, 86 Tenn. 228, 6 S. W. 393, the fraud consisted in suing and taking judgment a second time upon certain bonds which had already been put in judgment, but which had been thereafter stolen.

In *Wonderly v. Lafayette County*, 150 Mo. 635, 51 S. W. 745, 45 L. R. A. 386, 73 Am. St. Rep. 474, the fraud consisted in concealment of the real ownership of certain bonds, so that suit might be brought on

them in a federal court on the ground of diverse citizenship. The court in its opinion said:

"The scheme was a fraud on the court whose jurisdiction was betrayed, and a fraud on the defendant who was tricked out of its defense. True, the statement in the petition in that suit that Owings, a citizen of Illinois, was the owner of the bonds, is a statement which, under fair conditions, might have been traversed, and the plaintiff put to his proof. But there were no such fair conditions there. The fact that that statement was false was known only to the plaintiff and Owings and they concealed it for the purpose of preventing defendant from making that defense. Not only was the true ownership of the bonds known to them, but the false appearance of ownership was a fact of their own creation, concocted for the purpose of deceiving the court into entertaining a case which, if the truth appeared, it would have rejected on the ground that it had no jurisdiction."

The cases cited by defendant wherein relief was denied which have not already been reviewed are the following:

Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, which was a case where the fraud complained of was perjury pure and simple. The Throckmorton Case was cited and followed.

Hudgens v. Baugh (D. C.) 225 Fed. 899, was a case where the fraud attacked was not between the plaintiff and defendant in the bill, but a fraud practiced on the plaintiff by a third party. The court said:

"It is not alleged nor suggested that the defendant in this action, the plaintiff in the action at law, practiced any fraud on the complainants, whereby they were prevented from making a full defense."

In Ross v. Wood, 70 N. Y. 8, 12, the fraud attacked was perjury simply. The court in its opinion said:

"There was no suppression of evidence by the plaintiff in the former action, or ignorance on the part of the present plaintiff of any fact material to the controversy, and all the evidence which is now within his reach was produced or might have been produced on that trial, and was equally competent then as now."

In Mayor v. Brady, 115 N. Y. 599, 608, 22 N. E. 237, 239, the fraud attacked was thus described by the court in its opinion:

"The entire grievance of the plaintiff, when reduced to its simplest form of statement, consists of a complaint that its own surveyor has classified certain excavations as earth, which should have been described as rock, and the measure of the relief demanded is that the court make a classification which the contract requires the surveyor to make."

And again (115 N. Y. 618, 22 N. E. 243):

"The plaintiff must be considered negligent in not discovering and availing itself of its defense, upon the trial of the action, resulting in the judgments referred to."

In Railway Co. v. Ingram, 85 Ill. 172, a bill was filed in equity for a new trial at law, on grounds of false and fraudulent testimony, and that evidence to that effect had been discovered since the trial. The bill was dismissed because it was not accompanied by affidavits of witnesses by whom the new evidence would be given.

In Railroad v. Mirrieles, 182 Mo. 126, 81 S. W. 437, the fraud at-

tacked was perjury by the plaintiff in the law action. The court in its opinion said:

"The only fraud propounded or suggested is this alleged false testimony given by the then plaintiff in the case. * * * There is no averment of any artifice, trick, promise, or fraudulent conduct of the said plaintiff whereby the company was in any manner deceived or lulled into security or by any means prevented from obtaining testimony to rebut the said evidence of plaintiff."

In *Hamilton v. McLean*, 139 Mo. 678, 688, 41 S. W. 224, 226, the fraud attacked was false testimony and a forged deed introduced in the action at law, and the case was held to be within the rule in the *Throckmorton Case*, the court adding, as to the perjury:

"It does not appear * * * that plaintiff was prevented by any interposition of defendants from showing that fact, if true, in the partition suit."

Hamilton v. McLean, 169 Mo. 51, 68 S. W. 930, was a second suit between the same parties, on the same cause of action as in 139 Mo. The result was the same.

The facts in the case at bar have been already stated, and the question arises wherein lay the fraud. Was it simply in the false testimony at the time of the trial that plaintiff was permanently paralyzed? By no means. The fraud consisted also in a concocted history of the case, to wit, that plaintiff a few days after the accident became paralyzed, and remained so continuously thereafter up to the time of the trial, a period of more than six months. The continuance of the paralysis for a period of more than six months was one of the most important factors on which all of the medical men, both for plaintiff and defendant, based their conclusions. We may disregard the question whether at the several times of the examinations of plaintiff he was artificially paralyzed by drugs or feigned paralysis through self-control. We may even assume that he had true paralysis on these several occasions if possible, but the fact remains that in the intervals he had the use of his legs, and had been seen and known to use them on many occasions. Yet this true history of the case was, by a conspiracy, concealed from the defendant; the false history of the case was given to the various doctors for the defendant, and even to one of the plaintiff's own doctors, either by the plaintiff himself or by another of his doctors. On this false and fraudulent foundation these medical experts rested their conclusions. In other words, they were induced by trickery to testify directly opposite to what they would undoubtedly have testified had they known the truth. The jury was deceived; the court was deceived; the witnesses many of them were deceived—all by this conspiracy and fraud, a fraud consisting not merely in the testimony of plaintiff on the trial, but also in this concocted plan outside of court, pursuant to which a false history of the case was made up and proclaimed. By this fraud the witnesses for defendant, and one at least of the witnesses for the plaintiff, were led to give entirely different testimony from what they would have given but for this fraud. The examination tests on the plaintiff himself and the history of the case were the two main factors on which the experts rested their conclusions. Had these experts been caused to

make tests on a real paralytic fraudulently substituted in place of plaintiff, no one would hesitate to say that the fraud was extrinsic and collateral; yet to substitute a false history of the case in place of the true one, by deception and conspiracy, was equally an extrinsic and collateral fraud, and did "not merely consist in false and fraudulent documents or testimony submitted to the tribunal and the truth of which was contested before it and passed upon by it," as the rule was stated in the case of *Hilton v. Guyot*, supra. In our judgment the facts take the case out of the rule announced in the *Throckmorton Case* and restated in the *Hilton Case*.

All of the elements essential to a good cause of action in equity are present in the case. In *National Surety Co. v. State Bank*, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394, this court stated those elements as follows:

"The indispensable elements of such a cause of action are: (1) A judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; (5) the absence of any adequate remedy at law."

As to the last element, it is to be noted that at the time of the trial in the court below, appeals were pending in the Supreme Court of Missouri from the original judgment, and also from the order denying the writ of error *coram nobis*. This condition of affairs—the possibility that the plaintiff company might obtain relief at law in the state court in the original case—apparently had considerable influence, and properly so, in causing the trial court to deny relief in the present suit. But the remedy at law has now been exhausted and yet the merits of the company's application for relief have not been passed upon in the state courts, the Supreme Court of Missouri holding (*Callicotte v. R. R.*, 204 S. W. 528; *Id.*, 274 Mo. 689, 204 S. W. 529) that the lower court had no jurisdiction to entertain a motion for a writ of error *coram nobis* after the term and while an appeal from the original judgment was pending in the Supreme Court; and holding, further, that, on the appeal from the judgment, relief from the alleged fraud could not be granted in the Supreme Court because that court was restricted to the record in the case as made at the trial. One of the judges in concurring stated that he did so on the ground that relief in equity was not precluded by their decision. Relief in the present equitable suit is, we conclude, not barred by the proceedings in the state courts.

[2] 3. That the judgment against which relief is sought was rendered in the state court is not material. In cases of this character the injunction acts not on the court rendering the judgment, but on the party. *Arrowsmith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870; *McDaniel v. Traylor*, 196 U. S. 415, 25 Sup. Ct. 369, 49 L. Ed. 533; *Simon v. Railway*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492; *Graver v. Faurot*, 76 Fed. 257, 22 C. C. A. 156; *Nat. Surety Co. v. State Bank*, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394; *Lehman*

v. Graham, 135 Fed. 39, 67 C. C. A. 513; Union Ry. Co. v. Ill. Cent. Ry., 207 Fed. 745, 125 C. C. A. 283; N. W. Port Huron Co. v. Babcock, 223 Fed. 479, 139 C. C. A. 27.

Decree dismissing the bill is reversed, with instructions to grant the injunctive relief prayed for.

THE SUSQUEHANNA.

THE SCHUYLKILL.

(Circuit Court of Appeals, Second Circuit. June 9, 1920.)

Nos. 201, 202.

1. Maritime liens ⚡11—Statute as to repairs gives no lien for reconstruction of vessel.

Act June 23, 1910, § 1 (Comp. St. § 7783), giving to any person furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel, a maritime lien enforceable by suit in rem, held not to give a lien for reconstruction of vessels under contract and involving large expense, nor to architects employed to make the plans and superintend the work.

2. Admiralty ⚡11—Contract for reconstruction of used vessel is maritime. Contracts for reconstruction of vessels long in use and for making the plans and superintending the work of reconstruction are maritime.

3. Admiralty ⚡25—Objection to jurisdiction in rem may be waived.

Where a suit in rem is brought on a maritime contract, the claimant may waive objection to the form of suit, and a decree may be rendered against him, although the right to a lien is not established.

4. Admiralty ⚡66—Suit in rem may be changed by amendment to suit in personam.

Where in a suit in rem on a maritime contract objection to jurisdiction in rem is sustained by either the trial court or appellate court, libellant may be permitted to amend by praying judgment in personam against the owner and asking for the usual citation.

Appeals from the District Court of the United States for the Eastern District of New York.

Suits in admiralty by Harry G. Smith and Eugene L. Smith against the Steamship Susquehanna, the Susquehanna Steamship Company, claimant, and against the steamship Schuylkill, the Schuylkill Steamship Company, claimant. Decrees for libellants, and claimants appeal. Affirmed against claimant of the Susquehanna, and reversed as to the Schuylkill, with leave to amend libel.

Cass & Apfel, of New York City (Alvin C. Cass, of New York City, of counsel), for the Susquehanna.

Bullowa & Bullowa, of New York City (H. L. Cheyney, of New York City, of counsel), for the Schuylkill.

Thomas C. Burke, of Buffalo, N. Y., and Robert M. McCormick, of New York City, for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. Harry G. Smith and Eugene L. Smith, naval architects and marine surveyors, were employed by the owners of the lake steamers *Susquehanna* and *Schuylkill* to furnish plans and specifications for their alteration, so as to fit them for ocean navigation and to superintend the making of the said alterations by Buffalo Dry Dock Company. The principal work was in lengthening the steamers. These libels were filed against the steamers, respectively, to cover an alleged balance due in the case of the *Susquehanna* of \$5,741.93 and of \$6,020.41 in the case of the *Schuylkill*, and the usual stipulations for value were given to release them.

The claimant of the *Susquehanna* answered that there was no maritime lien for the libelants' services, or for a large part of them, and that they were entitled to receive nothing because they grossly failed in the performance of their duty to the claimant by permitting the Dry Dock Company to make overcharges at least to the amount of \$200,000. The claimant of the *Schuylkill* excepted to the libel on the ground that it did not set forth facts sufficient to constitute a maritime lien against the steamer.

Judge Chatfield overruled the exceptions, on the ground that the steamer was and had long been a duly enrolled vessel when the work was done, and that there was a lien for the libelant's services under the Act of June 23, 1910, although they were ordered by the owner in the home port.

Judge Garvin found that the contract was that the libelants should be paid 3 per cent. on the cost of the alterations, that no maximum limit was fixed, and that the libelants performed their work in a satisfactory manner in accordance with the contract. Although the time employed and the actual cost greatly exceeded the expectations of all concerned, he found that the claimant in each case continued to pay bills as rendered by the Dry Dock Company, and to pay the libelants commissions long after what they now say was the agreed limit of cost had been exceeded. We agree with him in these conclusions.

From the decree entered in favor of the libelants, both claimants took appeals. At the trial the claimant of the *Susquehanna* declined to except to the jurisdiction of the court; its counsel saying:

"As far as the *Susquehanna* is concerned, we do not raise the jurisdiction in this court. We yield to the jurisdiction of the admiralty court, either on express promise, or quantum meruit, or in any other way."

And no error was assigned in relation to jurisdiction nor was the question argued in this court. The claimant of the *Schuylkill* persisted throughout that there was no liability in rem. It would be useless to go over the many disputes as to facts which the District Judge has found in favor of the libelants, as we think rightly, and we therefore confine ourselves to the questions of law only.

[1] The first is the construction of the act of 1910 (Comp. St. §§ 7783-7787). Section 1 reads as follows:

"That any person furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which

may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

The purpose of this section was to alter the then existing presumption that repairs, supplies, or other necessities ordered by the owner in any port or by the master in the home port were furnished on the credit of the owner, in the absence of proof that credit was given to the vessel. The act gave a maritime lien in such cases on the vessel enforceable in rem for repairs, supplies, and necessities ordered by the master or by a person authorized by him, without the necessity of proving that credit was given to the vessel. The work done by the Dry Dock Company in this case was more in the nature of reconstruction than of repairs. It was not of a kind that owners of shipyards would undertake without being fully advised of the security they were going to have for payment. Contractors for such work did not need the same protection as did small dealers. The fact that the use of dry docks or marine railways was included in express terms seems to us to justify a strict construction of the act.

[2] The work done by the Dry Dock Company and by the libelants were both maritime in character. The contract was not to build the vessel, which would be nonmaritime (*People's Ferry Co. v. Beers*, 20 How. 393, 15 L. Ed. 961), but to lengthen existing vessels which had long been employed in navigation. If the Dry Dock Company had been required to prepare the plans and specifications, the expense would have been a part of the maritime contract. In the case of a third person employed by the claimants to do so, and to superintend the work done under it, the services would be equally maritime.

[3] It seems to us that, though the libelants' services do not fall within the language of the act of 1910, they may be enforced against the *Susquehanna*, because the claimant has deliberately agreed to accept the jurisdiction of the court. This is not a case of giving jurisdiction by consent over a subject-matter of which the court has not jurisdiction. The cause of action is maritime, within the jurisdiction of the court, and the claimant merely waives an objection to the enforcement of it by a form of procedure against his property. He acquiesces in the court's jurisdiction over the thing belonging to him, just as he might over his person, though not properly served with process. It would certainly be sticking in the bark to compel a libellant in a suit in rem to begin a new suit in personam, notwithstanding that the claimant consented to have his rights determined in the suit in rem.

[4] But the considerations are different when the claimant insists upon his objection to jurisdiction in rem. The proper practice, if the objection is sustained in the District Court, was laid down by Judge Addison Brown in *The Monte A.* (D. C.) 12 Fed. 331:

"This libel should therefore be dismissed as against the vessel, * * * and the sureties upon the bond given upon her release should be discharged, but without prejudice to any application by the libellant, within 10 days, to amend the libel by praying judgment against the owner, who has heretofore appeared and answered herein, and for the usual citation against him, and after due service thereof, or his voluntary appearance, the cause to be heard upon the proofs already taken, and such additional proofs as either party may desire to add."

When the objection has been overruled in the District Court, but upon appeal sustained in this court, the libelant should have leave to make the same application here. It follows that the libelants are entitled to a decree against the claimant of the Susquehanna, its sureties being discharged, and that their libel against the Schuylkill be dismissed, unless on or before July 15th they apply to the senior Circuit Judge to amend by including a prayer for a decree against the owner in personam and for the usual citation against it.

UNITED STATES, to Use of MENDENHALL et al. v. PEARSON et al.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1920.)

No. 3440.

Contracts ¶198(5)—**Subcontractor held not required to excavate portions left to supply dirt to cover subsequent structures.**

Where a subcontract for excavation for government reclamation project, not only referred to the plans and specifications in the original contract, but also expressly required the work to be done pursuant to the direction of the government engineers, and the contractor was not required to complete omitted embankments left for subsequent structures, the subcontractor was not required to return and excavate portions of the canal left by direction of the engineers to furnish dirt to fill the embankments over structures completed after the original excavation was made.

In Error to the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Action by the United States, for the use and benefit of John Mendenhall and others, against Alexander Pearson and another. Judgment for use plaintiffs, and defendants bring error. Affirmed.

Gunn, Rasch & Hall, of Helena, Mont., and James Lanagan, of San Francisco, Cal., for plaintiffs in error.

J. H. McDonald, of Provo, Utah, McIntire & Murphy, of Helena, Mont., and John B. Clayberg, of San Francisco, Cal., for defendants in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. This action was brought by the defendant in error in the court below to recover of the plaintiff in error Alexander Pearson, doing business under the name of Pearson Construction Company, the sum of \$3,687.58, with interest thereon at the rate of 8 per cent. per annum from June 15, 1917, with costs of suit, being the alleged balance due the plaintiff in the case from the defendant, for certain work done by the plaintiff as subcontractor under a contract that the defendant to the action had theretofore entered into with the United States. The case shows that on October 19, 1916, the plaintiff in error entered into a contract with the government, agreeing, under penalty of a bond executed by the United States Fidelity & Guaranty

Company as security for the performance of the contract, to construct and complete certain earthwork and structures, laterals and sublaterals, specifically described in schedules 1, 2, 3, and 4, and on laterals 43A and 50A of the Flathead reclamation project, in the state of Montana. The subcontract did not embrace any of the structures, openings for laterals, or emplacements, but included only excavation work specified in 50A and sublaterals specified in schedule 3. It in terms referred to the original contract, the provisions of which were expressly made applicable to the subcontract, in so far as pertinent.

The contention that the contract between Pearson and the United States was only referred to in the subcontract for the purpose of showing what the plans and specifications were that the Mendenhall Bird Company agreed to comply with is contrary to the express terms of the subcontract, declaring that the subcontractor should do the work thereby agreed to be performed under and pursuant to "the direction of the engineers" of the government. It is obvious, therefore, that the decision of the Supreme Court in the case of *Guerini Stone Co. v. Carlin Construction Co.*, 240 U. S. 264, 36 Sup. Ct. 300, 60 L. Ed. 636, in no wise sustains the contention. The original contract required that all of the work thereby provided for should be performed under the direction and orders of an engineer for the government and his subordinates, which requirement, of course, entered into and became a part of that in suit.

Since the excavation work that the subcontractors agreed to do preceded the making of the openings and the building of the structures embraced by the principal contract, and since the entire work was by both contracts made subject to the supervision, direction, and control of the government engineers, necessarily the subcontractors were precluded from excavating such portions of the canal and laterals as the engineers determined should be left until the time arrived for the building of the structures and the making of the required openings. The contract itself in its fiftieth paragraph declared:

"When canal excavation precedes the building of structures, openings shall be left in the embankments at the sites of the structures, and, except when the construction of the structures is included in the contract, the contractor will not be required to complete such omitted embankments."

The necessity for this was thus explained by the chief engineer, Mr. Crowe, in his testimony:

"On our work, we line up our organization so as to move dirt but once. We make the fills from the cuts wherever practicable, wherever possible. When a structure is to be placed, we leave the ground in that vicinity untouched, without any work on it until the structure is completed. Then that dirt is moved out of that excavation and put on top of the structure. There is a fill on top of the structure. The structure is a device placed in the ditch to distribute the water more readily than could be distributed, if it were not there. In order to have the water running through the ditch these had to be removed. In this instance they were removed by Mr. Pearson—the Pearson Construction Company. Necessarily they must have been removed before they finished their work on August 14, 1917. The plaintiffs Mendenhall Bird Company had completed their work at the time I accepted it. I wouldn't have accepted it if it were not."

And again:

"Where a sublateral is put in—a concrete structure—the top will come up level with the bank of the ditch; that is, the head wall. We also excavate about two feet below the bottom of the ditch in the base of the foundation for his concrete structure on the small structures, and on large structures we excavate deeper, of course. A small structure would be from 18 inches to 4 feet deep. The large structures run up to 10 feet. Dirt taken out of the plugs is put on top of this concrete structure. The head wall of the structure comes up to the top of the embankment, and there is a pipe or box that comes through the bank of the ditch. The dirt that is removed in order to put in the headgates is the dirt that we put on top of the structure, and then we go to the bottom of the ditch to make the rest of the fill. If we have a structure that is 10 feet wide to put in, we leave sufficient dirt in the plug to cover the structure. As to whether that would require a 10-foot plug, it is apt to be 30 feet long. Some of these fills are 10 feet high, and the cut might only be a 2-foot cut.

"Q. Now, isn't it a fact that the man who digs the canal is supposed to dig all the dirt that he possibly can in the canal without interfering with the stakes showing the location of that structure? A. The fact that the stakes are there is simply of secondary importance. The fact that the dirt is there with which to make the embankment is the point, and that is why we require that plug to be left there, and we are only going to move that dirt once; we are not going to let these contractors take that out and remove that; we are only going to move that dirt once. Our contract says they must leave a hole in the embankment."

The evidence in the case shows that the dirt left in the canal by direction of the engineers, and indicated by stakes placed by them, necessary for the making of the required fills and embankments, were called "plugs," and that such dirt was left by the subcontractors by order of the engineers for the purposes stated, and was subsequently removed by the contractor in pursuance of his contract with the government. It shows that the subcontractors had three "outfits" at work in their undertaking, the last of which "pulled out" June 7, 1917, leaving the "plugs" of dirt that have been referred to remaining in place. They were not subject to removal by the subcontractors for the simple reason that the engineers, as both contracts authorized them to do, directed that they remain for subsequent use when the structures and openings should be built and made. The evidence shows, too, that the "plugs" were not included in the estimates made by the engineers of the work by the subcontractors to be paid for by the original contractor, and it shows further that the latter so understood the matter and made no objection to paying the subcontractors for the work actually performed by them, on any such ground. The testimony to that effect is undisputed, and, the evidence presenting no issue of fact for the determination of the jury, we are of the opinion that the court below was quite right in directing a verdict for the plaintiff in the case in accordance with the estimate of the government engineer, with interest from the time the amount became due.

The judgment is affirmed.

J. & S. FERGUSON v. LYLE (two cases).

In re G. S. BAXTER & CO.

(Circuit Court of Appeals, Fifth Circuit. June 29, 1920.)

Nos. 3534, 3549.

1. Limitation of actions ⚡146(3)—Signed statement of indebtedness by creditor sufficiently "signed" acknowledgment to remove bar.

A statement of indebtedness furnished on request of a creditor, prepared and signed with the name of the debtor, by his bookkeeper, and delivered to the debtor, who in turn delivered it to the creditor, *held* sufficient acknowledgment under either Gen. St. Fla. § 1717, or Code Civ. Proc. N. Y. § 395; the statement being "signed" by the debtor, for by delivering it to the creditor the debtor adopted it in its entirety including the signature.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sign.]

2. Bankruptcy ⚡324—Creditor entitled to interest owing when petition is filed.

Under Bankruptcy Act, § 63a(1) being Comp. St. § 9647a(1), a creditor is entitled to include in his claim interest owing at the time of filing of the petition.

Appeal and Petition to Superintend and Revise from the District Court of the United States for the Southern District of Florida; R. M. McCall, Judge.

In the matter of G. S. Baxter & Co., a partnership, bankrupt; H. Lyle, trustee. J. & S. Ferguson appeal from an order of the District Court, and also petition to revise. Reversed and remanded, with directions.

See, also, 250 Fed. 307.

E. J. L'Engle and Wm. K. Jackson, both of Jacksonville, Fla., for appellants and petitioners.

Telfair Knight and Lee Guest, both of Jacksonville, Fla., for appellee and respondent.

Before WALKER and BRYAN, Circuit Judges, and HUTCHESON, District Judge.

BRYAN, Circuit Judge. On January 23, 1918, G. S. Baxter & Co., a partnership, and the individual partners, consisting of G. S. Baxter, W. Frazier Jones, and Walton Ferguson, Jr., of New York, Florida, and Connecticut, respectively, were adjudged bankrupts upon a petition in involuntary bankruptcy filed December 7, 1917. After the adjudication appellants filed and proved their claim, which was based upon promissory notes and open accounts, and which amounted to \$599,277.65. There is no controversy either as to the justice or the amount of the claim. However, a considerable portion of it is barred by the statute of limitations. In Florida the statutory period on the notes is five years and on the open accounts is three years, while in New York it is six years on both. This claim accrued in New York. The trustee relies upon the Florida statute of limitations. Appellants insist that, if either statute be applicable, it is that of New York; but

⚡For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

they seek to avoid both statutes of limitations upon the ground that the bankrupt firm acknowledged the indebtedness in writing.

[1] On July 31, 1917, the bankrupts, in compliance with a request therefor by appellants, furnished a statement from their books and entitled it "Bills Payable—J. & S. Ferguson, July 31, 1917, by G. S. Baxter & Co." This statement covered the entire indebtedness of the bankrupts to appellants, including items from October, 1909, to the date thereof. A member of the bankrupt firm instructed its bookkeeper to prepare the statement, which she did, and delivered it to him, or to his son, who in turn delivered it to appellants. The entire statement was typewritten, except the words "by G. S. Baxter & Co.," and they were in the handwriting of the bookkeeper, and were written into the statement by her before she delivered it to her employers.

The referee held that the proof submitted by appellants was insufficient to take the case out of the statute of limitations, and applied the Florida statute, which resulted in the reduction of the claim by the amount of \$120,577.65. He also declined to allow any interest, and certified to the District Court for review the following questions:

(1) Are the claims of J. & S. Ferguson controlled by the statute of limitations of the state of New York, or of the state of Florida?

(2) Does the list of bills payable attached to the amended claim, and filed in evidence as aforesaid, constitute such a new promise or acknowledgment as will toll the statute of limitations?

(3) Are claimants entitled to be allowed interest on their claims?

The District Court denied the petition for review and affirmed the order of the referee. By appeal, and by petition to superintend and revise, appellants seek reversal of the order of the District Court.

The conclusion we have reached as to the sufficiency of the acknowledgment renders it unnecessary to consider the first question certified. Section 1717 of the General Statutes of Florida is as follows:

"Every acknowledgment of, or promise to pay a debt barred by the statute of limitations, must be in writing and signed by the party to be charged."

Section 395 of the Code of Civil Procedure of New York is to the same effect. It is the acknowledgment, and not the promise, that is relied upon by appellants. We think the court below erred in holding this acknowledgment insufficient. In our opinion, the proof showed a compliance with the requirements of the statutes above quoted and cited. The creditors requested of the debtors a written statement of their indebtedness, and in pursuance of that request the statement was furnished. It can make no difference that the statement was prepared by the bookkeeper, because, after its preparation, it was delivered to the bankrupts, and by them in turn delivered to the creditor. The statement furnished by the bankrupts constitutes a clear, unconditional admission of the indebtedness, and was undoubtedly sufficient to constitute an acknowledgment under the laws of New York. *Manchester v. Braedner*, 107 N. Y. 346, text 349, 14 N. E. 405, 1 Am. St. Rep. 829; *In re Lorillard*, 107 Fed. 677, text 679, 46 C. C. A. 553.

In *Wetzell v. Bussard*, 11 Wheat. 309, 6 L. Ed. 481, the general rule is stated as follows:

"An unqualified admission that the debt is due at the time has always been held to remove the bar created by the statute."

The statement was signed within the meaning of the statute. By delivering it to appellants the bankrupts adopted it in its entirety, including the signature. *Lieberman v. Gurensky*, 27 Wash. 410, 67 Pac. 998; *In re Deep River National Bank*, 73 Conn. 341, 47 Atl. 675. What constitutes a signing has arisen more frequently in cases involving the statute of frauds, under which the signing shown here would be sufficient.

The statute under consideration, in so far as it requires the writing to be signed, is identical with the statute of frauds; it was enacted for a like purpose, and therefore should be given a similar construction.

[2] The court below erred also in refusing to allow interest. Under sections 63a(1) and 65e of the Bankruptcy Act (Comp. St. §§ 9647a[1], 9649e), creditors are entitled to interest owing at the time of the filing of the petition.

The case is therefore reversed and remanded, with directions to allow the whole of the claim of appellants, together with interest to the date of the filing of the petition in bankruptcy.

WELSH v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 2, 1920.)

No. 215.

1. Criminal law ⚡1092(4)—Time for settling bill of exceptions.

A District Judge is without authority to sign a bill of exceptions after expiration of the term and any extensions, and after the cause has been removed by writ of error to the Circuit Court of Appeals.

2. Criminal law ⚡1090(1)—Errors appearing on record reviewable without bill of exceptions.

Bill of exceptions is not necessary to authorize Circuit Court of Appeals to consider errors appearing on the face of the record.

3. War ⚡15—Construction of Trading with the Enemy Act.

Trading with the Enemy Act Oct. 6, 1917, § 3(c), being Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½b(c), defines two separate offenses; First, bringing in or sending out of the United States a letter in any other way than in the regular course of mail; and, second, sending out of the United States in any way a communication intended for an enemy or ally of enemy.

4. Indictment and information ⚡129(1)—Offense and attempt to commit such offense may be charged in separate counts.

A complete offense and an attempt to commit the offense may be charged in separate counts, when relating to the same transaction.

5. Arrest ⚡71—Letter as instrument of crime may be seized from person.

Where defendant was arrested in commission of a felony by bringing a letter into the United States in violation of Trading with the Enemy Act Oct. 6, 1917, § 3(c), being Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½b(c), it was lawful to seize such letter from his person as an instrument of crime.

In Error to the District Court of the United States for the Southern District of New York.

Criminal prosecution by the United States against Thomas Welsh. Judgment of conviction, and defendant brings error. Affirmed
See, also, 247 Fed. 239; 250 Fed. 309.

Martin Conboy, of New York City (Edwin N. Moore, of New York City, of counsel), for plaintiff in error.

Francis G. Caffey, U. S. Atty., of New York City (James W. Osborne, Sp. Asst. Atty. Gen., of counsel), for the United States.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. The defendant Welsh was convicted of violating section 3, subd. (c), of the Trading with the Enemy Act of (October 6, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½b[c])). The indictment contained two counts, the first charging him with willfully attempting to bring into the United States from a foreign country, to wit, England, a certain tangible form of communication, to wit, a certain letter, and the second count charging him with willfully bringing in the same letter. April 5, 1918, the case was tried and the defendant convicted upon both counts and sentenced to imprisonment for a year and a day in the United States penitentiary at Atlanta, Ga.

[1] December 31, 1919, long after the term and all extensions of it had expired, and some 20 months after the cause had been removed by writ of error to this court, the trial judge signed the bill of exceptions. He was without any jurisdiction to do so under these circumstances, and we can consider no exception taken at the trial. *Jennings v. Railway Co.*, 218 U. S. 255, 31 Sup. Ct. 1, 54 L. Ed. 1031.

[2] But the writ of error does permit us to consider any errors appearing on the face of the record, because no exception is necessary to save them. *Moline Plow Co. v. Webb*, 141 U. S. 616, 623, 12 Sup. Ct. 100, 35 L. Ed. 879; *Nalle v. Oyster*, 230 U. S. 165, 33 Sup. Ct. 1043, 57 L. Ed. 1439; *Denver v. Home Saving Bank*, 236 U. S. 101, 35 Sup. Ct. 265, 59 L. Ed. 485.

[3] Section 3, subd. (c), reads:

"It shall be unlawful * * * (c) for any person (other than a person in the service of the United States government or of the government of any nation, except that of an enemy or ally of enemy nation, and other than such persons or classes of persons as may be exempted hereunder by the President or by such person as he may direct), to send, or take out of, or bring into, or attempt to send, or take out of, or bring into the United States, any letter or other writing or tangible form of communication, except in the regular course of the mail; and it shall be unlawful for any person to send, take, or transmit, or attempt to send, take, or transmit out of the United States, any letter or other writing, book, map, plan, or other paper, picture, or any telegram, cablegram, or wireless message, or other form of communication intended for or to be delivered, directly or indirectly, to an enemy or ally of enemy: Provided, however, that any person may send, take, or transmit out of the United States anything herein forbidden if he shall first submit the same to the President, or to such officer as the President may direct, and shall obtain the license or consent of the President, under such rules and regulations, and with such exemptions, as shall be prescribed by the President."

Section 16 (section 3115½hh) reads:

"Whoever shall willfully violate any of the provisions of this act * * * shall, upon conviction be fined not more than \$10,000, or, if a natural person, imprisoned for not more than ten years, or both."

December 19, 1917, the defendant demurred to the indictment on the ground that it charged no crime under the act, because it did not allege that the letter in question was "intended for or to be delivered directly or indirectly to an enemy or ally of enemy." Judge Mayer correctly overruled the demurrer, holding that the section covers two offenses: First, the bringing in or sending out of the United States such a letter in any other way than "in the regular course of mail"; and, second, the sending out of the United States in any way a communication intended for an enemy or ally of enemy. The description of each of these offenses is prefaced by the words "It shall be unlawful," indicating that they are distinct. The first covers any letter or tangible communication whatever, and the second only such communications as are intended for an enemy or ally of enemy.

[4] On the same day the defendant moved to quash the indictment on the ground that the counts were inconsistent, because he could not be at the same time guilty of an attempt to bring in and of actually bringing in the letter. But it is proper to charge the complete offense and an attempt to commit the offense in separate counts, when relating to the same transaction. 22 Cyc. 397. The motion was properly denied.

[5] December 27, 1917, the defendant filed a petition for the return of the letter, on the ground that it was seized on his person without any search warrant, in violation of the Fourth and Fifth Amendments of the Constitution. Judge Augustus N. Hand denied the petition. (D. C.) 247 Fed. 239. It showed that defendant was arrested when committing a felony—i. e., an offense punishable by imprisonment for more than one year (section 335 of the Penal Code¹)—and the letter taken was the instrument of crime, the very thing which the act prohibited from being brought into the United States except by mail. It was the right and duty of the government to seize it, just as it would seize burglars' tools found on a defendant's person when arrested.

The judgment is affirmed.

¹ Comp. St. § 10509.

GRONER v. BABCOCK PRINTING PRESS MFG. CO.**In re MOORE.**

(Circuit Court of Appeals, Fourth Circuit. July 6, 1920.)

No. 1788.

1. **Bankruptcy** \S 188(2)—Trustee is subsequent lienholder as against improperly recorded obligation.

Trustee in bankruptcy is entitled to the rights of a subsequent lienholder as against an improperly recorded obligation.

2. **Bankruptcy** \S 188(2)—Contract providing for installment payments held not recorded, so as to give priority.

Where a so-called lease contract, under which the seller delivered a printing press to the bankrupt, showed that the cash was not to be paid, and the notes were not to be given until the new press was delivered, etc., but the date of delivery was not fixed, so that the date and maturity of the notes was uncertain and incapable of ascertainment from the face of the contract, the docketing of such contract in the office of the corporation court, together with a description of the terms of payment, which was erroneous, did not take it out of the terms of Code Va. 1904, § 2462, declaring such contracts to be void as to purchasers and creditors without notice until the docketing of a memorandum showing amounts due and when payable, etc.; hence the trustee of the bankrupt, who occupies the position of a subsequent lien creditor, is entitled to the proceeds from the sale of the press as against the seller.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

In the matter of the bankruptcy of Elwood F. Moore, trading as the Minter-Moore Printing Company. J. A. C. Groner, trustee, appeals from a judgment in favor of the Babcock Printing Press Manufacturing Company, which claimed a preference to the proceeds of the printing press. Reversed.

T. D. Savage, of Norfolk, Va., for appellant.

D. Lawrence Groner, of Norfolk, Va., for appellee.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. Elwood F. Moore, doing business as Minter-Moore Printing Company, was adjudicated a bankrupt September 23, 1918. Among the assets which came into the hands of J. A. C. Groner, trustee, was a printing press and other property, on which there was due by the bankrupt \$1,298, under a contract with the Babcock Printing Press Manufacturing Company; that corporation being referred to in the contract as the lessor and Moore as the lessee. The contract was as follows with respect to payment of the purchase money:

"The lessee does lease of the lessor upon the express terms and conditions hereinafter mentioned for the period of thirty-six (36) months: [Property described] *delivered and erected in press room, ready for power*, and valued at \$2,350.00, and the said lessee hereby agrees to pay to said lessor a total rental of twenty-three hundred and fifty dollars (\$2,350.00) as follows: 29x42" bed drum cylinder Potter printing press, with all parts belonging thereto, as it

stands in press room, at No. 307 Brewer St., Norfolk, Virginia, free from all incumbrances valued at \$100.00, *\$400.00 in cash when said press is in good running order in the press room*, and the residue of the rent above reserved and mentioned during the term of this lease to be evidenced by promissory notes of the lessee bearing interest at *six* per cent., as listed and numbered below, and the payment of these notes is to be deemed and taken as payment of said rent: One note at 1 month, No. 1, \$50. One note at 2 months, No. 2, \$50"—(continuing the list of 36 notes each for \$50, except the last which was for \$100, at 36 months).

[1, 2] By section 2462 of Code of Virginia of 1904 such a contract is void as to purchasers and creditors without notice—

"until and except from the time that a memorandum of said writing, setting forth the date thereof, the amount due thereon, when and how payable, and a brief description of said goods or chattels, be docketed in the clerk's office of the circuit or corporation court of the county or corporation in which said goods or chattels may be."

The District Court held that the contract had been docketed as required by the statute, and that the Babcock Company was entitled to be paid from the proceeds of the sale of the property in the hands of the trustee in bankruptcy occupying the position of a subsequent creditor.

It is evident from the expressions in the contract we have italicized that the cash was not to be paid and the notes were not to be given until the new press was delivered and set up in running order. The date when this was to be done was not fixed, and therefore the date and the maturity of the notes were uncertain and incapable of ascertainment from the contract. On May 18, 1918, the clerk of the corporation court of the city of Norfolk docketed the contract, describing the terms of payment as follows:

"Four hundred dollars (\$400.00) cash, and balance is evidenced by notes of even date, payable at the Seaboard National Bank, Norfolk, Virginia, as follows to wit: Fifty dollars (\$50.00) per month for thirty-five (35) months each, and one hundred dollars (\$100.00) per month for thirty-sixth (36th) month, with interest at six per cent. (6%) per annum until paid in full."

The 36 notes were actually made June 15, 1917, payable in series for 36 months from that date. Thus it appears that no date of maturity of the notes was fixed by the contract, or ascertainable from it, and that the statement of the maturity in the docketing was not only unwarranted by the contract, but contrary to the actual facts. It follows inevitably that the case falls under *National Cash Register Co. v. Burrow*, 110 Va. 785, 67 S. E. 370. The trustee of the bankrupt, occupying the position of a subsequent lien creditor, is therefore entitled to hold the proceeds of the property against the appellee claiming under contract of sale not docketed as required by the statute.

Reversed.

GENERAL ELECTRIC CO. v. INDEPENDENT LAMP & WIRE CO., Inc.

(District Court, D. New Jersey. June 29, 1920.)

No. 648.

1. Patents ⚡82—Patentee entitled to benefit of earlier application.

In so far as an earlier application disclosed any invention contained in a patent subsequently issued, the patentee is entitled to the filing date of the earlier application.

2. Patents ⚡328—1,082,933, for improvement in tungsten and methods for making filaments, held valid.

Patent No. 1,082,933, for improvements in tungsten and methods for making the same for use as filaments in incandescent lights, *held valid*, showing invention, and not having been anticipated; the patent disclosing a method of rendering ductile tungsten which had previously been considered a nonductile and brittle metal.

3. Patents ⚡328—1,082,933 not invalid as claiming a principle.

The Coolidge patent, No. 1,082,933, for improvements in tungsten and methods for making the same for use as filaments in incandescent electric lamps and other purposes, which is the pioneer patent for process for making ductile tungsten, is not invalid as claiming a principle.

4. Patents ⚡328—1,082,933, claims 33 and 34, for wrought tungsten, not invalid.

The Coolidge patent, No. 1,082,933, claims 33 and 34, for wrought tungsten, are not invalid; the inventor having discovered a new substance and the claims being to cover the product, tungsten previously having been regarded as nonductile.

5. Patents ⚡328—1,082,933, claim 14, for process for forming a body of tungsten powder, valid.

Coolidge patent, No. 1,082,933, claim 14, for process for forming a body of tungsten powder, containing additional material which will prevent coarse crystallization at high temperature, etc., and then subjecting it to hot mechanical working, *held valid*; not being anticipated.

6. Patents ⚡317—Former infringement held to warrant decree enjoining future infringement.

Although defendant showed that it had ceased part of its infringement of a patent, yet where there had undoubtedly been infringement, and it had secured the patent process from one of complainant's former employes, *held*, that it was proper to enjoin future infringement.

In Equity. Bill by the General Electric Company against the Independent Lamp & Wire Company, Incorporated. Decree for complainant.

See, also, 244 Fed. 825.

Howson & Howson, of New York City (Frederick P. Fish and Hubert Howson, both of New York City, and Albert G. Davis and Alexander D. Lunt, both of Schenectady, N. Y., of counsel), for plaintiff.

Cornelius C. Billings and Livingston Gifford, both of New York City, and John M. Coit, of Washington, D. C., for defendant.

MORRIS, District Judge. The plaintiff, General Electric Company, by its bill charges Independent Lamp & Wire Company, Incorporated, the defendant, with infringement of United States letters patent No. 1,082,933, granted December 30, 1913, to plaintiff, as assignee of William B. Coolidge, for improvements in tungsten and

methods of making the same for use as filaments of incandescent electric lamps, and for other purposes. The application for the patent in issue was in part a continuation of prior applications by Coolidge, filed July 2, 1906, October 6, 1909, February 23, 1910, and August 15, 1910.

[1, 2] The defenses are invalidity of the patent and noninfringement of certain claims. The specification states:

"My invention comprises a new incandescent lamp filament of drawn wire made from the metal tungsten and a process of producing the same. * * * The wire produced by my invention has found various other applications. * * * So also the new material of which the wire consists, fully worked ductile tungsten, has in other mechanical forms a wide variety of useful applications. Further, an incidental, but valuable, new product is found at an intermediate stage of my process. * * *"

Touching the discovery the specification says:

"I have discovered a process by which tungsten bodies, when prepared under certain conditions, as will be hereinafter more fully described, can be mechanically worked, as by hammering, swaging, rolling, and drawing, and have further discovered that, when this mechanical working is carried on while the metal is heated to temperatures within certain maximum and minimum limits, and is continued long enough, such bodies will be converted from their original crystalline character to a condition having all the characteristics of a ductile metal. In other words, the repeated hot working so changes the metal that it acquires tensile strength, and also becomes pliable and ductile at ordinary or room temperatures, and if the mechanical working is carried sufficiently far, and under proper conditions, the tensile strength of the metal may become equal to or greater than that of the best steel. I have thus not only devised a new process by which it has become possible to work tungsten, as by hammering it or rolling it into the desired form, and by drawing it into fine, strong wire, but I have also produced by the operation of this process a new product, viz. wrought tungsten, and, if the process be carried far enough, ductile tungsten, a material having properties and utilities different from those of any previously known substance. When it is desired to produce from this material an incandescent lamp filament, or any other body which in normal operation is to be operated at high temperatures, I use a special mode of preparation in order to minimize the tendency of the tungsten to revert to a brittle crystalline form. When this crystallization becomes excessive, the crystals may, in the case of a filament, become so large as to extend across the entire section of the filament, and thereupon the sections may move laterally upon each other and produce the condition known as 'offsetting.'"

The claims are for process and product. Typical claims are:

"1. The process of producing tungsten having a fibrous structure which consists in repeatedly hot working a crystalline body of tungsten until the crystalline structure is broken down and a fibrous structure developed."

"24. A wire formed of ductile tungsten.

"25. An incandescent electric lamp having a filament of drawn tungsten wire."

The history of tungsten for upwards of a century after its discovery in 1781 is brief and monotonous. It does not occur native in nature, but is found in certain ores, as wolfram and scheelite. Its ores exist in abundance in all parts of the world. The metal is isolated as a heavy steel gray to black powder, having a fusing point of about 3,200 to 3,350 degrees Centigrade. Since discovery it has been almost constantly under the inquiring eye of chemist and metallurgist. Large quantities of tungsten and its compounds have long been used in alloys, such as tungsten steel, and in chemical compounds. It was well

known that it possessed certain properties that would make its use greatly beneficial, particularly to the electrical art. As a powder, however, it was not capable of being so used as to make its desirable properties available. Owing to its high specific gravity, it was also thought desirable for projectiles. From the beginning of the nineteenth century efforts were made to cast it, reduce it to plates, or draw it into wires; but, with certain possible exceptions which will be hereinafter considered, it was with frequency and uniformity pronounced hard, brittle, unworkable, and nonductile. As late as 1903 Sir Robert Hadfield, a leading metallurgist, in a paper read before the British Iron & Steel Institute, said:

"As far as we know, the metal tungsten, like chromium, is not malleable. If an absolutely pure metal could be obtained, possibly this statement might have to be modified; but the purest forms which the author has been able to obtain possess hardness, brittleness, and are not ductile, either in the ordinary or heated condition."

In 1904 two Austrians, Just and Hanaman, succeeded in making a tungsten filament, not by drawing, but by mixing the fine tungsten powder into a wet paste, with starch or sugar to act as a binder, squirting the paste into a thread, drying and baking the threads, hanging up each thread in an atmosphere of moist hydrogen, passing electric current through it, whereby the carbon in the binding material was removed by the oxidizing action of the moisture in the hydrogen, and the particles of tungsten sintered or softened and stuck together until the threads became consolidated into filaments, which, though exceedingly brittle, were usable in incandescent lamps. This was the first practical use ever made of the metal tungsten, pure and unalloyed. The patent for this invention was sustained in *General Electric Co. v. Laco-Philips Co.*, 233 Fed. 96, 147 C. C. A. 166. The advantages of tungsten as an incandescent lamp filament are due chiefly to its extremely high melting point and its low vapor tension at high temperature; that is, it may be heated well up towards its melting point, even in a vacuum, which generally helps volatilization, without giving off vapor sufficient to cause appreciable deterioration, though the lamp be burned hundreds of hours. The Just & Hanaman filament, brittle though it was, brought about the enormous advantage of diminishing the power necessary for a given illumination to approximately one-third of the amount formerly required, and produced a whiter light.

The revolution in the art caused by the Just & Hanaman invention was described by Judge Mayer in his opinion in the case above referred to. But, notwithstanding their advantages, the Just & Hanaman filaments had many shortcomings. They had to be made in short loops or hairpin shaped sections, of which several were required for a single lamp. They could not be made with sufficient precision to meet definite voltage requirements. They were exceedingly fragile. They broke in great numbers in manufacture, in shipment, and through vibration when in use. Though Just & Hanaman gave to the world the tungsten lamp, they did not advance the art, if art there was, of working tungsten. They did not work it. They did not even discover that it was susceptible of being worked. They did not give to it any new artificial

properties or characteristics. They did not make it pliable or ductile. Chemists and metallurgists continued to say that tungsten, whether cold or hot, was neither malleable nor ductile; that it could not be drawn into wires. For instance, in "The Petty Metals, Titanium, Tungsten, Molybdenum," by Truchot, published in 1905-06, it is said:

"Like chromium, tungsten is not malleable or ductile, whether cold or hot. When pure, it is hard and brittle."

In Roscoe & Schorlemmer's *Treatise on Chemistry*, revised by Sir H. E. Roscoe, F. R. S., and Dr. A. Harden, in 1907, it was stated:

"The purest forms of tungsten at present obtainable are hard and brittle, and are not ductile, either at ordinary temperatures or when heated."

Even as late as 1910, in "Illumination and Photometry," by Prof. Wickenden, of the Massachusetts Institute of Technology, this statement occurs:

"The metallurgy of tungsten is very complex, and the metal, when refined, is nonductile."

Consequently a problem remained to be solved. It was said:

"The elimination of this excessive brittleness is the crux of the tungsten lamp problem."

The specific problem was how to make ductile a metal naturally and normally nonductile. To the solution of this problem the lamp manufacturers in Europe and America bent their every energy. Coolidge solved it, and produced wrought tungsten, or "Coolidge metal," having properties differing most radically from those of the normal or natural tungsten metal. Tungsten is nonductile; Coolidge metal is remarkably ductile. Tungsten is absolutely brittle at ordinary temperatures; Coolidge metal is pliable and flexible. Tungsten is fragile and easily broken; Coolidge metal is stronger than steel. The new metal is so ductile it may be drawn into wires uniform in quality miles in length; it is so flexible that it can be tied in a knot or used as a thread to sew on buttons; its tensile strength may run as high as 600,000 pounds per square inch, while the tensile strength of steel piano wire, the material next in strength, is only about 400,000 pounds to the square inch.

The announcement of the Coolidge achievement caused much comment. The United States Geological Survey Report for 1910, "Mineral Resources of the United States," published in 1911, says:

"No important new uses for tungsten came to the notice of the Survey during the year, but such wonderful improvements were made in the manufacture of tungsten incandescent electric lamp filaments as to make their use amount almost to a new one. The General Electric Company so developed the drawing of tungsten into fine wire that, as now made, it is about as strong as steel wire. This has made possible, not only the shipping of tungsten lamps with a very small loss from breakage of the filament, but railroad trains and automobiles now carry tungsten incandescent electric lamps. To railroads this means a very great saving in electric power, with a consequent lessening of the weight of storage batteries used or a lengthening of their period of service per charge; or it means that a smaller dynamo will light the trains. * * * The toughening of the filament has also made more practicable lamps of large candle power. Tungsten lamps are now used almost everywhere that electric lighting is used."

Numerous other publications spoke of it in the highest terms. Prof. Thompson testified:

"The advantage given by the ductile tungsten wire of Coolidge which might be briefly referred to as 'Coolidge metal,' is an avoidance of brittleness in manufacture; the filament being handled like any fine wire, wound on a frame or properly looped, with only its ends attached to the wires leading through the glass of the lamp for electric current, instead of, as in the sintered filament, in the forms used involving a number of joints, two for each loop or bent portion. Another advantage, which is of great value, is that whereas, with a sintered filament, which preceded the Coolidge wire, it was more or less of an accident whether the lamp came out with its proper voltage rating or not, while with the Coolidge wire it is the practice to cut a definite length of wire for a given voltage and mount it in the lamp. The making of the sintered filament lamp was like shooting at a target, with occasional bull's-eyes. The making of the Coolidge ductile tungsten lamp was as if the target was every time reached by a dead shot in the center. * * * The whole incandescent lamp manufacture was revolutionized by the Coolidge ductile tungsten filament, without loss of those advantages which had already been secured in incandescent lighting by the sintered filament. * * * It has also given rise to a new form of incandescent lamp, known as the half-watt or gas-filled incandescent lamp, in which the filament is a tiny close coil of tungsten wire, mounted and used as an illuminant, and surrounded by an inert gas, such as nitrogen or argon, enabling the consumption of energy for a given candle power, which had been reduced by the introduction of tungsten to about one-half to one-third of what it was with the prior carbon filament lamps, to again be cut down in about the ratio of one-half; that is, one-quarter or one-sixth of the energy for a given illumination in the case of carbon."

The defendant, too, adds its verbal tribute. In January, 1915, it advertised its lamp, which is substantially the same as that of the patent in suit, as follows:

"The Life of a Lamp Lies in Its Filament.

"Independent Ductile Drawn Tungsten Wire,

As a filament for tungsten lamps, represents a tremendous step in the development of lamp manufacture. It gives Independent lamps a durability far greater than is obtained with the pressed tungsten filaments. The Independent, not only will resist shock and vibration, destructive to the ordinary lamp, but it furnishes a white light, more nearly approaching daylight than anything yet devised.

"Pick your lamps for long, satisfactory, economical service. Get our details and prices."

And again:

"The Vibration Kills Your Lamps Unless the Filament is Ductile.

"Ductile metal—metal that can be drawn into wire—cannot be brittle. In fact, Webster's Dictionary gives 'pliant' as a synonym for 'ductile.'"

"Independent Ductile Drawn Tungsten Wire Stands the Racket.

Of vibration because it is pliant—not brittle. That's why Independent lamps give longer service than the ordinary kind. Specify Independent—the lamps with the durable ductile drawn filaments. Write for quotations."

The ductile tungsten filament has gone into general use, and has in large measure, if not entirely, supplanted all other filaments, including that of Just & Hanaman, for incandescent electric lamps. It is less expensive to produce, yet it has far greater durability and utility than

the squirted filament. It is a commercially new product of great utility, having properties and characteristics unknown to the natural and normal tungsten, or, in fact, to any other material.

The defendant contends, however, as I understand its argument, that tungsten is ductile, or it could not be drawn into wires, and again that the drawn tungsten is not ductile, in that annealing makes it brittle, instead of more workable. The first contention overlooks the distinction between natural and artificial ductility, or ductility produced by mechanical strain. Such metals as nickel, silver, and copper are naturally ductile; worked under certain conditions they become very brittle and are readily broken. Yet it would not be deemed accurate to say that such metals are brittle. Again, as I see it, annealing is not a test for ductility. It was the one means known to the prior metal working art for restoring to a metal the ductility destroyed by mechanical strain. But its restoration presupposes prior ductility. Consequently the test for ductility is not annealing, but in ascertaining whether the metal is capable of being permanently drawn out or hammered thin without being fractured.

The defendant also urges that the work of Coolidge was done in the metal working art, and that in this art it was well known that the application of heat and mechanical forces would produce certain results, including those of Coolidge; that all the knowledge necessary to make the Coolidge product is embodied in the adage, "Strike whilst the iron is hot." The plaintiff, on the other hand, meets this contention of the defendant by the statement that the characteristics of tungsten are peculiar to it; that there was in reality no prior art as to tungsten, and that the metal working processes of the prior art taught that the application of mechanical forces to a metal at a temperature below its annealing point produced brittleness and hardness, not ductility, malleability, and pliability; that working hot or cold had never been known to produce these properties, at least after cooling, in a metal normally and naturally brittle.

These conflicting contentions make necessary an inquiry touching the prior metal working art. In the main, I find the testimony of Prof. Zay Jefferies the most satisfactory upon this point. Metal working is performed by changing the shape of the metal by means of mechanically applied stresses, such as hammering, rolling, and wire drawing. Before the metal can be worked, it must, of course, be first obtained from the mine and separated from its ores, if it be not found native, and presented to the mechanic in a mass suitable for working. The mass so presented to the mechanic is known as an "ingot," "slug," "billet," or, where the mass is small, a "button." To produce the mass for working, the metal is invariably subjected to a temperature either above or just below its melting point and allowed to cool. When cool, the metal, whatever it may be, will be crystalline in structure. Consequently the metal as received by the mechanic is always granular, not fibrous. The number and size of grains vary according to the rate of cooling; rapid cooling producing numerous grains, or a "fine-grained" structure, and slow cooling producing fewer and larger grains, or a "coarse-grained" structure. The normal shape of grains, when free

from mechanical strain, is equiaxial; the diameter in all directions being approximately the same.

Certain metals, such as gold, silver, platinum, aluminum, iron, nickel, and copper, when composed of an aggregate of equiaxed grains, may be reshaped cold without rupture. Such metals are called "ductile." Other metals, such as chromium, manganese, antimony, and tungsten, lack this property and are called "brittle." When a ductile metal is worked at ordinary or room temperature, certain well-known changes occur in its internal structure and in its properties or characteristics. The individual grains are thereby deformed in about the same manner and to the same extent as the mass. Its tensile strength increases, but its malleability and ductility decrease. If the working is continued, malleability and ductility disappear, and the metal becomes brittle and unworkable. The same results follow if the working is done hot, but below the temperature at which the grains, when deformed, spontaneously reassume their equiaxial form.

Reheating to a proper temperature, the metal made brittle by working restores its deformed grains to their former equiaxial condition. The restoration of the original granular structure is accompanied by a restoration of ductility and malleability, and consequently of workability. This heating process is known as "annealing." The annealing temperature varies with the different metals. Sometimes a metal is worked above its annealing temperature. This closes the pores, and may with the use of less power make a change in the shape of the mass. If the work is finished at a temperature only slightly above the annealing point, the grain is refined and the metal made more workable at lower temperatures, for, the smaller the grain of a ductile metal, the greater its tensile strength, malleability, and ductility. The prior art also taught that hot wire drawing is the exception and not the rule. The rule and its underlying reason is stated in "General Metallurgy," by Prof. Hofman, of the Massachusetts Institute of Technology, thus:

"As the tensile strength of a metal decreases with a rise of temperature, metals are always drawn cold."

Tensile strength is, of course, an indispensable prerequisite to wire drawing. "Metallurgy" by Prof. Rhead, of the Manchester Institute of Technology, says:

"In wire drawing the metal becomes hard and brittle, and required to be frequently annealed. The ductility is much less hot than cold, so that all wires are drawn cold."

The defendant cites specifically the working of zinc and molybdenum, and the Wollaston method of working platinum, as pointing the way to work tungsten. Zinc does not differ in principle from the other ductile metals, although its unusually low annealing temperature and the consequences flowing therefrom might create a different first impression. The ordinary ductile metals are less ductile when coarse-grained. Zinc, when possessing a coarse-grained structure, is brittle at room temperature, owing to the coarse grains. If the coarse grains are broken up by mechanical working above its annealing temperature, the resulting fine-grained structure is ductile at room temperature, as are

the ordinary ductile metals, when possessing a similar structure. When worked below its annealing temperature, a fibrous structure is developed, resulting in brittleness of the metal. Annealing restores its ductility.

I have been unable to conclude from the record that pliable or ductile molybdenum was known to the prior art. Nor do I find that, prior to Coolidge's efforts to work tungsten, there was any known method of working molybdenum. True, in his endeavor to attain the end sought with tungsten, Coolidge did not limit his experiments to tungsten alone. Molybdenum was included, with the hope that thereby he might acquire experience and knowledge that would be of assistance in solving the tungsten problem. In so doing he succeeded in drawing some molybdenum filaments. Coolidge's work with molybdenum was only incidental to his tungsten work. I do not understand that such work upon molybdenum, or its result, is of any evidential value in this case, other than to show the difficulties of working tungsten.

Wollaston published a paper in 1828, entitled "A Method of Making Platina Malleable." But pure crystalline platinum is exceeded in ductility by gold and silver only. The platinum problem was not the tungsten problem. Dr. Alfred Riche, about 1857, tried the platinum processes on tungsten and failed. A manufacturer of platinum, whose skill was well known, used his every method and effort upon tungsten and failed. For more than three-quarters of a century chemists and metallurgists all over the world, with Wollaston's work before them, were endeavoring to find a method of working tungsten, and alike they all failed. Under these conditions I attach no importance to the Wollaston method of working platinum, nor to the experiments of Dr. Liebmann, the defendant's expert, in working tungsten, not according to the Wollaston process, but according to the Wollaston process with Coolidge improvements. Metals normally brittle and fragile, such as chromium, manganese, and antimony, are not used commercially in the pure state. Such, in brief, was the prior metal working art.

We may now examine the characteristics of tungsten and the method of working it. A mass of crystalline tungsten, however fine be the grain, is entirely brittle cold. It may be worked above its annealing temperature, which is exceedingly high; but after being so worked it is still entirely brittle cold. If the mass is worked at a high temperature, but below its annealing temperature, the grains are deformed. This hardens the metal, and makes it less workable at the immediate working temperature, but increases its workability at some lower temperature, an entirely new phenomenon. If worked at that lower temperature, the same results follow. At each stage the grains are drawn out more and more, until a very fibrous structure is produced, which is pliable and ductile cold. If the metal is heated to its annealing temperature at any working stage, or after the working has been completed, it reverts to its crystalline condition, in which it is entirely brittle cold. The most workable condition of other metals is the least workable condition of tungsten, and vice versa.

It is thus seen that the characteristics of tungsten are peculiar to it, and that the method of working tungsten is an exact reversal of the

metal working processes of the prior art, although heat and mechanical forces are used in each. Never, with the exception of tungsten, have heat and mechanical forces produced ductility in a metal. Furthermore, tungsten is made ductile by working it under its annealing temperature, a method by which brittleness in other metals is uniformly produced. The important thing in this patent, at least so far as the process claims are concerned, is therefore a method of procedure, not the particular means by which the method shall be practiced; yet the specifications point out, not only the method of procedure, but also complete mechanical devices whereby the method can be put into operation, though the mechanism is not claimed by the patentee. Working tungsten was the ultimate problem, not the preliminary one. It was first necessary to produce the tungsten in a proper condition; next get it into a mass, such as an ingot, billet, or slug, suitable for working; and, lastly, to work that ingot into the desired filament or wire. Each problem presented innumerable difficulties.

Coolidge's first discovery consisted in finding that a small filament of tungsten, prepared in a particular way, could be hammered at high temperatures, and its form thereby changed. Upon becoming cool, the metal so hammered was still brittle. Experiments disclosed that the brittleness was due not to impurities, but was inherent in the nature of the metal itself. Coolidge attempted to draw a filament through wire-drawing dies. He failed. Subsequently, by heating the filament, the die through which the filament was being drawn, and the tongs by which it was being drawn, he succeeded. He succeeded in putting the filament through a second die with a draft a fraction of a thousandth of an inch less than that of the first die. The process was continued with die after die. Eventually he discovered that the filament had lost its brittleness and was ductile even when cold. A remarkable thing had been accomplished, yet the filament so ductilized was little more than a laboratory curiosity, owing to the smallness of the original mass. The process, though it produced the new product, produced it only in small quantities and at great cost. It seemed inherently inapplicable to ingots of substantial size.

Nevertheless Coolidge through years of effort and failure evolved a process by which masses of tungsten substantial in size could be converted into filaments ductile when cold. The method so evolved is the process that revolutionized the electric lamp industry, and is the preferred process of the patent. As to it the specification states:

"My process divides itself into two stages: First, the preparation of an ingot or billet of tungsten; and, second, the working of the ingot, and I find that the more successfully the ingot is prepared the more quickly and readily it can be worked; also, by using certain precautions in working, I am able to handle ingots which have not been prepared in the best possible way."

The stages of the process are interdependent. The ingot is prepared by pressing the dry metal powder (obtained from the tungstic oxide in a manner described in the patent) in a side pressure mold under great pressure, sliding the fragile resulting stick upon a piece of metal, baking it, to give it mechanical strength, and then sintering it; that is, forming it into a homogeneous, compact, nonporous ingot by

the passage through it for a proper length of time, when surrounded by an atmosphere of hydrogen, electric current sufficient to raise it to a temperature near but below the melting point. The result is a non-porous, crystalline body of tungsten suitable for working. If the ingot is to be converted into filaments for electric lamps, a small amount of a material, such as thoria, is added to the tungsten powder for the purpose of preventing offsetting in the filament. If the wrought tungsten is not to be used where offsetting would occur, the thoria is omitted from its composition. The ends of the sintered slug are porous, as they are not thoroughly sintered. They are unworkable and are broken off. The remainder of the sintered slug is exceedingly brittle, but is subjected with the utmost carefulness to a mechanical working process at high temperatures and within prescribed ranges for the several steps. The working is performed by swaging or rolling. Precautions are taken to prevent the metal becoming too cool while being worked. The reduction of the cross-section of the ingot in each operation is very small. The working operation is continued, and the working temperature ranges are gradually reduced, until the diameter of the rod is brought to thirty-thousandths of an inch when it is ready to enter the wire-drawing die. The drawing temperatures are high, but below the swaging temperatures. The temperatures of the drawing operation are likewise gradually reduced, as the diameter of the wire is decreased and the fibrosity increased.

With the exception of molybdenum, which differs from tungsten in many substantial respects, tungsten stands alone among the metals in its characteristics and peculiarities. It is not surprising, therefore, that chemists and metallurgists were baffled by it for more than a century. If they could not succeed in working it, it is safe to assume that a mere mechanic would fail also. *Cimiotti v. Comstock* (C. C.) 115 Fed. 524.

In my opinion the solution of the tungsten problem involved invention. The defendant, however, cites certain publications and patents to show anticipation of the Coolidge invention. Among the most important of these is the publication of Moissan, an eminent French scientist, who, in his work, "*Le Four Electrique*," published in 1897, translated by Lenher, when referring to tungsten, said:

"When it is porous, like iron, it has the property of being welded by hammering much below its melting point."

Moissan placed in a carbon crucible a mixture of tungsten oxide and carbon and heated it by an electric arc. The outer portion of the resulting mass contained carbon absorbed from the crucible, and was very hard and brittle. The inner portion of the mass was the porous tungsten of which Moissan speaks. Coolidge tried the Moissan process. He testified:

"We were able to take from the center portions which were very porous, which could be, by hot working with a hammer, compacted to a certain extent. Upon attempting to really hot work these pieces—that is, in the sense of elongating them—they cracked all to pieces. It seemed clear to me from Moissan's publication that all he had done was to produce a porous mass of tungsten, which could, by hammering, be compacted to a certain extent, and

when we, with excellent facilities, tried to go further and make some use of this material, we were unable to do so."

Prof. Jeffries says:

"Moissan specifically states that the product which he hammered was porous before hammering, and consequently, in order to obtain a coherent mass of workable tungsten by hammering this porous mass, welding must take place. It is of interest in this respect to note that, under the most ideal conditions for welding of tungsten particles together, I have determined the minimum temperature for a period of 15 minutes to be not less than 2,200° Centigrade. I have also tried many times, under the most ideal conditions commercially available at the present time, to weld pieces of tungsten together by means of mechanically working the tungsten in the air atmosphere after it had been heated to an extremely high temperature in an atmosphere of hydrogen. I have not succeeded in welding the two parts together in this manner."

Moissan's contribution was a laboratory experiment, that has never proved of any value in practice. Apparently it taught the world nothing. It is inconceivable that Just & Hanaman could have attained fame by their inferior, fragile, squirted tungsten filament, if those skilled in the metal working art had learned from Moissan years before how to work tungsten. Dr. Liebmann testified that he performed the Moissan operation and says:

"I obtained a product which tallied exactly with the description given by Moissan."

But, where Moissan stopped, there Dr. Liebmann stopped. I look in vain among defendant's exhibits for a filament drawn from the porous tungsten of Moissan. I am constrained to conclude, therefore, that the Moissan metal cannot in fact be worked, and that Moissan did not in truth discover that tungsten is susceptible of being worked. But this conclusion is not supported by inference alone, for enlarged photographs of the Moissan metal, hammered by Dr. Liebmann, show very little, if any, deformation, but do show very large cracks. Manifestly Moissan did not teach Dr. Liebmann how to work tungsten.

Again, it expressly appears from the record that, to be workable, the tungsten mass must be coherent, not porous. To convert the porous mass into a coherent mass "welding must take place." Yet "under the most ideal conditions commercially available at the present time" tungsten cannot be welded. It would seem that Moissan's hammering closed only a few pores in the spongy mass. We have seen above what Sir Robert Hadfield in 1903 said of tungsten. Moissan failed to teach him to perform the process or make the product covered by the Coolidge patent. Just & Hanaman and Dr. Coolidge, as well as Sir Robert Hadfield and Dr. Liebmann, were uninstructed by the Moissan publication. In fact I do not find that the disclosure of the Moissan publication was sufficient to enable any one to perform the process or make the product covered by the patent in suit.

It necessarily follows that, if the Moissan publication did not instruct how to work tungsten in a practical sense, it did not disclose that tungsten could be so worked, or that Moissan discovered that it was susceptible of being so worked. "Novelty," says Walker in his work on Patents (section 57), "is not negated by any prior patent or printed publication, unless the information contained therein is full

enough and precise enough to enable any person skilled in the art to which it relates, to perform the process or make the thing covered by the patent sought to be anticipated."

The patents mainly relied on by the defendant are French patent, No. 358,272, of February 7, 1906, granted to Just, Hanaman, and others, an abstract thereof by Ballois in "L'Eclairage Electrique," and a series of Siemens and Halske patents as follows: English No. 20,277, of 1904; German, 165,138 of 1904 and 173,134 of 1905; English No. 3174 of 1907; and Austrian Nos. 33,683 and 34,416 of 1908.

The Just & Hanaman patent and the article by Ballois are similar. They state that tungsten can be drawn, but do not show how this could be accomplished. Manifestly, in view of the failure of scientific men for a century preceding, and the inappropriateness of the wire-drawing processes of the prior art for drawing tungsten, the mere statement that tungsten can be drawn is no disclosure at all. A subsequent statement of Just & Hanaman is in conflict with their statement in the patent. On January 9, 1907, they filed an argument in the United States patent office in which they said:

"Tungsten, whether pure or impure, whether melted or not, is so brittle as to render the same not drawable."

Incidentally, it may be noted that Just & Hanaman made this statement after knowledge of the Moissan publication, for they refer to him in their French patent.

The disclosures of English patent, No. 20,277 of 1904, and German patent, No. 165,138 of 1905, are no more instructive than those of the Just & Hanaman French patent. Siemens and Halske by their British patent endeavored to extend their drawing process, which had been successful with tantalum, to molybdenum, thorium, titanium, tungsten, and zirconium. The problem with tantalum had been to obtain it in a pure state. When pure, it was found to be naturally ductile. The Siemens & Halske patents now under consideration were applied for apparently with the hope that tungsten and the other metals mentioned would be found ductile under like conditions. This conclusion is supported by the fact that Siemens & Halske in their British patent, No. 5,387 of 1908, say in substance that tungsten is nonductile.

Dr. Liebmann, however, performed some experiments for the purpose of demonstrating the practicability of the disclosures of the English patent, in so far as they relate to tungsten. Dr. Liebmann was formerly an employé of the General Electric Company, where he also worked in its laboratory "on the problem of developing the ductile tungsten filament." He left the employ of the plaintiff about August, 1910, when Coolidge's work had been substantially completed, went to Europe, where he was employed until October, 1912, in connection with the manufacture of carbon lamps and squirted filament tungsten lamps. He returned to America in October, 1912, and—

"started at once to install modern machinery for the manufacture of tungsten lamps in the factory of the Independent Lamp & Wire Company (the defendant), and also to proceed with the manufacture of ductile drawn wire for these lamps."

Hence it appears that Dr. Liebmman learned how to draw tungsten according to the plaintiff's method. The experiments conducted in supposed conformity with the English patent were made in a factory whose machinery was designed to work tungsten as Coolidge worked it in the laboratory of the plaintiff. As said in effect by the Supreme Court in *Minerals Separation, Limited, v. Butte & Superior Mining Co.*, 250 U. S. 336-345, 39 Sup. Ct. 496, 63 L. Ed. 1019, it is always difficult to recover the realities of a situation long past, such as we have here; but it is especially difficult when extensive improvements have been made in mechanical appliances for utilizing the invention, and the disclosures of the patent have revealed properties or susceptibilities of the metal theretofore unknown. How much of the modern art did Dr. Liebmman employ, "let us say, subconsciously," in his experiments? "How can a court in this very practical age be convinced of the absolute accuracy of experiments post, when the alleged anticipation ante died in its infancy, and the present invention captured the commercial art almost instantaneously?" *Tungsten Lamp Case*, 233 Fed. 96, 104, 147 C. C. A. 166, 174.

But apart from this I think the decisions of the Court of Appeals of this circuit in *International Curtis M. T. Co. v. Cramp*, 202 Fed. 932, 121 C. C. A. 290, and *Hanifen v. Godshalk*, 84 Fed. 649, 28 C. C. A. 507, show that the English and British patents now under consideration are insufficient in disclosure. The patents and publications hereinbefore discussed are the only ones of which the effective date is prior to July 2, 1906, the date on which Coolidge filed his first United States patent application for working tungsten. As hereinbefore stated the application on which the patent in suit issued was in part a continuation of the 1906 application. In so far as the earlier application discloses any invention contained in the patent in issue, the patentee is entitled to the benefit of the filing date of the earlier application. *Badische Anilin & Soda Fabrik v. Klipstein* (C. C.) 125 Fed. 543; *Victor Talking Machine Cases* (C. C.) 140 Fed. 860; *Id.*, 145 Fed. 350, 76 C. C. A. 180; *Id.* (C. C.) 177 Fed. 248. This was recognized by the Patent Office.

The soundness of the Patent Office ruling is recognized in briefs of counsel for the defendant. The pertinent disclosures of the 1906 application are the necessity for a homogeneous, coherent ingot, with instructions for its preparation; the necessity of working at high temperature, and certain useful expedients, such as encasing the tungsten to be worked in a sheath of some ductile metal. If its disclosures are insufficient, so also are the same or lesser disclosures of subsequent patents. If, on the other hand, its disclosures, not its claims, are sufficient, the patent now in issue is entitled to the benefit of the date of July 2, 1906, as against subsequent patents. I deem it unnecessary to analyze each of these patents. I find in them no information not found in the Coolidge 1906 application, other than the statement in Austrian patent, No. 33,683 of 1908, that an alloy of tungsten and a ductile metal may be drawn, which has no value here.

But the Siemens & Halske patents should not be finally put aside without a reference to their British patent, No. 5,387 of 1908, applied

for March 10, 1908, which is a date later than that of the application supporting any Siemens & Halske patent hereinbefore considered. This patent is referred to for the reason that therein they contradict the statement of their earlier patents, and say in substance that tungsten is nonductile. This patent says:

"The object of the present invention is to facilitate the manufacture of incandescent electric lamps having filaments of nonductile, difficultly fusible metals. The impossibility of making directly a filament of one of these metals suitable for use in the lamp is well known. Broadly speaking, there are two methods of making what may be called the preliminary filament. According to one method, the finely divided refractory metal, like tungsten, is made into a paste or ductile mass, either with aid of some agglutinant or with aid of an amalgam or alloy of low melting point, such as a cadmium bismuth alloy. This mass is then squirted to form a filament. The preliminary filament made in this manner cannot be of any considerable length and must be handled by skilled persons.

"According to the other method, preliminary filaments of any desired length can be made, and can be wound up and preserved, so that the required length can be cut off when desired; moreover, this preliminary filament can be handled and applied by persons having little experience. The method consists in combining the nonductile refractory metal with one more ductile, and as a rule more easily fusible and more volatile; the combination being effected by imbedding the nonductile metal in the more ductile metal in such a manner that each particle of the former is wholly or partly surrounded by the more ductile metal, or by incasing a rod of the nonductile metal in the more ductile metal, or by making an alloy of the nonductile and ductile metals, so that a ductile alloy is produced.

"By whichever method the preliminary filament is made, the auxiliary matter, namely, the agglutinant, or amalgam, or alloy, or the more ductile metal, is expelled by heating the filament by means of an electric current, in order to obtain the finished filament."

Evidently Siemens & Halske should have been added to the list of those uninstructed by the Moissan statement.

Heating the alloy sufficiently to drive off the auxiliary matter results in a filament of tungsten, but it is brittle, for the heating restores it to its former crystalline condition. I am satisfied that novelty of the main process and product claims is not negated by the publications and patents cited.

The British Thompson-Houston Company, the owner of British patent, No. 21,513 of 1906, based upon and substantially similar in its disclosures to the Coolidge 1906 United States application, instituted an action for infringement thereof in the English courts against Duram, Limited. The patent was held invalid. The reasons therefor were set out at much length in the several opinions filed in the various courts in which the case was heard. The defendant in the case at bar contends that the English decision is in effect a decision upon the patent now in issue, and that the patent now under consideration should be held invalid for the reasons assigned for the invalidity of the English patent. With these contentions I am unable to agree. As I understand the opinions of the English courts, the crux of the decision was that the patent there in issue was invalid, owing to the invalidity of claim 1 of the patent; the law of England being that, if one claim is invalid, the whole patent falls. *Murchland v. Nicholson*, [1893] 10 R. P. C. 417; *Robinson on Patents*, vol. 3, § 971, note 2. That claim is:

"1. The method of working tungsten, which consists in subjecting the metal in a coherent form to the action of heat while it is being operated on or manipulated."

Lord Dunedin says:

"It is really on the form of the claim that the judgments of the courts be-
low proceed."

Mr. Justice Astbury said:

"This is a wide claim for working pure coherent tungsten hot. It would appear from the language of this claim that it is not limited to any specific or particular degree of working to any defined end, such as the drawing of filament wire. * * * For the purpose of considering the validity of this claim it is unnecessary to decide whether the patentee made and published a new and valuable invention for making wire-drawn tungsten filaments, assuming his directions to have been sufficient for this purpose. I am inclined to think he may have done so. * * * Claim 1, however, is in no sense confined to protecting any such limited invention, if made, but claims, as I have said, 'working pure coherent tungsten hot,' without further limitation."

[3] The defects of the English patent, as pointed out in the several opinions, have, I think, been overcome in the patent here in suit. It was there suggested that the claim was so broad as to be analogous to claiming a principle; but, as I view the claims in the United States Coolidge patent, they are not of that character, but are well within the provisions of the patent statutes. I think *Morton v. N. Y. Eye Infirmary*, 5 Blatchf. 116, Fed. Cas. 9865, inapplicable.

For the foregoing reasons, the main product and process claims are in my opinion valid. *J. E. Baker Co. v. Kennedy Refractories Co.*, 253 Fed. 739, 165 C. C. A. 333; *Badische Anilin & Soda Fabrik v. Kalle (C. C.)* 94 Fed. 163, 173; *Young v. Fernie*, 4 Giff. 577; *Robinson on Patents*, § 101, note 3, and sections 104 and 266. See, also, *Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177.

[4] There are few claims, however, that require further consideration. Claims 33 and 34 are:

"33. The material, wrought tungsten, having a specific gravity of approximately 19, or greater, and capable of being forged and worked.

"34. Wrought tungsten, a solid coherent material, characterized by the presence of crystals deformed by mechanical working."

They were intended to cover the new product found at an intermediate stage of the process. The defendant says they are too broad, vague, and indefinite. They are broad, but they claim a thing unknown to the prior art—"wrought tungsten." It has uses of great importance. One is an electric contact mechanism in place of the expensive metals, platinum and platino-iridium. It is estimated that during the year 1916 85 per cent. of the automobiles manufactured in this country used tungsten contacts. The number of such contacts used during that year was approximately 8,000,000. For this purpose wrought tungsten lasts two to five times as long as the more expensive platinum and platino-iridium. Another use for wrought tungsten is in forming electrodes in vacuum apparatus, particularly in X-ray tubes. I am inclined to think these claims should also be sustained.

[5] There are also certain claims, referred to as "beneficial additions" claims, of which No. 14 is typical. It is:

"14. The process which consists in forming a body of tungsten powder containing additional material, which will prevent coarse crystallization of the tungsten at high temperature, sintering the body, and then subjecting it to hot mechanical working."

The defendant challenges their validity on the ground that they are broad enough to include the addition of a ductile metal, such as nickel, called for by the Siemens & Halske Austrian patent, No. 33,683 of 1908, and on the further ground that they were anticipated by Lederer's French patent, No. 371,557, published in 1907, and British patent, No. 24,179 of 1906. The ductile metal was added to the tungsten to make a workable alloy, and was driven off before the filament was used. The beneficial additions of Coolidge are included to serve a purpose while the filament is in use. They are to prevent the coarse crystallization of the tungsten at high temperature. Read in the light of the specification, I think these claims are not broad enough to include the ductile metal alloy of Siemens & Halske, and are not anticipated by their Austrian patent. Lederer's patent, however, called for the addition of oxygen compounds of rare earth metals, such as thorium, zirconium, erbium, cerium, lanthanum, and the like, to the tungsten paste of the squirted filament lamp, to delay the coarse crystallization of the squirted filament.

The plaintiff contends that, owing to the ever-present extreme brittleness of the squirted tungsten filament, the coarse crystallization and consequent offsetting did not become a problem of that filament; further, that it is not the mere presence of the additions in the Coolidge filament that is effective, but the extraordinary action of the thoria, when drawn out into little rods or fibers, that determines the character of the crystallization of the drawn tungsten filament, and that this makes patentability of these claims obvious; that it is not the delay of crystallization, which in any event proceeds rapidly when the filament is heated, but that the decisive thing is the form which the crystallization of the tungsten takes, and that the correct form is due, not to thoria, but to thoria drawn out into rods of a particular shape and oriented in a particular way. I am not free from doubt that this argument, though supported by the facts, overcomes the effect of the Lederer patent; yet, as I am of the opinion that the main process and product claims are valid, and as the magnitude of the matters involved in this case is an assurance that errors of this court will not remain uncorrected, I more readily resolve the doubt in favor of the patent. The coarse powder and the Battersea crucible claims do not seem to require any special consideration. They are, in my opinion, valid.

[6] Infringement is not seriously questioned. The defendant began the manufacture of ductile tungsten before the Coolidge patent was issued, but with machinery installed by Dr. Liebmann, who was working upon tungsten for the plaintiff, in whose laboratory Coolidge solved the tungsten problem, until about the time Coolidge's work had been completed. It also brought to its plant from the works of the Westinghouse Lamp Company, a licensee of the plaintiff, and employed, a number of persons who had there learned the Coolidge process. The defendant not only makes the Coolidge product, and by the Cool-

idge process, but in so doing it follows in a very large measure the Coolidge mechanical details. The defendant shows that it no longer uses the Battersea crucible in the manufacture of its product. Its former infringement of these claims, however, is under the circumstances sufficient to call for a decree enjoining their further infringement. *Morton Trust Co. v Standard Steel Car Co.*, 177 Fed. 931, 101 C. C. A. 211. All the claims of the patent will be held valid and infringed.

A decree in conformity herewith may be prepared and submitted.

SELECTASINE PATENTS CO. et al. v. PREST-O-GRAPH CO. et al.

(District Court, D. Oregon. August 2, 1920.)

No. 8388.

1. Patents ☞328—1,254,764, for method of producing colored pictures, valid and infringed.

The Owens, Beck & Steinman patent, No. 1,254,764, for a method of reproducing pictures and designs, by which multicolor pictures, having an embossed effect, are produced by means of a screen through which coloring materials are forced, each succeeding color overlaying those previously applied, except as to such parts as are successively blocked out by the application of shellac to the screen to render it impervious to the coloring matters, *held* not anticipated and valid, but limited by the proceedings in the Patent Office to the use of a single screen for applying all of the colors, and, as so construed, *held* infringed.

2. Patents ☞65—To constitute anticipation, patent must be clear and specific.

To be effective as an anticipation, a patent must be so clear and definite as to enable any mechanic skilled in the art to reach the patented invention certainly, directly, and without the necessity of experiment, and this rule is enforced with particular strictness when applied to a foreign patent.

3. Patents ☞58—In infringement suit, anticipation must be proved beyond reasonable doubt.

Where infringement is charged, the burden of proof is cast on defendant to establish anticipation beyond a reasonable doubt.

4. Patents ☞49—Infringer cannot deny utility of invention.

The fact that a defendant has infringed a patent is sufficient to establish its utility as against him.

5. Patents ☞91(1)—Evidence to disprove joint invention must be clear and unequivocal.

To overthrow the presumption of joint invention, created by the filing of a joint application on a joint oath, the evidence should be clear and unequivocal.

In Equity. Suit by the Selectasine Patents Company and the Selectasine System, Incorporated, against the Prest-O-Graph Company, a copartnership, and others. Decree for complainants.

Charles E. Townsend, of San Francisco, Cal., and Griffith, Leiter & Allen, of Portland, Or., for plaintiffs.

Atkins & Atkins, of Portland, Or., for defendants.

WOLVERTON, District Judge. The plaintiff Selectasine System, Incorporated, is the owner of certain letters patent, No. 1,254,764,

☞For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

relating to "method of delineating or reproducing pictures and designs," by assignment from Edward A. Owens, Roy C. Beck, and Jacob H. Steinman, who are the alleged first inventors of the process which is the subject of the patent. Plaintiffs seek by the present suit to enjoin alleged infringement on the part of defendants.

Defendants interpose three defenses, namely: (1) That the alleged invention is without patentable novelty, and is not the product of inventive faculty, in view of the prior state of the art. (2) That the subject-matter of the patent was the conception of one only of the alleged three joint inventors. (3) That the methods which defendants employ in doing their work are not comprised by the patent, as is shown by the file wrapper, and therefore there is no infringement.

[1] Plaintiffs' patent is for a process, whereby multicolor pictures, having an embossed effect, are produced. The method of production is by use of a screen, consisting of bolting cloth or other material, through which coloring substances, such as paints and the like, are forced, by pressure applied by means of a scraper, or what is termed a squeegee, upon a background or surface upon which the picture is produced. An outline of the picture is first provided, according to the colors of which it is designed to be composed. The background or surface is given a base color, which covers the whole of it, such as green for instance. Such portions of the base color as are designed to be retained and form a shade in the picture are then traced out upon the screen, and blocked or stopped out, as it is termed, by the use of shellac or some substance that is impermeable by the paint or other coloring matter. The screen is then applied to the background, and the second color, such as blue, for instance, is pressed through the screen by the use of the squeegee, upon the background; the second color overlaying the first, except such of the first as has been blocked out on the screen. The blocking out process and the application of colors are repeated in the same way until all the colors of the design are produced upon the picture. The result is that each subsequent color overlays some portion of the previous colors, so that the last color applied always overlays in some area all the previous colors. Thus is produced a picture having an embossed effect, very attractive to the vision, especially when oil paints are used of such viscous consistency as to give such sensible thickness to the succeeding layers as to form plateaus of color. The screen, being stretched upon a frame, is so hinged upon or adjusted to another frame as to give exact register in outline of colors, as well as exact register of the weave of the screen fabric, upon each succeeding imprint.

I am giving but an outline of the process, so that the method employed for producing the picture may be understood. A reference to the specifications of the patent will clarify the details. It should be further stated that the required number of copies, as each color is projected upon the design, may be printed before another color is applied.

The present statement proceeds upon the hypothesis that but a single screen is used for producing the finished picture. Plaintiffs claim that the patent is broad enough to comprise the use of a plurality of screens, corresponding to the number of colors to be projected upon the

picture after the color forming the base is applied. Defendants controvert this, of which I will inquire later.

Logical sequence suggests inquiry first as to the patentability of the process. As anticipatory of the patent in suit, several patents are cited. Among others are those of Pirkis, Vericel, and Simon. The latter is an English conception. The first of these has to do with open stencils, several in number, so arranged as to be applied one after another, to produce a composite design, upon postcards and the like. In this there is no overlapping or building up of one color upon another to produce a plateau of color, and it is obvious there is no anticipation. The second combines the idea of the use of stencils, several in number, for producing floral designs and the like upon fabrics. The stencils are made of bolting cloth, or like material, by blocking or stopping out all parts of the bolting cloth, except some particular part of the design desired to be projected upon the fabric. A separate stencil is provided for each color going to make up the design, and each is applied to the fabric consecutively; the color being pressed through the stencil by means of a scraper. When all the stencils are thus applied, one after another, the design, which is composite in character, is complete. The distinguishing features of this process from the patent in question are the use of a separate stencil for each color applied and that there is no overlapping of colors.

The Simon patent is vague and obscure, and by no means readily understood. This much is obvious, however: That it employs a plurality of screens, made of chiffon, one for each color making up the design desired to be produced, through the blocking or stopping out method, by the use of "knotting," which is described as "a liquid sold by all paint and color merchants," and is probably a substitute for shellac as used by plaintiffs. Further, the specifications in the patent contain this extraordinary language:

"It is desirable that, where three tones of the same color make a form, then the whole of that form is placed on the first screen of that color; the form, less the first tone, on the second screen of that color; the form, less the first and second tones, on the third screen of that color."

It is possible to conceive that it was designed by the patentee that one tone in part should overlap another tone, but the language does not readily suggest the idea of laying color on top of color to form plateaus for giving the picture an embossed effect.

[2] Such vague, indefinite, and ambiguous descriptions and delineations, especially when contained in a foreign patent, are far from sufficient upon which to predicate disclosure. The rule is that the reference, to be sufficient upon which to predicate anticipation, "must be so clear and definite as to enable any mechanic skilled in the art to reach the patented invention certainly, directly, and without the necessity of any experiment, and this rule is enforced with peculiar strictness when the alleged disclosure is found in a foreign patent or publication." *Hoskins Mfg. Co. v. General Electric Co.* (D. C.) 212 Fed. 422, 429; *Seymour v. Osborne*, 11 Wall. 516, 555, 20 L. Ed. 33; *Berry v. Wynkoop-Hallenbeck-Crawford Co.*, 84 Fed. 646, 651, 28 C. C. A. 505; *Westinghouse Air Brake Co. v. Great Northern Railway Co.*, 88 Fed.

258, 263, 31 C. C. A. 525; Consolidated Car-Heating Co. v. West End St. Ry. Co., 85 Fed. 662, 665, 29 C. C. A. 386.

If there is anything in practical suggestion in this Simon patent it is that multiple screens are to be employed in constructing the design or picture. I find nothing in these stencil patents anticipatory of plaintiffs' process of building color upon color in producing their multicolor picture designs, or which is calculated to produce the embossed effect which they claim for their product. I pass over the other references, as the three herein noted are the most pertinent for examination.

As it relates to the alleged prior use, the evidence upon which the contention is predicated is meager, and is without that positive and convincing character required to overcome the presumption of novelty that attends the issuance of the patent.

[3] It is obvious that the "Kissel Kar" pennant lacks the novelty in the process of construction that the specifications in plaintiffs' patent indicate. The testimony of Dibble and Heinrich shows, if it shows anything, that pennants were constructed in Vancouver, B. C.; but it is not such as to impel conviction that the same method was employed as that portended by plaintiffs' patent. Where infringement is charged, the burden of proof is cast upon the defendant to establish anticipation beyond a reasonable doubt. San Francisco Cornice Co. v. Beyrle, 195 Fed. 516, 518, 115 C. C. A. 426; Beckwith v. Malleable Iron Range Co. (C. C.) 174 Fed. 1001.

[4] The novelty and utility of plaintiffs' patent are established by the quick and eager response of the public to avail itself of the use thereof. John Kitchen, Jr., Co. v. Levison, 188 Fed. 658, 110 C. C. A. 424; Snow v. Kellar-Thomason Co., 241 Fed. 119, 123, 154 C. C. A. 119. The evidence amply shows this. Further the patent itself is *prima facie* evidence of both novelty and utility, and the fact that it has been infringed by the defendants is sufficient to establish its utility, at least as against them. Gandy v. Main Belting Co., 143 U. S. 587, 595, 12 Sup. Ct. 598, 36 L. Ed. 272.

Nor can I agree with counsel for defendants that plaintiffs' process is a mere aggregation of devices. The test of aggregation is lacking, which is that each device produces its own effect, unchanged by the others. Here the several devices of the combination co-operate each with the other in creating a novel result, both in the method adopted and in the thing produced. Hailes v. Van Wormer, 20 Wall. 353, 372, 22 L. Ed. 241.

The question of particular moment relates to whether the claimants by their patent are to be confined to the use of a single screen for realizing their process, or are the claims of their patent broad enough to comprise a plurality of screens; each being blocked out to conform to the laying on of succeeding colors of the design to be produced in the form of a picture. The solution of the problem requires a survey of the file wrapper.

Without attempting to trace the history of the allowance of the claims under the patent, it is sufficient to state that a rather sharp controversy arose between the attorneys for claimants and the patent examiner relative to the effect of certain references, including Simon,

Vericel, and Pirkis, above noticed, bearing upon whether petitioners were entitled to be allowed the use of multiple screens in their process. By the examiner's letter of February 21, 1917, it appears that claim 1 was rejected by reference to these three patents; it being held that they are "not necessarily limited to the use of a single screen, but that the same process could be carried out within the terms" of the claims "by the use of a screen for each separate color." By letter of March 23, 1917, petitioners' attorney made some verbal amendments, and requested a reconsideration of the rejection of claims, as amended, including also claim 11. In response, the examiner again rejected 1, 10, and 11, giving as his reason therefor that the language of claim 1, as also of claim 10, "is broad enough to mean that a single screen is used for the several colors; said screen, however, being differently blocked out for each successive color. The amendment to claim 11 does not render the same patentable."

To meet the objections of the examiner, the attorney requested a cancellation of claims 1, 10, and 11, and the insertion of claim 10, with renumbering of claims 1 to 9. With some verbal changes, the claims were finally accepted as embodied in the patent.

These are not the only rejections predicated upon like ground. On November 2, 1916, claims 1, 3, 9, and 10, as then presented, were rejected, because, it was said, the language was "broad enough to cover a process employing a screen for each separate color." In the earlier discussion of attorneys in avoidance of the Simon reference they say:

"It entirely fails to disclose the making of a multicolored picture by the use of a single screen, which is reblocked or partly filled in after each successive color application."

And again in the same letter, that of July 25, 1916, they say:

"One new feature of applicants' method is the employment of a single screen, which is gradually blocked out after each color application; that is, after one color has been applied, it is necessary to block out such portions of the screen as would cover the parts of that color that it is desired to retain."

The claims as finally allowed would seem to indicate that but a single screen was contemplated. 1, 3, 9, and 10 are the ones particularly relied upon as having been infringed. 1 and 3 specify "a single screen," and the language of the ninth and tenth is susceptible of interpretation as having relation to but a single screen. In reality, it is scarcely susceptible of a broader interpretation.

The claims should receive a reasonable interpretation, and it is only where the language is ambiguous and susceptible of different constructions that reference may be had to the file wrapper for clarification of the intentment of the patent. In discussing the construction of a patent, the Supreme Court (*Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 222, 227 [26 L. Ed. 149]) has this to say:

"We do not mean to be understood as asserting that any correspondence between the applicant for a patent and the Commissioner of Patents can be allowed to enlarge, diminish, or vary the language of a patent afterwards issued. Undoubtedly a patent, like any other written instrument, is to be interpreted by its own terms. But when a patent bears on its face a particular construction, inasmuch as the specification and claim are in the words of the

patentee, it is reasonable to hold that such a construction may be confirmed by what the patentee said when he was making his application."

But it has been held, in effect, by this court that, where the claims allowed are not uncertain or ambiguous, the courts should be slow to permit their construction of the patent actually granted and delivered to be affected or controlled by alleged interlocutions between the officers of the Patent Office and the claimant. *Fullerton W. G. Ass'n v. Anderson-Barngrover Mfg. Co.*, 166 Fed. 443, 92 C. C. A. 295, citing *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 582, 18 Sup. Ct. 707, 42 L. Ed. 1136. The comprehensive rule is lucidly stated in *Hubbell v. United States*, 179 U. S. 77, 80, 21 Sup. Ct. 24, 25 (45 L. Ed. 95), as follows:

"It is well settled that the claim as allowed must be read and interpreted with reference to the rejected claim and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the Patent Office or disclosed by prior devices. * * * It is quite true that, where the differences between the claim as made and as allowed consist of mere changes of expression, having substantially the same meaning, such changes, made to meet the views of the examiners, ought not to be permitted to defeat a meritorious claimant. While not allowed to revive a rejected claim, by a broad construction of the claim allowed, yet the patentee is entitled to a fair construction of the terms of his claim as actually granted."

"One who acquiesces in the rejection of his claim, because it is said to be anticipated by other patents or references, is not thereby estopped from claiming, and securing by an amended claim, every known and useful improvement which he has invented that is not disclosed by those references." *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693, 714, 45 C. C. A. 544, 565.

If, however, "an applicant, in order to get his patent, accepts one with a narrower claim than that contained in his original application, he is bound by it." *Shepard v. Carrigan*, 116 U. S. 593, 6 Sup. Ct. 493, 29 L. Ed. 723.

Now, to the interpretation: The specifications contain the statement that the method of reproducing pictures may also be applied, when necessary, in the form of a separate stencil for each color. Undoubtedly this indicates a purpose of the petitioners to avail themselves of the use of a plurality of screens in producing their designs. While the specifications may be considered where the scope of the claims is ambiguous or doubtful, they are not competent to vary the otherwise palpable intentment of the claims themselves. The examiner, it would appear from the file wrapper held tenaciously to the opinion from the first that the patentees were not entitled to claims broad enough to comprise a plurality of screens, or more than a single screen. The only seeming incongruity in his uniform holdings appears in the last above noted, wherein he says that the claim is broad enough to mean that a single screen is used for the several colors; but he refers back to the next previous holding, which is perfectly clear.

One of the most persuasive illustrations of the Simon process is the reproduction of several screens brought into the record by plaintiffs, designed to explain his method, being Exhibits 60a, 60b, and 60c. To this extent, the Simon patent is clear. It unquestionably teaches the use of a plurality of screens in the production of his designs, but it does not teach the use of a single screen for the production of pictures by the laying of color upon color, having an embossed effect, with clean-

cut marginal lines and perfect registration. It is possible, and perhaps practicable, to produce pictures of like character by the use of a plurality of screens, and in practical application these may be regarded as mechanical equivalents. *Hunt Bros. Fruit Packing Co. v. Cassidy*, 53 Fed. 257, 3 C. C. A. 525; *Reece Buttonhole Machine Co. v. Globe Buttonhole Machine Co.*, 61 Fed. 958, 10 C. C. A. 194. But the difficulty with the patentees is that they have so specifically narrowed their claims as to comprise but a single screen. If it were not for this, I should be inclined to hold that the use of a plurality of screens was but the application of mechanical equivalents.

The patentees unwillingly accepted the narrower claims, but, notwithstanding, they must be held to be bound by them. If insistent upon the broader claims, their remedy was by an appeal. *Shepard v. Carrigan*, *supra*.

[5] It is further insisted, upon the part of the defendants, that the patentees were not joint inventors of the alleged patented process, but that Owens was the sole inventor, if the invention was patentable at all, and hence that the patent issued is void by reason of having been issued to the patentees jointly. The patent is at least *prima facie* valid as against this objection, and the burden was upon the defendants to establish its invalidity on this ground. Without reviewing the testimony pertaining to the subject, suffice it to say that, in my opinion, the testimony fails to overcome the *prima facie* validity of the patent.

"To overthrow the presumption of joint invention created by the filing of a joint application upon a joint oath, the evidence should be clear and unequivocal." *Consolidated Bunting Apparatus Co. v. Woerle* (C. C.) 29 Fed. 449, 451.

Further, it is said in *De Laski & Thropp C. W. T. Co. v. Wm. R. Thropp & Sons Co.* (D. C.) 218 Fed. 458, 463:

"This defense has, however, always been regarded as technical, and looked upon with disfavor by the courts, and clear and convincing proof has uniformly been required to sustain it."

See, also, *Butler v. Bainbridge* (C. C.) 29 Fed. 142, 143, and *Sieber & Trussel Mfg. Co. v. Chicago Binder & File Co.* (C. C.) 177 Fed. 439.

It is by no means clear and convincing, under the testimony, that the patentees are not joint inventors, and further comment is unnecessary.

Lastly, it is quite satisfactorily shown that the defendants have infringed plaintiffs' patent by the use of a single screen in producing their designs and pictures. This is apparent, as it relates to the Beaver Glove design and the Allen & Lewis advertisements, copies of which are in evidence; and the evidence tends strongly to show that the Pendleton Woolen Mills job, as it is termed, was produced in the same way. On the other hand, it is shown that the picture of the lady, Exhibit E, produced for the Ball Manufacturing Company was constructed through the use of a plurality of screens.

It results, therefore, that defendants should be enjoined from the manufacture of designs through the use of the single screen, but not through the employment of a plurality of screens, and that plaintiffs are entitled to a decree accordingly.

EIBEL PROCESS CO. v. MINNESOTA & ONTARIO PAPER CO.

(District Court, D. Maine. September 30, 1920.)

No. 769.

1. Patents ~~328~~—845,224, for improvement of Fourdrinier paper-making machine held not anticipated nor indefinite in claim; also held infringed as to claims 1-8, 12.

The Eibel patent, No. 845,224, for improvement in Fourdrinier paper-making machine held not anticipated, and not invalid for indefiniteness of claim, and claims 1, 2, 3, 7, 8, and 12 held infringed.

2. Patents ~~45~~—Commercial utility resolves doubt as to patentable novelty in favor of patent.

Where there is doubt as to patentable novelty, it may be resolved in favor of the patent by reason of its commercial utility.

In Equity. Suit by the Eibel Process Company against the Minnesota & Ontario Paper Company. Decree for plaintiff.

Fish, Richardson & Neave, of Boston, Mass., for plaintiff.

Livingston Gifford, of New York City, Nathan Heard, of Boston, Mass., Amasa C. Paul and Maurice M. Moore, both of Minneapolis, Minn., and Verrill, Hale, Booth & Ives, of Portland, Me., for defendant.

HALE, District Judge. This is a suit in equity to enjoin the infringement of United States letters patent to William Eibel, No. 845,224, dated February 26, 1907, for an improvement in Fourdrinier paper-making machines. The patent seeks to construct and arrange such machines, so that they may be run at a higher speed and produce a more uniform sheet of paper. For many years the Fourdrinier machine has been the best known and most widely used paper-making machine. In describing it, I follow substantially the plaintiff's details. It consists, primarily, of an endless wire-cloth sieve, or "wire," passed over a series of rolls at a constant speed. At the "breast roll" end, or wet end, of this wire there is discharged upon it from the "flow box," or "pond," a constant stream of paper-making stock, consisting generally of fibers of wood pulp, mixed with from 135 to 200 times their weight of water, and having the appearance of diluted milk. This sieve is woven with 60 or 70 meshes to the inch, and may be 75 feet long and 100 inches or more wide. As it travels forward, the fibers are deposited upon the wire, as the water drains out; the wire being given a sidewise thrust or "shake" to insure their proper felting and interlocking. The stock is carried along on the wire, draining off its water as it goes, until the "couch rolls" at the further end of the wire are reached. The stock is pressed between the "couch rolls," and then, in the form of a uniformly distributed wet pulp, is strong enough to hold together, and be carried through a series of pressing and drying rolls and calenders, which constitute the "dry end" of the machine. In order to aid in the extraction of the water from the pulp, there is placed, somewhere about 20 feet from the "breast roll," a series of "suction boxes" beneath

and in contact with the under surface of the wire. A partial vacuum is maintained within these boxes, so that the greater part of the water remaining in the paper stock is sucked out into the boxes, and very little free water remains in the wet web of paper after it has passed beyond this point.

There are many details of construction to which attention is called. The "flow box" is the box in which the stock is stored up, and from which it is discharged upon the moving wires, through the "slice," namely, the horizontal gate extending across the wire, by raising which the stock is discharged from the "flow box" upon the wire, in a stream having the width of the desired sheet of paper, and having a thickness dependent upon the height of the "slice" opening. The "deckle straps" are rubber bands, resting upon the wire at each side of the stream of pulp. They travel with the wire, so as to form lateral walls, to confine the stream of stock until it has reached a condition of such dryness that it no longer tends to flow. The "table rolls" are a series of parallel, horizontal rollers between the "breast roll" and the "couch roll," upon which the active portion of the wire is supported, so as to present a plane surface. The "dandy roll" is a roller, faced with the wire cloth, placed above the wire at a point beyond the first suction box and in contact with the upper surface of the paper. It imparts to the upper surface of the paper a texture similar to that which the lower surface receives from its contact with the wire. This "dandy roll" may also carry the design which impresses the watermark on the sheet, in case a watermark is desired. The last roller for supporting the wire is larger than the others, and is called a "guide roll," since it is equipped with a device for automatically varying the position of its axis, so as to guide the wire and keep it running straight. After the wire passes over the "guide roll," it drops at an angle below horizontal to the "couch roll." Fourdrinier machines are very expensive; and so for purpose of economy, they are operated day and night; and it is the constant endeavor of all paper manufacturers to run these machines at the utmost possible speed consistent with the production of good paper.

Prior to Eibel, as the proofs show, 450 feet of paper per minute was the substantial maximum at which good paper could be made. At speeds exceeding this limit, great commotion was caused in the stock on the wire, so that the paper formed was uneven, or "wild." It had waves, ripples, and wrinkles in it, during the critical period while the paper was forming, thus preventing an even formation. If higher speed was attempted, the sheet would sometimes break, stopping the machine.

The plaintiff says that Eibel made the discovery that the reason for this commotion of the stock, when high speeds were given to the wire, was the excessive difference of speed between the wire and the stock; and that such commotion could be avoided if the stock could be speeded up to equal the wire speed, at the point where active paper formation begins.

Eibel observed—so plaintiff alleges—that, so long as the actual difference between stock speed and wire speed did not exceed say 100 feet per minute, there was no great trouble, because the "drag" or

friction of the wire was sufficient to accelerate the stock to such an extent that speed equality and the consequent quiescence of stock was accomplished before the stock lost its fluid character. He saw the reason why "wild" paper was produced at high speed to be that there was too great a difference between stock speed and wire speed to be overcome by "drag," and that the under part of the liquid was dragged along faster than the upper part, thus causing waves and ripples. In order to meet these conditions, Eibel gave the wire "a sharp, downward pitch from the 'breast roll' to the 'guide roll'; and thus called in the aid of gravitation to speed up the stock on the wire, and to bring it up to speed equality with the wire"; his effort being to use gravity, in correlation with the other elements then in use, with the purpose of making the stock catch up with the speed of the wire. The plaintiff contends that the above is substantially Eibel's inventive thought. Translating that thought into a machine, he took the old Fourdrinier machine, and raised the "breast roll" end to a substantial elevation above the level. As a process, plaintiff says that Eibel's invention consists in giving a rapid flow of stock under the influence of gravity, due to a substantial wire pitch, and correlating this pitch with the speed of the wire in such a way that the initial difference of velocity between stock and wire is overcome under the influence of gravity, so that the waves and ripples, which would otherwise be present at the point of paper formation, are done away with; and plaintiff urges that Eibel had in mind the fact that small elevations of the wire had, up to that time, been used, but that these pitches were mainly for drainage requirements, and that no one had conceived the idea of applying a substantial elevation of the "breast roll" end of the wire to the purpose to which he applied it.

In his specification, Eibel calls attention to the prior art as follows:

"The Fourdrinier wire has usually been arranged to move in a horizontal plane, although I am aware that means have been provided for adjusting the breast roll and of the wire to different elevations, usually below the level, to provide for running with different grades of stock—as, for instance, with quick stock and slow stock; but so far as I am aware the making wire has always had to perform the work of drawing along the stock, and as the wire moved much faster than the stock, the stock waved or rippled badly near the breast roll end of the wire, which gradually diminished until an equilibrium was established, and a smooth, even, and glassy surface presented, and not until the waving or rippling ceased did the fibers lay down uniformly and produce a well-formed sheet of paper. The machine has been run necessarily at a slow rate of speed to give ample time for the water to escape and for the fibers to lay down, so as to make a uniform sheet, and in case the time was insufficient the breast roll end of the wire has been lowered still farther, until the desired result was accomplished. In accordance with my invention I operate entirely above the level to cause the stock to travel by gravity at a velocity approximately equal to the speed of the making wire, which I believe to be a new principle of operation."

He thus points out with some detail what his invention is:

"My invention is embodied, essentially, in the first part or element of the machine having the Fourdrinier wire, or paper-making wire, and consists in causing the stock to travel by gravity in the direction of movement of the making wire and approximately as fast as the making wire moves, there-

by resulting in a 'gravity feed' for the machine. The stock may be, and preferably is, caused to travel more rapidly than the normal or usual speed of the making wire for a certain grade of stock, and means are provided for increasing the speed of the machine, so as to cause the making wire to move at a higher rate of speed than usual, being substantially equal to the speed of the rapidly moving stock. To accomplish this result in a simple manner, the breast roll end of the paper-making wire is maintained at a substantial elevation above the level, thereby providing a continuous downwardly moving paper-making wire, and the declination thus given to the wire is such that the stock is caused to travel by gravity in the direction of the movement of the wire and substantially as fast as the wire moves. The declination of the paper-making wire may be adjustable, or the speed of the wire may be variable, or both the declination and speed of the wire may be adjustable, in order that the velocity produced by gravity in the stock on the declining wire will approximately equal the speed of the wire. By this arrangement the speed of the machine may be increased to such an extent as to bring the speed of the making wire up to the maximum velocity of the rapidly moving stock, and a strong, even, and well-formed sheet produced, which is more uniform than usual. * * *

"The elevation above the level at which the breast roll end of the making wire is maintained will vary according to the grade of stock; but in any event it will be substantial, so as to cause the stock to move rapidly by gravity. * * * For the purpose of increasing the speed of the machine to the maximum, I maintain the breast roll end of the making wire at a high elevation above the level so that the stock travels by gravity much faster than the making wire ordinarily runs for a certain grade of stock, and I then increase the speed of the machine to such extent as to bring the rate of speed of the paper-making wire up to the speed of the rapidly moving stock, and as a result the capacity of the machine is largely increased.

"I find in practice that, by providing a gravity feed operating substantially as herein described, the stock runs smoothly and evenly, without waving or rippling, and the fibers are thereby permitted to settle with great uniformity, as regards their distribution over the wire, so that the paper, in addition to being well formed, is very uniform. Furthermore, as the stock is moving with the paper-making wire, instead of being moved by the wire, or essentially by the wire, the formation of the paper will begin at the start and will continue to the end of the travel of the stock with the wire. Furthermore, by making the sheet of paper uniform over all less sulphite or strengthening material is required. Furthermore, as the stock carries less water when arriving at the suction boxes, the amount of suction ordinarily required may be reduced, thereby reducing the friction due to the making wire passing over the suction boxes, and hence increasing the life of the wire. * * *

The claims of Eibel's patent now at issue in this suit are claims 1, 2, 3, 7, 8, and 12, as follows:

"1. A Fourdrinier machine having the breast roll end of the paper-making wire maintained at a substantial elevation above the level, whereby the stock is caused to travel by gravity, rapidly, in the direction of the movement of the wire, and at a speed approximately equal to the speed of the wire, substantially as described.

"2. A Fourdrinier machine having the breast roll end of the paper-making wire maintained at a high elevation, whereby the stock is caused to travel by gravity faster than the normal speed of the wire for a certain grade of stock, and having means for increasing the speed of the machine to cause the wire to travel at substantially the same rate of speed as the rapidly moving stock, substantially as described.

"3. A Fourdrinier machine having the paper-making wire declined from the breast roll to the guide roll, the breast roll end of the wire being maintained at a substantial elevation above the level, whereby the stock is caused to travel by gravity, rapidly, in the direction of movement of the wire and

at a speed approximately equal to the speed of the wire, substantially as described.

* * * * *

"7. A Fourdrinier machine having the paper-making wire declined from the breast roll to the guide roll, and the suction boxes supported at a corresponding declination, substantially as described.

"8. A Fourdrinier machine having the paper-making wire declined from the breast roll to the guide roll, and the several suction boxes arranged at different elevations, substantially as described.

* * * * *

"12. In a Fourdrinier machine, a downwardly-moving paper-making wire, the declination and speed of which are so regulated that the velocity of the stock down the declining wire, caused by gravity, is so related to the velocity of the wire in the same direction that waves and ripples on the stock are substantially avoided and the fibers deposited with substantial uniformity on the wire, substantially as described."

The defenses are: First, invalidity of the patent by reason of anticipation in the prior art, and by reason of indefiniteness in some of the claims; second, noninfringement.

The patent has been before the Court of Appeals in the Second Circuit. *Eibel Process Co. v. Remington-Martin & Co. et al.*, 234 Fed. 624, 148 C. C. A. 390. The court held the patent to be valid and infringed as to claims 1, 2, and 3.

[1] 1. The defendant contends that there has been anticipation in the prior patented arts, and also that there has been actual prior use of the Eibel invention. In introduces testimony tending to show that there were certain patents disclosing a substantial pitch, both for drainage purposes and for the same purposes to which Eibel applied the "gravity feed" system.

In the *Remington-Martin Case*, 234 Fed. 624, 631, 148 C. C. A. 390, 397, the court examined certain prior patents introduced by the defendant as proving anticipation. As to these patents the court said:

"Six United States and ten foreign patents were received in evidence. All show means for effecting a slight adjustment of the breast roll, and none amounts to more than an illustration of the drainage adjustment which Eibel fully understood and referred to in his patent. The patents demonstrate that skilled men prior to Eibel did not appreciate the possibility of raising the breast roll end of the machine more than an inch or two, and that none of them had had the faintest conception of the principle of operation which characterized the Eibel invention."

The same patents are before me in this case. Upon examination of them, I find no reason to differ from the conclusion of the Court of Appeals in the Second Circuit. The defendant now refers to the Barrett & Horne patent, No. 691,333. This is said to be an improvement on an earlier Barrett & Horne patent, No. 634,288, which was in evidence in the *Remington-Martin Case*. The later patent refers to the former patent and says:

"It is the object of our present invention to modify this type of machine by placing the adjusting device for the shake frame above the same and out of reach of any moisture or water that might flow over onto the floor."

The purpose of the adjustment appears to be the same as in the earlier patent, namely, "to adapt the machine for pulp of different kinds

or grades." In the earlier patent the method of so adapting the machine for pulp of different kinds is explained as follows:

"In certain kinds of pulp, notably the wood pulp which is now largely used in making paper, the water drains away very rapidly, so that the pulp may become nearly dry before it leaves the shake frame, and thus not be properly laid when it reaches the rollers. This tendency may be obviated to a considerable extent by downwardly inclining the shake frame toward the rollers, so that the water tends to travel along with the pulp, and will not, therefore, drain out through the wire so rapidly. It is further desirable that the amount of inclination or slope should be variable, so as to adapt the machine for pulp of different kinds or grades."

It appears, then, that the reason for the slight pitch of the wire which these patents provide is to prevent the difficulty arising when certain kinds of pulp are used, in which the water drains away rapidly. In the later patents, as in the earlier one, I find no claim of any novelty in respect to an effort toward adjustment, for the purpose which Eibel disclosed. The patents tend, rather, to illustrate adjustments well known to the whole art before Eibel, and referred to at lines 82 et seq. of his specification. They do not disclose that these adjustments are for the Eibel purpose of reducing the relative speed of stock and wire, giving the stock a gravity acceleration, and thus doing away with the waves, ripples, and wrinkles caused by the difference of speed between the stock and the wire. There is no indication that the patents seek to increase the speed of production. I think this may also be said of the alleged prior use at Lisbon Falls. This relates to two machines of the Pejepscot Paper Company. There was a pitch of 2 inches used on these machines before the Eibel patent. This use was clearly for "carrying the water nearer to the suction box."

Evidence was offered by the defendant tending to show a pitch of 4 inches or more, and that such pitch was used for purposes which might be held to be within the Eibel patent. After examining this testimony, I find it insufficient to establish either the date or other substantial facts with reference to this alleged prior use. This is especially so in view of the well-known rule invoked by Judge Putnam of the Court of Appeals in this circuit, in the Emerson and Norris Case, 202 Fed. 747, 750, 121 C. C. A. 113. After a careful study of all the evidence offered by the defendant to prove anticipation, either in patents or by a prior use, I am led to the conclusion that no one of the prior inventors, or alleged users, disclose any of the inventive purpose of Eibel. No one shows any knowledge of any relation between the pitch of the wire and speed, or of the use of gravity to aid the other elements in well-known use before Eibel. From a study of the proofs now before me, I see no reason to differ with the Court of Appeals in the Second Circuit in its conclusion that no one before Eibel had any knowledge of his theory; and that the slight pitches of the prior art were used in most instances to bring stock to the "dandy roll" more quickly than when the horizontal wire was used.

It is true, of course, that a slight pitch of two inches causes some slight increase in the speed of the stock on the wire. Eibel's claims are limited to a substantial pitch, for it is only by such assistance of gravity that Eibel could acquire the speed which he sought. He ap-

pears to have been invoking this aid of gravity, in correlation with the conditions which he already found in the use of Fourdrinier machines, namely, "drag" and "head."

It is evident that the trivial pitches in the prior art were used for a wholly different purpose from that of Eibel. Those who used them are not shown by the proofs to have appreciated and observed the operative system which Eibel invoked. Their use was so inconsiderable in extent that any possible effect was apparently too small to be capable of observation. They would give no help to any one seeking to obtain further speed in the use of the Fourdrinier paper machine. They would give no hint in regard to any practical purpose of conforming the speed of the stock to the speed of the wire. If, in using the pitch for drainage, some slight advantage was obtained in reference to equalizing the speed of the stock to that of the wire, it was clearly an unexpected and unappreciated result. And it is clear that such result is not sufficient to constitute infringement. *Tilghman v. Proctor*, 102 U. S. 707, 711, 26 L. Ed. 279.

[2] If there be any doubt as to patentable novelty, this doubt may well be resolved in favor of the patent, by its commercial utility. The proofs show that, when the Eibel process was first put in use at Rhineland, the high pitch which Eibel had brought to the art was looked upon as revolutionary. Up to that time the usual speed of Fourdrinier machines had seldom exceeded 450 feet per minute, although the whole art was seeking greater speed. It was said that the "fastest machines in the world" had arrived at a speed of about 500 feet per minute; but to attempt to get an increase of speed beyond this limit had met with failure, and where high speed had been tried it had been abandoned, because it was found that at higher speed there was great commotion on the wire, resulting in "wild" paper. After the Eibel idea got fairly before the public, it was at once adopted by substantially the whole art. As a result of using the high pitch, taught by Eibel, the proofs show that the paper machines have been able to increase their speed from 25 to 30 per cent., or even more; so that it is now the common practice to make newspaper at a speed of 600 feet, or even 680 feet, per minute, and that it is not now known what the limit may be to speed.

In *Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177, the Supreme Court found a new and useful result where a loom was made to produce 50 yards a day, when it had never produced more than 40. The teaching of that case has now become common learning in courts accustomed to pass upon patents. Success makes the result seem simple; and it is quite usual to have witnesses say that the thing was easy, and did not involve any use of the inventive faculty. In the case before me it does not appear to have occurred, either to the prior patentees or to machine workers, before Eibel, that high speeds could be attained by using a high pitch. When the result was attained, however, the public was glad to profit by it. And the proofs show that the result of the Eibel invention has been a most extended commercial use of his process. This commercial utility and success may properly be invoked in favor of the patent.

The defendant contends that claims 1, 2, and 3 are void for indefiniteness.

In claim 1, Eibel has the breast roll end of the paper-making wire in the machine "maintained at a substantial elevation above the level, whereby the stock is caused to travel by gravity, rapidly, in the direction of the movement of the wire." Similar language is used in claims 2 and 3. The defendant says that the use of such words as "substantial elevation" and "rapidly" are so indefinite as to render the claims void. Eibel's inventive thought had for its object a process whereby the machine might be run at a much higher speed than heretofore. Eibel found the Fourdrinier machine with the wire running horizontally. He took the elements which were already in use and added to them a process whereby the breast roll end of the wire is maintained at a sufficient elevation above the level to make the stock travel by gravity at great speed. It is apparent from the testimony of the experts that it was impossible to know in advance the exact speed which any particular pitch would cause. This lack of knowledge beforehand was due to the variations in the stock used, and to the varied use of the different elements then employed in operation; sometimes the depth of the "pond" back of the slices would be greater than at others. The "drag" or "friction" of the wire on the stock might be different at different times. Other elements might vary. A sufficient pitch had to be given to cause a rapid gravity flow of the stock under all existing conditions. A pitch of 2 or 3 or 4 inches would not be enough. It must be found by practice what pitch of the wire would be enough to bring the speed of the stock up to the speed of the wire. The claims should not be pronounced void because they do not express in inches the amount of elevation required to achieve the result which Eibel had in mind. I think the claims should not be held invalid by reason of indefiniteness.

2. *Infringement.*—The defendant says that its machines do not infringe the claims of the patent in suit; that Eibel's proposition was to give the wire such an elevation that gravity *alone*, due to the pitch of the wire, would cause the stock to attain the same speed as the wire at the point where the stock would lose its viscosity and settle down upon the wire in a thin sheet. The defendant urges that it has not given its wire such an elevation, and that, therefore, it does not infringe. In other words, the defendant contends that Eibel's invention contemplated that pitch *alone* should do all the work of bringing the stock from nothing up to an ultimate speed equal to that of the wire; that Eibel contemplated that there should be no "head" at all back of the slices, and that "drag" should be done away with altogether, as a factor in accelerating the speed of the stock; and that no machine comes within the Eibel inventive thought, unless that part of the stock speed which is contributed by pitch is greater than that part of the stock speed which is due to the other two factors. The learned counsel for defendant urge that, when Eibel speaks of a gravity machine, or of a "gravity feed," he refers to the use of gravity, to the exclusion of all other elements, and that when, in his claims, Eibel speaks of the stock traveling by gravity, he refers to the use of gravity without any help from other sources.

It is to be noted that Eibel's one object was to arrange a process by which the machine could be run at a much higher speed than heretofore. With this in view, Eibel organized his machines at the Rhinelander Paper Company in such a way that they had a pitch of about 14 inches and run at a speed between 500 and 600 feet per minute. To produce this result he used gravity. He used, also, the elements which he found at hand, namely, the "drag" and the "head," due to the depth of the "pond" back of the "slice." His effort was to get speed; he did not wish to abolish or disregard any of the elements which helped him to get speed.

But, if the contention of the defendant is correct, he did not put his own invention into practical use at Rhinelander, or at any other place; for in practice he did not obtain his speed by gravity alone. In fact, the defendant's experts testify that the mode of operation set forth in the Eibel patent in suit has never been put in practical use by anybody; it was not used at Rhinelander; it was not used in the other mills; it is not embodied in the drawings of the patent.

I cannot sustain such contention. I cannot so construe the specification and claims of the patent. Eibel introduced a new speed-making factor. He proposed to bring the speed of the stock up to the speed of the wire, and to use gravity to that end; but I cannot hold that he contemplated that gravity should be used to the exclusion of the other elements which were already in use. He found those elements at work; there is no reason why he should exclude them from helping along the work. The process invented by him begins to operate after the stock has entered upon the wire. His apparent attempt was to get rid of bubbles and wrinkles, before he got to the place on the machine where paper is formed. To do this, he allowed gravity to work with "drag" and with "head." He harnessed all the elements he could find. He brought gravity in with the other elements, and so brought the speed of the stock up to equality with that of the wire. By this means he achieved high speed and also freed the stock on the wire from waves and ripples.

The proofs show that the defendant has used a substantial pitch, and not merely the trivial pitch employed for drainage adjustments, and that it has used this pitch in order to call gravity into operation, as an accelerating factor, to speed the stock up to a speed equal to that of the wire. I think it must be held that the defendant infringes the principles of the Eibel patent.

The proof indicates that the defendant has used, in some machines, a pitch of 12 or 14 inches. In these machines it clearly infringes. Testimony tends to show that it has used a smaller pitch of about 6 inches in what is called a No. 2 machine. In the present aspect of the case, I think it unnecessary to decide whether or not the use of the smaller pitch in the No. 2 machine is or is not an infringement.

Coming to the details of infringement: It is evident, from what I have already said, that the defendant infringes claims 1, 2, and 3 of the patent. Claims 7 and 8 are machine claims, referring to that element of the machine which is found in claim 3, namely, the declination of the paper-making wire from the breast roll to the guide roll, and including

the suction boxes in such declination. The extent of the declination is not given in precise terms, but it must be "substantially as described"—that is, it must be a substantial declination. It seems to me clear from the evidence that the defendant infringes, also, claims 7 and 8.

Claim 12 specifies that the speed of the stock and wire shall be so adjusted that waves and ripples on the stock are substantially avoided, and the fibers deposited with substantial uniformity; this being a result obtained by the claims 1, 2, and 3. Claim 12 is a process claim. It clearly involves the principles of claim 1. I think the evidence in the record shows an infringement by the defendant, of claim 12. My conclusion, then, is that claims 1, 2, 3, 7, 8, and 12 are valid and infringed. A decree may be entered for the plaintiff for an injunction and for an accounting.

The plaintiff recovers costs.

The plaintiff may present a draft decree on or before October 9, 1920. The defendant may present corrections, if any, on or before October 25, 1920. The decree is to be settled October 30, 1920, at 10 o'clock a. m.

UNITED STATES v. FRIEDMAN.

SAME v. NESBY.

(District Court, E. D. Pennsylvania. September 28, 1920.)

Nos. 87, 168.

1. Intoxicating liquors ☞248—Affidavit held to show probable cause for search warrant.

An affidavit by a federal prohibition agent that he purchased intoxicating liquor on the premises of defendant, occupied as a saloon and dwelling, and stating the kind and quantity of liquor and the amounts paid, sets forth facts from which the commissioner can find probable cause to believe that an offense had been committed against the National Prohibition Act, so as to authorize the issuance of a search warrant.

2. Intoxicating liquors ☞248—Affidavit held to describe sufficiently place to be searched.

An affidavit for a liquor search warrant, which described the place to be searched by street and number, and stated that the premises were occupied as a saloon and dwelling, is sufficient.

3. Intoxicating liquors ☞247—Search warrant under Prohibition Act not limited to cases of felony.

National Prohibition Act, tit. 2, § 2, empowering officers mentioned in Rev. St. § 1014 (Comp. St. § 1674), to issue search warrants under the limitations of Act June 15, 1917, tit. 11 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10496¼a-10496¼v, 10212i), authorizes the issuance of search warrants for violation of the Prohibition Act, which are misdemeanors only, though section 2 of said title 11 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10496¼b) provides for search warrants under that act only in case of felonies.

L. Friedman and John N. Nesby were arrested for violation of the National Prohibition Act. On petitions by defendants to have restored to them property taken from them under search warrants and to quash the search warrants. Petitions dismissed.

Charles D. McAvoy, U. S. Atty., of Philadelphia, Pa.
Roy L. Daily, of Philadelphia, Pa., for defendants.

THOMPSON, District Judge. [1] The petitions in each case aver that the search warrants issued and the seizure thereunder are void and illegal, because the affidavit on which the warrant was issued does not set forth facts upon which the commissioner could find probable cause. The affidavits in each case are made by a federal prohibition agent and set out that the premises in each case are occupied as a saloon and dwelling, and that on a day and at an hour stated the affiant purchased intoxicating liquor, to wit, whisky, in one case two drinks and in the other case one drink, containing one-half of 1 per centum or more of alcohol, and the sum paid for the liquor is set out. These are facts, and upon such facts the commissioner could find probable cause to believe that an offense against the National Prohibition Act (41 Stat. 305) had been committed upon the premises.

[2] It is urged that the affidavit does not set forth with sufficient particularity a description of the property and the place to be searched. As the property is described by street and number, and it is stated that the premises are occupied as a saloon and dwelling, that is sufficient.

[3] It is further contended that the search warrants are not in compliance with the provisions for issuing search warrants under the Espionage Act of June 15, 1917 (40 Stat. 217), made applicable to the National Prohibition Act. Section 2 of title 2 of the National Prohibition Act provides:

"Section 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of this act. Officers mentioned in said section 1014 are authorized to issue search warrants under the limitations provided in title XI of the act approved June 15, 1917 (Fortieth Statutes at Large, page 217 et seq.)."

One effect of this section is to grant power to issue search warrants under the limitations provided in title 11 of the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10496 $\frac{1}{4}$ a-10496 $\frac{1}{4}$ v, 10212i) to other officers in addition to those named in title XI. It is contended that one of the limitations in title XI is that the property to be seized under the search warrant "was used as the means of committing a felony."

Section 25 of title 2 of the National Prohibition Act further provides:

"It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in title XI of public law numbered 24 of the Sixty-Fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof."

If the language of section 2 providing that search warrants may be issued under the limitations provided in title XI of the Espionage Act is to be construed as contended by counsel for petitioners, the issuing of search warrants could not be made applicable to the National Prohi-

bition Act so as to carry its purpose into effect. Under title XI, section 2, of the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10496 $\frac{1}{4}$ b) there are three subparagraphs reciting grounds upon which search warrants may be issued under that title. Surely the act cannot be read into the National Prohibition Act in such manner as to restrict the issuing of search warrants to the grounds upon which they may be issued under the Espionage Act. I think counsel has confused the grounds upon which search warrants may be issued with limitations upon the power of issuing them. The limitations are set forth in sections 3-6 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10496 $\frac{1}{4}$ c-10496 $\frac{1}{4}$ f), and there is nothing in the present petition to show that those limitations were not observed. It is not necessary, in order to have a search warrant under the National Prohibition Act, to set out in the affidavit that the property was used as a means of committing a felony, which is one of the grounds upon which a search warrant may issue under the Espionage Act.

I find no merit in the petitions, and they are dismissed.

BAYLEY & SONS, Inc., v. MORGAN.

(District Court, E. D. New York. August 7, 1920.)

Courts ¶354—No power to set aside decree pro confesso after term.

Under equity rule 17 (198 Fed. xxiii, 115 C. C. A. xxiii), providing that a final decree entered on an order pro confesso "shall be deemed absolute unless the court shall, at the same term, set aside the same * * * upon cause shown," the court is without power after the term to set aside such a final decree.

In Equity. Suit by Bayley & Sons, Incorporated, against George Morgan, doing business as Morgan & Co. On motion by defendant to open default and permit filing of an answer, and to vacate decree taken pro confesso. Motion denied.

Frank F. Adel, of Evergreen, N. Y., for the motion.
Dodson & Roe, of New York City, opposed.

GARVIN, District Judge. This is a motion for an order opening a default of the defendant above named, permitting him to file his answer to the complaint herein, and vacating and setting aside the judgment entered herein June 30, 1920. The moving papers show, and it is not denied, that on September 26, 1917, the defendant was served with a summons and bill of complaint in the above-entitled action, a suit in equity, in which the plaintiff was suing John Morgan, doing business under the firm name of Morgan & Co. The defendant told the deputy marshal, who sought to effect service, that he was not John Morgan, and that the latter was dead. The deputy marshal told the defendant to keep the paper. The defendant disregarded the summons and bill of complaint, and took no action with respect thereto. This motion was made after the expiration of the term during which

a final decree was entered herein against the defendant; the plaintiff, after the service of the summons, having amended the title of the action by substituting George Morgan, in place of John, as defendant. This was without notice to the defendant.

The papers in opposition show, and it is not denied, that the defendant never did anything after the service of the summons to inquire about the action; that the title was amended December 14, 1917; that thereafter the plaintiff took no action in the matter until December 19, 1919, when a final decree was entered pro confesso against the defendant. The records of this court show that the final decree was entered in December, 1919, and not in June, 1920, as alleged by defendant.

Plaintiff alleges, and it is not denied, that on July 13, 1917, a letter was sent to John Morgan & Sons, advising them they were infringing the plaintiff's patent; that on July 16, 1917, the defendant George Morgan wrote to counsel for plaintiff, stating that the business of John Morgan & Co. was taken over by Morgan & Co. This letter, written by the defendant, was signed by "Morgan & Co., Geo. Morgan." The handwriting of "Geo." was such that plaintiff's counsel believed the name to be "John" Morgan. After the receipt of this letter the summons and bill of complaint were served.

It is apparent that the defendant, who had notified plaintiff that the business of John Morgan & Co. had been taken over, knew that he, the defendant, was intended to be named in the summons. Having discussed the question of his identity with the deputy marshal who made the service, it was his duty to take legal advice, when the latter insisted upon leaving the paper with him. It appears, therefore, that no case is presented which would afford the slightest justification for disregarding rule 17 of the Equity Rules (198 Fed. xxiii, 115 C. C. A. xxiii), which reads in part as follows:

"When the bill is taken pro confesso the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the order pro confesso, and such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit."

When this rule has been the subject of judicial interpretation, the courts have uniformly held that the court is without power to set aside such a final decree, unless the motion is made at the same term as that at which the decree was entered. *U. S. v. Millinger* (C. C.) 7 Fed. 187; *School Dist. v. Lovejoy* (C. C.) 16 Fed. 323; *Allen v. Wilson et al.* (C. C.) 21 Fed. 881; *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797; *McGregor et al. v. Vermont Loan & Trust Co.*, 104 Fed. 709, 710, 44 C. C. A. 146.

Although I am exceedingly doubtful whether defendant has presented such facts as to justify granting this application as a matter of discretion, I prefer to base my decision upon the ground that under rule 17, as construed by a long line of authorities, the motion must be denied.

BULLARD et al. v. 230,263 FEET OF LUMBER.**LOWE et al. v. SAME.**

(District Court, S. D. Florida. June 29, 1920.)

Nos. 235, 237.

Salvage ~~Case~~ 27—Award of 75 per cent. of net proceeds for salvage of lumber cargo of wrecked schooner held proper.

An award of 75 per cent. of the net proceeds made for salvage of the lumber cargo of a wrecked and abandoned schooner, which lay in an exposed position, and where the work was difficult and had to be done for the most part in the water, *held proper*.

In Admiralty. Suit for salvage by Samuel Bullard and others and by William Graham Lowe and others against 230,263 feet of lumber. Decrees for libelants.

W. Hunt Harris, of Key West, Fla., for libelants.

CALL, District Judge. These two cases ask salvage for saving lumber from the wrecked and abandoned schooner Priscilla L. Ray, lying on Mullet Key bar. The testimony shows the schooner to have been wrecked and abandoned on February 16, 1920. The schooner was loaded with lumber. No efforts appear to have been made by the owners of the schooner and cargo to save the property, except sails, spars, etc.

The work of salving the lumber appears to have been onerous in the extreme, the men having to work in water most of the time, and continued over a considerable time, with a number of vessels and their crews engaged. The position of the wrecked schooner was an exposed one, adding to the difficulties of the work of the men engaged in salving the cargo.

Considering all the circumstances shown by the testimony, I am of opinion that an award of 75 per cent. of the net proceeds of the salvaged property, after paying the costs of the suits, and the costs of the damage suffered by the Serafina, the division of salvage to be made according to the wrecking rules, proportioned to the amount of lumber salvaged by each vessel, except when acting in consort.

Decrees will be made pursuant to this memorandum.

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

UNITED STATES v. YOUNT et al.

(District Court, W. D. Pennsylvania. October 21, 1920.)

No. 4773.

1. Criminal law ⚡242(5)—In proceeding to remove defendants to another district, indictment only *prima facie* evidence of probable cause.

In proceedings to remove a defendant to another district for trial, the indictment, while *prima facie* evidence of probable cause, is not conclusive, and the judge must, in the exercise of a judicial function, ascertain whether an offense is charged, whether there was probable cause, and whether the court to which removal is sought has jurisdiction of the offense.

2. Constitutional law ⚡251—"Due process of law" protects against arbitrary action.

"Due process of law," within Const. Amends. 5 and 14, is equivalent to the "law of the land," and is intended to protect the citizen against arbitrary action, and to secure to all persons equal and impartial justice.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

3. Constitutional law ⚡251—Due process of law includes equal protection of laws.

The due process of law provision of Const. Amend. 5, is broad enough in scope and purpose to include the equal protection of the laws, which no state may deny to any person under Const. Amend. 14.

4. Constitutional law ⚡253—Due process of law does not forbid classification.

Due process of law, required by Const. Amends. 5 and 14, does not prohibit classification, especially by states under their police powers relating to the safety, health, and morals of the public, which were not surrendered to the federal government by the Fourteenth Amendment.

5. Constitutional law ⚡253—Classification must be reasonable to conform to due process of law.

A classification, to be valid under the due process of law clause, must bear a reasonable and just relation to the act in respect to which it is imposed, and can never be arbitrary, though much discretion is necessarily given to the law-making power.

6. Constitutional law ⚡296(1)—Exemption of farmers from food control denial of due process.

A provision of Lever Act Aug. 10, 1917, § 4, as amended by Act Oct. 22, 1919, excluding from the act associations of farmers, is an attempted classification without any reasonable basis, contrary to Const. Amend. 5.

Application by the United States for an order to remove George W. Yount and others to the Northern District of Illinois, Eastern Division, to answer a charge of conspiracy to violate the Lever Food Control Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115 $\frac{1}{8}$ e-3115 $\frac{1}{8}$ kk, 3115 $\frac{1}{8}$ l-3115 $\frac{1}{8}$ r), as amended. Petition dismissed, and defendants discharged.

D. J. Driscoll, U. S. Atty., of St. Marys, Pa., and Daniel S. Horne, Asst. U. S. Atty., of Pittsburgh, Pa.

Thomas J. Hoffman, of Pittsburgh, Pa., for defendants.

THOMSON, District Judge. This is an application by the United States attorney for an order to remove the defendants to the Northern district of Illinois, Eastern division, there to answer a charge of conspiracy preferred by indictment against the defendants and others. The defendants were arrested and brought before the United States commissioner of this district, and after hearing were committed, on their failure to give bail. Thereupon this application for removal was made to this court. The application is resisted strenuously by the defendants, each of them denying any complicity in the conspiracy charged; Mr. Taylor in addition offering evidence that he was never within the jurisdiction of the court where the conspiracy is charged to have been made, and was in no way a party thereto. It is also alleged by the defendants that the section of the act of Congress under which they are indicted is unconstitutional and void, and that therefore they should not be removed or held to answer the charge in the indictment.

[1] The Supreme Court has mapped out with clearness the procedure under section 1014 of the Revised Statutes (Comp. St. § 1674), where it is sought to remove a defendant from the district where arrested to that where the offense is triable. It is distinctly ruled that, while the indictment constitutes *prima facie* evidence of probable cause, it is not conclusive, and evidence may be offered by the defendant tending to show that no offense triable in the district to which removal is sought has been committed; that in such a proceeding the function of the judge is not ministerial, but judicial; that—

"he must look into the indictment, to ascertain whether an offense against the United States is charged, find whether there was probable cause, and determine whether the court to which the accused is sought to be removed has jurisdiction of the same. 'The liberty of the citizen, and his general right to be tried in a tribunal or forum of his domicile, imposes upon the judge the duty of considering and passing upon those questions.'" *Tinsley v. Treat*, 205 U. S. 20, 27 Sup. Ct. 430, 51 L. Ed. 689; *Beavers v. Henkel*, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882.

Keeping these principles in mind, we turn to the facts of the case. The defendants are indicted under section 4 of the Act of Congress known as the Lever Act, approved August 10, 1917, as amended by Act Oct. 22, 1919, c. 80, which reads as follows:

"Sec. 4. That it is hereby made unlawful for any person willfully to destroy any necessities for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessities in or in connection with their production, manufacture, or distribution; to hoard, as defined in section 6 of this act, any necessities; to monopolize or attempt to monopolize, either locally or generally, any necessities; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessities; (b) to restrict the supply of any necessities; (c) to restrict distribution of any necessities; (d) to prevent, limit, or lessen the manufacture or production of any necessities in order to enhance the price thereof; or (e) to exact excessive prices for any necessities, or to aid or abet the doing of any act made unlawful by this section."

"Any person violating any of the provisions of this section, upon conviction thereof shall be fined not exceeding \$5,000 or be imprisoned for not more than two years, or both: Provided, that this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: Provided further, that nothing in this act shall be construed to forbid or make unlawful collective bargaining by any co-operative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them."

The purpose of the act, as set forth in its title, is:

"An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel."

This section of the act of Congress as amended is assailed as violating the Fifth Amendment to the federal Constitution, providing that no person shall be deprived of life, liberty, or property without due process of law, in that it creates a classification unreasonable, arbitrary, and unjust. Without attempting an extensive review of the decisions of the Supreme Court and other authorities bearing on this important question, I have chosen rather to summarize the principles enunciated in them, or clearly deducible therefrom, as the same may be applicable to this case:

[2] First. The "due process of law," by which Congress is limited in the Fifth Amendment, and the states by the Fourteenth Amendment, is equivalent to the "law of the land," and is intended to protect the citizen against arbitrary action, and secure to all persons equal and impartial justice under the law. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Missouri Pacific Ry. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463.

[3] Second. It seems reasonably clear that the "due process of law" provision of the Fifth Amendment is broad enough in its scope and purpose to include the "equal protection of the laws," which no state may deny to any person under the provisions of the Fourteenth Amendment. *Leeper v. Texas*, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225; *Giozza v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599.

[4] Third. Classification is allowable under these provisions of the Constitution. This is conspicuously true as to the states where certain powers, termed the police powers, relating to the safety, health, and morals of the public, exist in the sovereignty of the state, and the rights of the individual as to liberty and property are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of these police powers. With these the Fourteenth Amendment does not interfere. These powers were not surrendered by the states when the federal Constitution was adopted, nor taken from them when the Fourteenth Amendment became a part of the fundamental law of the land. *Railroad Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Cotting v. Kansas City Stockyards Co.*,

183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92; *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. Ed. 102; *Bell's Gap R. R. Co. v. Penna.*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892.

[5] Fourth. While large discretion is necessarily given to the law-making power to discern evils and correct them by legislation, as obstacles to a greater public welfare; while they may make discriminations, if founded on distinctions which cannot be pronounced as unreasonable; while, as said by the Supreme Court of the United States in *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765:

"In every well-ordered society, charged with the duty of conserving the safety of its members, the rights of the individual in respect to his liberty may at times under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand"

—yet, in the final analysis, the classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis. * * * Arbitrary selection can never be justified by calling it classification." *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679. In other words, no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances.

[6] Fifth. The case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, involved the validity of a trust statute of Illinois. The act prohibited any combination of capital, skill, or acts by two or more persons, to create or carry out restrictions in trade, to limit or reduce the production, or increase or reduce the price of commodities, to prevent competition in manufacture, transportation, or sale of commodities and merchandise and other like purposes. The act (Laws 1893, p. 182) contained this section:

"The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

In an elaborate opinion, the Supreme Court held this section to be repugnant to the Fourteenth Amendment, and to be so interwoven with other sections that its invalidity affected the entire act. In its opinion the court said:

"It will be seen that, so far as the statute is concerned, two or more agriculturalists or two or more live stock raisers may, in respect to their products or live stock in hand, combine their capital, skill or acts for the purpose of creating or carrying out restrictions in the sale of such products or live stock, or limiting, increasing or reducing their price, or preventing competition in their sale or purchase, * * * or establishing the price of such products or stock in hand, so as to preclude free and unrestricted competition among themselves or others, or by agreeing to pool, combine or unite, any interest they may have in connection with the sale or transportation of their products or live stock that the price might be affected. All this, so far as the statute is concerned, may be done by agriculturalists or live stock raisers in Illinois without subjecting them to the fine imposed by the statute. But exactly the same things, if done by two or more persons * * * who shall have combined their capital, skill, or acts in respect of their property, mer-

chandise, or commodities held for sale or exchange, is made by the statute a public offense."

This was held by the court such discrimination against those engaged in business, other than the sale of agricultural products or live stock in the hands of producers and raisers, as is forbidden by the Fourteenth Amendment.

Applying the foregoing principles to section 4, as amended, of the Lever Act, it seems clearly repugnant to the Fifth Amendment of the federal Constitution. The nation, being confronted with the great national exigency of war with Germany, not only called several million men into the military service, but summoned all the resources of the nation to support the national cause. As food for men, feed for animals, and fuel to aid in transportation were vital necessities, the Lever Act was passed to encourage the production, conserve the supply, and control the distribution of these necessities. In section 4 every improper act intended to limit the production, enhance the price, restrain the supply, limit the transportation, or restrict the distribution of necessities, is denounced by the statute. To destroy; to commit waste or preventable deterioration; to hoard; to monopolize or attempt to do so; to engage in any discriminatory or deceptive practice or device; to make any unreasonable rate or charge in handling or dealing in necessities; or to conspire with others to do any of these things—is made unlawful, and punishable by fine of not more than \$5,000, or imprisonment of not more than two years, or both.

All foods and feeds are the product of the soil and come from the land. Their production and initial distribution is the work of the farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, and all these persons are excepted from the provisions of the act. All these may with impunity, willfully, and for the purpose of enhancing the price, destroy, waste, or hoard the necessities which come from the farm. These thousands might form a gigantic combination, through any unfair device or discriminatory means, to limit the production or restrict the supply and distribution of these necessities, that they might make greater gains by extorting excessive profits, and yet such acts, while utterly destructive of the purpose of the statute, would receive the sanction of the law; while these very same acts, committed by any other person not in the favored class, would make him a criminal, and deprive him of his property, or his liberty, or both. Surely such classification is unjust and arbitrary in the extreme, violating both the letter and the spirit of the Fifth Amendment. It was so held in an elaborate and learned opinion by Judge Anderson, of the District Court of Indiana, in the case of *United States v. Armstrong* (D. C.) 265 Fed. 683.

I recognize the responsibility of declaring invalid a solemn act of the law-making power of the United States. But the Supreme Court has reminded us that—

"No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

The petition for the removal of the defendants to the Northern District of Illinois, Eastern Division, for trial, is dismissed, and the defendants are discharged.

Order.

And now, to wit, October 21, 1920, the petition for the removal of the defendants to the Northern District of Illinois, Eastern Division, for trial, is dismissed, and the defendants are discharged.

Thereupon counsel for the United States except to the order of court, whereupon exception allowed and bill sealed.

UNITED STATES v. RYKOWSKI. SAME v. KOZMAN. SAME v. KEY-DOSZIUS.

(District Court, S. D. Ohio, E. D. September 22, 1920.)

Nos. 31-33.

1. Intoxicating liquors ⚡248—Belief of affiant insufficient ground for issuance of search warrant.

Under Volstead Act, tit. 2, § 2, providing that officers mentioned in Rev. St. § 1014 (Comp. St. § 1674), can issue search warrants under the limitations of Act June 15, 1917, c. 30, an affidavit that affiant has reason to believe and does believe that a still is being conducted on certain premises is insufficient, either under section 1014 or the act of 1917; it being necessary that the affidavit state the facts showing probable cause for issuing the search warrant, or that the commissioner hear evidence to determine such cause.

2. Intoxicating liquors ⚡249—Description of premises to be searched held not sufficient.

A description of the premises to be searched for illicit operation of still, as a stated street and number in a named city, is insufficient, where there were both north and south streets of that name.

3. Intoxicating liquors ⚡249—Search of residence at night unlawful, unless directed by warrant.

It was unlawful to search a residence at night for illicit operation of still, where the search warrant contained no direction that it might be served at any time of the day or night.

4. Intoxicating liquors ⚡255—Illicit liquors and stills not returned, though seized unlawfully.

Where liquors and stills being used by defendants in violation of the law were seized by officers acting under invalid search warrants, the property will not be returned to defendants, though the evidence obtained by the search cannot be used against them, because of the illegal methods by which it was procured.

5. Criminal law ⚡395—To use evidence procured by illegal search, government must prove authority of wife to consent to search.

Property seized under an unlawful search warrant cannot be used in evidence against accused, merely because his wife consented to the search, there being no presumption that she was his authorized agent to consent to such search, so that the government must prove that she had such authority before it can rely on her consent.

Separate prosecutions against one Rykowski, one Kozman, and one Keydoszius for illicit operation of stills. On motions by Rykowski and

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Kozman for return of property seized, and by Keydoszius for a new trial. Applications for return of property denied, but new trial granted.

James R. Clark, U. S. Dist. Atty., and R. T. Dickerson and Thos. H. Morrow, Asst. U. S. Dist. Attys., all of Cincinnati, Ohio.

Murphy, Elliff & Leen, of Dayton, Ohio, for defendant Keydoszius.

SATER, District Judge. The affidavit on which a warrant was obtained on March 3 to search the premises of Rykowski is lost, but the warrant recites that the affiant has reason to believe and does believe that a fraud upon the revenue of the United States is being committed upon and by the use of certain premises for illicit making, keeping and storing of distilled spirits containing more than one-half of 1 per cent. of alcohol by volume "and distilling apparatus," "being the premises of 2311 E. 1st, Dayton, O., John Doe." Another affidavit was issued on April 6, whose contents differ from those of the warrant of March 3 mainly in that the premises are said to be those of John Doe (Rykowski), 2311 East First street, in the city of Dayton. The search warrant follows the language of the affidavit. The return on the older warrant purports to have been made on April 6, and states that on making the search there were found a "double still and condenser complete, but not set up or in operation, 50 gallons raisin mash fit for distillation, and six gallons finished product." The later warrant purports to have been returned April 8, and states that in pursuance of the search made there were found "complete still, mash fit for distillation, six gallons finished product." Both warrants were marked filed by the United States commissioner on April 22. The search disclosed what I take to be the disassembled parts of a crude still. The evidence is conflicting as to whether the warrant was displayed and explained to Rykowski's wife—he being absent at the time the search began, but returning before it was completed.

The affidavit for a warrant to search Kozman's place, made April 13, was also on belief that "a fraud upon the revenue of the United States has been and is being committed upon and by the use of a certain still and contents for making distilled spirits, being the premises of William Kozmar, 123 Garfield St.," in Dayton, Ohio. The warrant as to language does not differ from the affidavit. The return, purporting to have been made on April 14 and filed on May 20, states that there were found on Kozman's premises a double still complete, 4 full barrels of mash, 2 barrels containing raisins, and a small quantity of finished product. The search was made at a late hour at night at 123 North Garfield street, there being also a South Garfield street. The family had all retired. Without any pretext of having a warrant to search Kozman's barber shop at 1329 East Third street, the officers repaired there at a still later hour, entered the premises, and made a search. Rykowski and Kozman have applied for a return of their property.

The affidavit for a search warrant in the Keydoszius case, made April 13, is also on belief that "a fraud upon the revenue of the United States has been and is being committed upon and by the use of certain

premises, for making, keeping, and storing of illicit spirits, mash, and materials for making spirits and distilling apparatus, being the premises of John Doe (Kardosi), corner of Troy and Dell streets," in Dayton. My understanding is that the warrants (two having been issued) contain the same recitals in so far as the charge made against the defendant goes. He operated a soft drink parlor, in the rear of which was a residence occupied by his family. One squad of officers searched those premises, after reading the warrant to Keydoszius' wife. Keydoszius himself was absent, but when he came he protested vigorously against the search. There were found on the premises three barrels of raisin mash and two jugs containing raisin jack, and parts of what would seem to have been a still. While the search of such premises was in progress, another squad of officers searched other premises belonging to him. He was tried to a jury and convicted, and the case now stands on a motion for a new trial; his application for a return of the property seized having been previously overruled, on the theory that his wife's consent to the search was binding on him.

[1] In the opinion heretofore filed in this court in the case of *U. S. v. Borkowski et al.*, 268 Fed. 408, it was ruled that the form of affidavit and search warrant found in Swan's *Treatise* (21st Ed.) pp. 933, 934, and in Loveland's *Forms of Fed. Pr.* vol. 1, pp. 1088, 1089, should be followed. Attention was also drawn to *Kercheval v. Allen*, 220 Fed. 265, 135 C. C. A. 1, as to the form there used. In *Ripper v. U. S.*, 178 Fed. 24, 101 C. C. A. 152, it is made clear what the contents of the affidavit and warrant must be; the language being as follows:

"The affidavit on which the warrant was issued set forth no facts from which the existence of probable cause could be determined; nor did the warrant itself recite the existence of such cause. There was no recital in the warrant that the officer who issued it found or determined there was probable cause, further than the mere statement that some one had declared under oath that he had good reason to believe, and did believe, the accused was violating the law. It is true that section 3462, Rev. St. (U. S. Comp. St. 1901, p. 2283), authorizes a search warrant to be issued upon such an affidavit, but we think that all the requisites are not there expressed. This was also the view of the Attorney General in an opinion delivered June 19, 1903 (24 Ops. Attys. Gen. 685, 688). The oath in writing should state the facts from which the officer issuing the warrant may determine the existence of probable cause, or there should be a hearing by him with that purpose in view. The immunity guaranteed by the Constitution should not be lightly set aside by a mere general declaration of a nonjudicial officer that he has reason to believe and does believe, etc. The undisclosed reason may fall far short of probable cause."

In that case the testimony of the revenue officers was held admissible, notwithstanding the insufficiency of the affidavit and warrant, but there had been no application made for the return of any property prior to the trial of the case on its merits, nor had the cases of *Weeks v. U. S.*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, *L. R. A.* 1915B, 834, *Ann. Cas.* 1915C, 1177, and *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. — (January 26, 1920) been decided. In *Veeder v. U. S.*, 252 Fed. 414, 164 C. C. A. 338 (C. C. A. 7), the conditions upon which a search warrant may issue and the character thereof are thus stated, at page 418 of 252 Fed. (164 C. C. A. 342):

"One's person and property must be entitled, in an orderly democracy, to protection against both mob hysteria and the oppression of agents whom the people have chosen to represent them in the administration of laws which are required by the Constitution to operate upon all persons alike. One's home and place of business are not to be invaded forcibly and searched by the curious and suspicious; not even by a disinterested officer of the law, unless he is armed with a search warrant. No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises—but facts which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion, or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law. The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function, and it cannot be delegated by the judge to the accuser. No search warrant should be broader than the justifying basis of facts. For example, if a murder has been committed by means of a shot from a gun and by no other means, the search warrant should not direct the officer to enter the accused's home and seize the family register of births and deaths. And as the serving officer has no discretion in executing the search warrant in its entirety, the householder is entitled to have the search warrant quashed."

In that case a petition for a writ of certiorari was denied. 246 U. S. 675, 38 Sup. Ct. 428, 62 L. Ed. 933. It was further said (252 Fed. at page 419, 164 C. C. A. 343), touching the affiant, that—

"All he swears to is that 'he has good reason to believe and does verily believe' so and so. He does not swear that so and so are true. He does not say why he believes. He gives no facts or circumstances to which the judge could apply the legal standard and decide that there was probable cause for the affiant's belief. There is nothing but the affiant's application of his own undisclosed notion of the law to an undisclosed state of facts, and under our system of government the accuser is not permitted to be also the judge."

The insufficiency of the affidavit and of the warrant that issued upon it caused a reversal, with the direction that the trial court quash the search warrant. The case was followed with approval in *Re Tri-State Coal & Coke Co.* (D. C.) 253 Fed. 605. In the affidavits and search warrants, in so far as such instruments have been preserved, that were filed or issued, as the case may be, in the cases under consideration, the affiant merely swears that he has good reason to believe and does verily believe certain things. In no instance did he affirmatively swear that anything is true, nor did he in any instance state any facts or circumstances which would enable the United States commissioner to determine whether there was probable cause for his belief. None of the affidavits or search warrants was sufficient, and none of the warrants should have been issued.

The record in each of the above-entitled cases suggests that due care was not used to obtain the correct name of the persons accused. The warrant issued on March 3 in the Rykowski case, on account of its age at the time the search was made, should not have been used at all, and

yet the return on it is more complete than the return made on the later one of April 6.

Section 2, title 2, of the Volstead Act (41 Stat. 305) provides that section 1014, Rev. St. U. S. (Comp. St. § 1674), is made applicable to the enforcement of that act, and that the officers mentioned in section 1014 are authorized to issue search warrants under the limitations provided in title 11 of the act of June 15, 1917 (40 Stat. 217 et seq.). Whether an affidavit is filed and a warrant issued under section 1014, or under the act of June 15, 1917, the contents of each must be the same, but under the 1917 act there is a restriction as to the number of officers that may issue warrants. If United States commissioners will observe the provisions of the 1917 act, there can be no difficulty in the future regarding the requirements of affidavits made to obtain warrants or as to what the warrants upon their face must show.

Under the act of 1917, a search warrant cannot be issued, except upon probable cause supported by affidavit naming or describing the person and particularly describing the property and place to be searched. The commissioner, before issuing the warrant, must examine on oath the complainant and any witnesses he may produce, and must require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing them to exist. An enumeration of all the provisions of the act, which only states the essentials to the procurement of a warrant, which have long been required in English-speaking countries, is unnecessary, as the statute is readily accessible to those desiring to avail themselves of or who are required to act under its provisions.

[2, 3] The description of Kozman's premises was insufficient. There were two Garfield streets, and the statement does not locate his residence on either. There was no authority whatever for searching his barber shop. The search of his residence at night was in disregard of the law, in that the warrant contained no direction that it might be served at any time of the day or night. In none of the warrants under consideration was there compliance with the statutory requirement that the commissioner must insert a direction in the warrant that it be served in the day time, unless the affiants are positive that the property is on the person or in the place to be searched.

[4] It follows from the foregoing that the searches and seizures made in the two cases first named were not such as the law provides. The misfortune of it is that in each instance there was a violation of the law by the accused party, and yet, under the Silverthorne Lumber Company Case, the government will not be able to avail itself of the information derived from its agents' unwarranted action. In neither of the cases, however, will any of the illicit mash or illicit liquors taken, or stills or parts of stills found, be returned,—the same being contraband. The stills or parts thereof are instruments which have been used, and may possibly be again used, if returned, in violation of the law.

In the trial of certain cases which have gone into judgment, the court admitted evidence of the search and seizure for the reason the person who was in fact the guilty party consented to the search of the premises. In the Keydoszius case the wife, so the government claims, consented to the search, which evidence, however, is controverted. The rule stated in 35 Cyc. 1265, is that nothing will justify searching a dwelling for stolen property without a warrant for that purpose, unless made with the consent or by invitation of the owner, and authorities are cited to that point. The same rule of consent is applicable to cases such as we have here. It was not shown or claimed that the wife of Keydoszius was the owner of the property searched, or that she had offended the law. In *Re Tri-State Coal & Coke Co.*, 253 Fed. at page 608, it was ruled that any acquiescence by some agent as to the seizure and retention of property was simply a choice of evils, when confronted by an officer of the United States armed with a warrant which he was determined to execute, and that by virtue of no such means can the high constitutional rights of a citizen be invaded or taken away.

[5] Keydoszius himself objected to the search of the premises. Mere acquiescence on the part of Mrs. Keydoszius, it seems, was not enough, and there is no showing that her husband authorized her to consent. Whether or not she was his agent was a question of fact for the jury. 21 Cyc. 1234. But the government offered no proof that she was his agent; the burden of proving such being upon the government. 6 Ency. Ev. 807. She had no implied authority, in the absence of her husband, to license a search of his premises. *Humes v. Taber*, 1 R. I. 464. Without such authorization and consent—the affidavit and search warrant being insufficient—the search and seizure were unauthorized, and his prior attack thereon should have been sustained. Evidence having been admitted over the defendant's reserved exceptions, on the theory of consent lawfully given to the search, there was prejudicial error committed against the defendant, and the motion for a new trial in his case must therefore be granted. The illicit liquors and parts of a still will not be ordered returned.

This extended expression of my views is for the purpose of bringing to the attention of United States commissioners and those seeking search warrants the long-established conditions on which a search warrant may issue, and what the contents of such warrants must be when granted. The Eighteenth Amendment to the federal Constitution is as sacred as the Fourth and Fifth Amendments, but no more so. They stand on an equality. There is no inconsistency between them. The Volstead Act, like any other law, should be enforced as long as it is on the statute book. Efforts for its enforcement should be along legal lines, lest the law be made odious and the ultimate result be the defeat of justice.

DAYTON BRASS CASTINGS CO. v. GILLIGAN, Internal Revenue Collector.

(District Court, S. D. Ohio, W. D. September 23, 1920.)

No. 37.

1. Internal revenue ⚡4—Statutes construed to effect purpose.

The internal revenue statutes are not to be strictly construed as penal statutes, but are to be construed to carry out the intention of the Legislature, though not to be extended by implication beyond the clear import of their language.

2. Internal revenue ⚡9—Corporation which casts metal furnished by contractor into rough parts for fuses is "manufacturer."

A corporation which, under a contract with a maker of munitions, cast metal furnished by the maker into rough castings and returned them to the maker, to be finished for use in shell fuses, is a "manufacturer," within the war munitions tax provisions of Act Sept. 8, 1916 (Comp. St. §§ 6336 $\frac{1}{4}$ a-6336 $\frac{1}{4}$ m); it not being necessary that a manufacturer produce a finished product.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Manufacturer.]

3. Internal revenue ⚡11—Rough fuse castings are "relatively complete parts."

Castings made for use in shell fuses, though still in their rough condition and requiring numerous processes to prepare them for such use, cannot be used without further treatment for any purpose other than that for which they were designed, and are "relatively complete parts," within the regulations of the Commissioner of Internal Revenue relating to the war munitions tax.

4. Internal revenue ⚡11—Corporations casting metal and delivering it to owner "dispose of" castings.

Within Act Sept. 8, 1916, §§ 301, 302, 304 (Comp. St. §§ 6336 $\frac{1}{4}$ b, 6336 $\frac{1}{4}$ c, 6336 $\frac{1}{4}$ e), imposing a war munitions tax on those who sell and dispose of munitions or parts thereof, the words "dispose of" must be given some meaning in addition to that of sale, and, when given their ordinary meaning of passing an article into the control of another, include delivery of castings made by the casting company from metal furnished by the one to whom the castings were delivered.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dispose of.]

5. Internal revenue ⚡11—In proviso exempting "sale and delivery," delivery without sale is not excluded.

The proviso in Act Sept. 8, 1916, § 301 (Comp. St. § 6336 $\frac{1}{4}$ b), exempting the sale and delivery of certain articles from the war munitions tax, does not show that the tax was levied only on munitions or parts sold, since every sale includes delivery, and therefore the conjunction should be read "or," so that the provision applies to deliveries without sale; "delivery" in its legal sense denoting a transfer of possession, either with or without a sale.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Delivery; Second Series, Sale and Delivery.]

6. Internal revenue ⚡11—Provision for assessing tax on fair market price does not make act inapplicable to delivery without sale.

The provision of Act Sept. 8, 1916, § 303 (Comp. St. § 6336 $\frac{1}{4}$ d), for determining the munitions tax in case of articles sold below the fair market price to evade payment of the tax, does not prevent the imposition of the

tax on a manufacturer of castings for shell fuses from metal furnished him by the maker of the fuses.

7. Internal revenue §11—Company casting metal furnished by contract is special owner, liable to tax.

A corporation which received from a munitions maker metal owned by the maker, and made therefrom castings for shell fuses, which it returned to the maker, had a lien on the metal for its labor thereon and its profits, which made it a special owner of the metal, taxable under Act Sept. 8, 1916, imposing a tax on manufacturers of war munitions.

8. Internal revenue §38—Interest on wrongful penalty waived by unconditional acceptance of return.

Interest on a penalty wrongfully imposed under the Internal Revenue Law can be recovered only as damages, and where the penalty, when repaid, was accepted without any reservation that its acceptance should not affect the right to interest, there can be no subsequent recovery of interest.

At Law. Action by the Dayton Brass Castings Company against A. C. Gilligan, United States Collector of Internal Revenue, to recover a tax paid under protest. Judgment for defendant, except as to the item of interest on the penalty collected from plaintiff.

McMahon & McMahon, of Dayton, Ohio, for plaintiff.

James R. Clark, U. S. Dist. Atty., of Cincinnati, Ohio, for defendant.

SATER, District Judge. The plaintiff is a corporation "formed for the purpose of manufacturing and selling brass, bronze, aluminum, white metal, and all other kinds of metal castings, machining same and doing all things incident thereto." The Recording & Computing Machines Company (hereafter called the Recording Company) had a contract with the Canadian Car & Foundry Company for delivery of a large number of time fuses for shrapnel shells for the Russian government. Each fuse, when assembled and completed, consisted of 45 parts. On May 27 and 29, 1915, plaintiff entered into contracts with the Recording Company to make for use in fuses, from ingots and patterns to be supplied by such company, certain rough castings, to be paid for by the pound and to be delivered at such company's plant.

Plaintiff performed its contracts. The work done by it concerned but 4 of the 45 parts entering into a completed fuse. None of such 4 parts was at the time of their delivery fitted for insertion into fuses. On the contrary, the Recording Company was required to subject such parts to numerous mechanical operations, varying according to circumstances from 16 to 29, before they were perfected for use. The castings made by plaintiff, if not used in fuses, were serviceable only as scrap, and would have to be melted and properly treated to be utilized for other purposes. Down to the date of the above-mentioned contracts, plaintiff had practically at all times used its own raw material in its manufacturing business and sold its own product; but in its 12 years' experience it had sent out castings which were thereafter to be finished by machine work. Such subsequent finishing is a common practice, for the reason that castings are seldom ready for use after coming from the molds.

The plaintiff, being advised by counsel of unquestioned ability and standing that it was not subject to the war munitions tax imposed by the act of Congress approved September 8, 1916, entitled "An act to increase the revenue, and for other purposes" (39 Stat. 756, 781, 782 [Comp. St. §§ 6336 $\frac{1}{4}$ a-6336 $\frac{1}{4}$ m]), made no return to the internal revenue collector under such act. In the latter part of June, 1917, the plaintiff was duly notified to make a return. The Commissioner of Internal Revenue, after a hearing before him, requested that the return be filed under protest, without prejudice to the rights of the parties. A return was filed with the defendant, accompanied by plaintiff's formal protest as to liability. Following a hearing on such protest, plaintiff was directed to pay as a tax the sum of \$18,860.83, and a penalty of 50 per cent. additional (\$9,430.42) for failure to make a return within the statutory time. The tax and penalty so assessed were paid under protest on December 8, 1917. A claim was at once preferred for a refunder of the tax and penalty, on the ground that the plaintiff was not subject to such tax and was wrongfully required to pay it. The Commissioner of Internal Revenue ordered a repayment of the penalty on the ground that there was reasonable cause for plaintiff's failure to file a return, but otherwise rejected its claim.

Plaintiff thereupon sued to recover interest on the amount of the exacted penalty from December 12, 1917, to June 20, 1918, the date on which it was repaid, and also to recover the sum of \$18,860.83, with interest from December 8, 1917. The stated grounds for recovery are that the articles cast and delivered by it were not parts of fuses, that in the performance of its work under the provisions of the contract it was not engaged in manufacturing and was not a manufacturer, and that in delivering the castings in the manner provided for in the contract it did not sell or dispose of them within the terms of the above-mentioned act. A jury was waived and trial was had to the court. There are no controverted facts.

[1] The rule for the construction of revenue laws is thus stated in *Cliquot's Champagne*, 3 Wall. 114, 145 (18 L. Ed. 116):

"Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote the public good. They should be so construed as to carry out the intention of the Legislature in passing them and most effectually accomplish these objects."

The act here in question was under consideration by the United States Supreme Court in the cases of *Carbon Steel Co. v. Lewellyn*, 251 U. S. 501, 40 Sup. Ct. 283, 64 L. Ed. —, *Worth Bros. Co. v. Lederer*, 251 U. S. 507, 40 Sup. Ct. 282, 64 L. Ed. —, and *Forged Steel Wheel Co. v. Lewellyn*, 251 U. S. 511, 40 Sup. Ct. 285, 64 L. Ed. —, all decided March 1, 1920. In the last-named case the rule was recognized that statutes levying taxes should not be extended by implication beyond the clear import of their language. In the *Carbon Steel Co.* Case the purpose of the act is thus defined:

"It was such profits [i. e., of the contractor] that the act was intended to reach—profits made out of the war and taxed to defray the expense of the

war. Or, as expressed by the Court of Appeals, Congress 'felt that the large abnormal profits incident to these war contracts created a remunerative field for temporary taxation.'"

The court refused to accept a construction which would "reduce the statute to empty declarations."

[2] The plaintiff did not deliver raw material to the Recording Company. The labor performed by it on the Recording Company's metal changed its form into rough given-shaped castings adapted to use, after further treatment, as essential parts of fuses; but the castings were an advance upon the raw material. The Court of Appeals of this circuit has held that, if the application of labor to an article effects some transformation in the character of the article, and converts it into a new and different article, having a distinctive name, character, or use, such article is a manufactured article, and the person producing it is a manufacturer. *City of Memphis v. St. L. & S. F. R. Co.*, 183 Fed. 529, 539, 106 C. C. A 75. In manufacturing, the raw material may be subjected to different steps or processes for the production of a finished article, and each of such steps or processes will involve manufacturing. In *Tide Water Oil Co. v. U. S.*, 171 U. S. 210, 216, 18 Sup. Ct. 837, 839 (43 L. Ed. 139), it was said:

"Raw materials may be and often are subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required, to make the final product. Thus, logs are first manufactured into boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, window sashes, trimmings, and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations, each successive step in which is a distinct process of manufacture and for which the article so manufactured receives a different name."

In harmony with the doctrine of the last-named case is *U. S. v. Riga* (C. C.) 171 Fed. 783, in which it was ruled that parts of rough-bored rifles which had been advanced to a condition unfitting them for any other use than in connection with rifles, but which must be subjected to further processes and assembled with other parts in order to be made into a completed article, are manufactured articles.

The insistence in the *Worth Bros. Co. Case* was that that company's forgings on certain shell bodies made by it for the Midvale Company were not parts of shells, because their development was so far short of the point at which they could be combined with any other component of a shell structure that 29 subsequent progressive steps were necessary on the part of the Midvale Company to complete the manufactured shell. The contention was rejected; it being said by Mr. Justice McKenna:

"Congress did not intend to subject its legislation to such artificialities and make it depend upon distinctions so refined as to make a part of a shell not the taxable 'part' of the law. Besides petitioner understates its work. It did not deliver raw material to the Midvale Company. Certain processes had been performed on the material, giving it a shape adapted to its destination. It was made cylindrical, hollow, with one end closed. It was rough, it is true, but an advance upon the raw material. * * * 'Manifestly,' as counsel for the collector says, 'the shell body was not completely manufactured by either of the companies which were engaged in its production,' but 'by the two act-

ing together,' and each therefore is liable for the profit it made and judgment is affirmed."

The contention made and conclusion reached in the Forged Steel Wheel Company Case were the same as in that of the Worth Bros. Company. The Forged Steel Wheel Company, a subcontractor, made rough steel forgings for a principal contractor, who had agreed to supply the British government with high explosive shells. It put prepared steel rounds through two forging processes, whereby a hole was pierced from one end of each round to within two inches of the other, and the round was then lengthened by drawing it through three successive rings of a hydraulic press. To make the shell form (which weighed about 170 pounds) suitable for use as a shell, the principal contractor, by dressing, boring, and machining, requiring 27 distinct and separate processes, reduced such form to 77 pounds. The Supreme Court adopted the language of the Court of Appeals that—

"It is manifest that, standing alone, the statute neither expresses nor implies any warrant or implication for limiting the broad, inclusive, generic words, 'any part,' to the restricted, specific, qualified term 'any completed part.'"

The Forged Steel Wheel Company, like the Worth Bros. Company, was held to be a manufacturer, although each made but a rough part of a given article. The conclusion reached in those cases was foreshadowed in the following statement made in the Carbon Steel Co. Case, in speaking of the act in question:

"Of course it did not contemplate that 'person manufacturing' should use his own hands. It contemplated the use of other aid and instrumentalities, machinery, servants, and general agents, availing thereby the world's division of labor; but it contemplated, also, the world's division of occupations, and in this comprehensive way contemplated that all of the world's efficiency might be availed of, and, when availed of for profits, the latter could not thereby escape being taxed. And where, indeed, was the hardship of it? The tax was on profits and measured by them."

The conclusion here must be that the plaintiff was a manufacturer, and as such engaged at a profit in the making of parts of fuses.

[3] Article 13 of the regulations of the Commissioner of Internal Revenue, in so far as need be quoted, is as follows:

"'Any part thereof,' as used in section 301 of this title, is any article *relatively complete* within itself and designed or manufactured for the special purpose of being used as a component part of a completed munition, and which, by reason of some peculiar characteristic, loses its identity as a commercial commodity, and which, without further treatment, cannot be used for any purposes other than that for which it was designed."

It is asserted that the four articles made and delivered by plaintiff under its contract are not "relatively completed" parts. The articles produced by plaintiff, by reason of peculiar characteristics (their form being one of them), lost their identity as a commercial commodity, and, without further treatment, could not be used for any purpose other than that for which they were respectively intended. Each was designed or manufactured for the special purpose of being used as a component part of a completed munition after further progressive treatment. "Rela-

tively" means "in relation or respect to something else." Century Dict. Each of the parts was complete within itself in respect to the raw material out of which it was made, and, as was said in the Worth Bros. Company Case, each of the parts "was rough, it is true, but an advance upon the raw material." They were relatively complete.

The tax for each taxable year is imposed upon the entire net profits actually received or accruing for such year "from the sale or disposition of" the articles, or any part of any of the articles, named in the act. Sections 301, 302, 304. The proviso of section 301 exempts from taxation the net profits received in 1916 which were derived "from the sale and delivery of" the articles enumerated in that section under contracts fully performed prior to January 1, 1916. Section 303 is designed to prevent evasion and fraud on the part of manufacturers coming within the terms of section 301. It declares that, if any such manufacturer during any taxable year or part thereof, by any agreement, arrangement understanding, or otherwise, so "sells or disposes of any such article at less than the fair market price obtainable therefor" as directly or indirectly to benefit himself or any other person interested in his business, or with intent to cause such benefit, the gross amount received or accruing for such period "from the sale or disposition of" such article is to be taken as the amount which would have been received or accrued "from the sale or disposition of such article, if sold at the fair market price."

The plaintiff's contention is that the use of the terms "sale or disposition of," "sale and delivery of," "sells and disposes of," and "fair market price" implies that the articles delivered must be the property of the person taxed; that he must have some title thereto which he can "sell or dispose of"; that the title to the castings, having been at all times in the Recording Company until their delivery to the Canadian Company, the plaintiff never at any time had the sole or even a qualified title to such castings, never received payment from the vendee, and was compensated solely by the Recording Company at a specified rate per pound; and that therefore—

"It cannot be said, even under a tortured construction, that any net profits were received by or accrued to the Brass Company from the sale or disposal of the articles specified in section 301 of the act."

It is conceded that the words "dispose of" are more comprehensive than the word "sell"; but it is urged that the maxim, "*noscitur a sociis*," as defined in 36 Cyc. 1119, 1120, and *First Nat. Bank v. U. S.*, 206 Fed. 374, 379, 124 C. C. A. 256, 46 L. R. A. (N. S.) 1139 (C. C. A. 8) applies, and that, the word "sell" having a definite meaning of disposal for money, the words "dispose of" mean "a disposal by way of barter, exchange or otherwise" i. e., by "some one of the ingenuous plans that are always brought out to escape the law." To sustain the view advanced several authorities are cited, some of which were distinguished and held inapplicable by both the Appellate and Supreme Courts in the *Forged Steel Wheel Co. Case*.

[4] The contention made is unsound. A meaning must, if possible, be given to the words "dispose of." *Platt v. Union Pac. R. Co.*, 99 U. S. 48, 58, 25 L. Ed. 424. They do not mean the same as the word

"sell"; selling being but one mode of disposing of property. *Hill v. Sumner*, 132 U. S. 118, 122, 10 Sup. Ct. 42, 33 L. Ed. 284. Thus to define them is to hold that they are unnecessary, and that Congress used a superfluous term. They mean something more than the word "sell," and must have a distinctive meaning beyond that word. *Hill v. Sumner*, 132 U. S. 123, 10 Sup. Ct. 42, 33 L. Ed. 284; *Platt v. Union Pac. R. Co.* supra; *Andrew v. Auditor*, 5 Ohio N. P. 123. They were intended to embrace every sort of transaction or device other than a sale. They are words of general use and not of legal technicality. Many shades of meaning have been assigned to them. *Phelps v. Harris*, 101 U. S. 370, 381, 25 L. Ed. 855; *Whitfield v. Thompson*, 85 Miss. 749, 38 South. 113, 117. That meaning should be given to them, if possible, which will consist with, and not defeat, the object of the act, or lead to injustice to manufacturers. To pass an article over into the control of another, to part with it, to relinquish it, to get rid of it, actually to remove it, is to dispose of it. *Webster's Dict.*; *Herold v. State*, 21 Neb. 50, 56, 31 N. W. 258; *Koerner v. Wilkinson*, 96 Mo. App. 517, 70 S. W. 509; *Connelly v. Putnam*, 51 Tex. Civ. App. 233, 236, 111 S. W. 164; *Re Olsen's Estate*, 17 S. D. 1, 94 N. W. 421, 422; *Swenson v. Kleinschmidt*, 10 Mont. 473, 482, 26 Pac. 198; *Guile v. McNanny*, 14 Minn. 520 (Gil. 391), 100 Am. Dec. 244; *Newcomb v. Newcomb*, 12 N. Y. 603, 620; 9 Am. & Eng. Ency. Law, 540; 14 Cyc. 516.

Congress knew that manufacturers in the production of munitions were operating under just such contracts as the plaintiff had, and we have the declaration of the supreme judicial authority that the act in question contemplates the availing of the world's division of labor and occupations and of all the world's efficiency, and that, when availed of for profits, such profits cannot thereby escape being taxed. The definition of the words "dispose of," above given, must, on a fair interpretation of the act, be accepted as correct. The plaintiff delivered the parts made by it, and relinquished and passed its control over them to the Recording Company, and, by thus parting with and getting rid of them, disposed of them.

[5] The proviso in section 301 is an exempting clause within whose terms the instant case does not fall. It is thought, however, by plaintiff, that the words "sale and delivery," found therein, warrant the application of the "*noscitur a sociis*" maxim. If the meaning to be ascribed to those words is what plaintiff claims, may it not be that the proviso created a distinct and separate class, embracing manufacturers only who, as exclusive owners, held the full title to the articles made by them, and who sold and delivered such articles and received a net profit thereon before January 1, 1916? If so, the words "dispose of," occurring elsewhere in the act, can have no application, except as to such class. It is manifest that the provisions of the act, other than the proviso, are consistent and directly applicable to a case such as plaintiff presents, unless the expression "fair market price," occurring in section 303 and hereafter to be considered, operates to defeat such consistency and application. The conclusion herein reached is preferably based on other and what is believed to be rational grounds. As said in

Williams v. State, 99 Ark. 149, 137 S. W. 927, Ann. Cas. 1913A, 1056, 1057, quoting 2 Lewis' Sutherland Stat. Const. § 368:

"A statute is passed as a whole, and not in parts or sections, and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section, and so as to produce a harmonious whole."

Considering the context of the act in question, the words "sale and delivery" must be read "sale or delivery." Its language elsewhere than in the proviso is "sell or dispose of," or "sale or disposition of." A like situation existed in the statute considered in *Geiger v. Kobilka*, 26 Wash. 171, 66 Pac. 423, 90 Am. St. Rep. 733. The rule that "and" and "or" are convertible, as the sense may require, applies to their use in statutes (*U. S. v. Fisk*, 70 U. S. [3 Wall.] 445, 447, 18 L. Ed. 243; *Hensel, Bruckmann & Lorbacher v. U. S.* [C. C.] 126 Fed. 576; *Union Central Life Ins. Co. v. Skipper*, 115 Fed. 69, 72, 52 C. C. A. 663 [C. C. A. 8]; *Ohio v. Covington*, 29 Ohio St. 102, 115; *Finckh v. Evers*, 25 Ohio St. 82, 85; *Seaton v. Grimm*, 110 Iowa, 145, 149, 81 N. W. 225), as well as to other instruments (*Dumont v. U. S.*, 98 U. S. 142, 143, 25 L. Ed. 65; *Brown v. Grand Rapids Parlor Furniture Co.*, 58 Fed. 286, 291, 7 C. C. A. 225, 22 L. R. A. 817 [C. C. A. 6]). If Congress had in mind merely a sale, or a disposal by way of barter or exchange, or their equivalent, the words "and delivery" are superfluous, for the reason "delivery" is one of the elements of a sale (*City of Iola v. Lederer*, 86 Kan. 347, 120 Pac. 354; *Commonwealth v. Williams*, 72 Mass. [6 Gray] 1, 9); the term "sale," in common parlance, importing a delivery (*Hamilton v. Steck* [Sup.] 5 N. Y. Supp. 831, 832).

"Delivery" is a word used in various senses and to express various shades of meaning. *Benjamin on Sales* (5th Ed.) 677; 5 Am. & Eng. Ency. Law (1st Ed.) 520a, note. "Delivery," in its legal sense, may denote a transfer of title to the thing sold, or it may mean a transfer of possession (*De Bary v. Souer*, 101 Fed. 425, 428, 41 C. C. A. 417 [C. C. A. 5]; *Morse v. Sherman*, 106 Mass. 430, 433; 35 Cyc. 154), and it is generally used to denote a transfer of possession (*Bloyd v. Pollock*, 27 W. Va. 75, 128, 129). It means:

"To give or transfer; to yield possession or control of; to part with." *Webster's New International Dict.* "To put into another's possession or power; pass to another." *Century Dict.* "Transmit the possession of a thing from one person into the power or possession of another." 13 Cyc. 773, 774.

But according to these definitions "delivery" and "disposition of" must be held to be equivalent terms. The language of the proviso affords no shield to the plaintiff.

[6] Nor is the plaintiff's contention aided by the expression "the fair market price," found in section 303. To prevent avoidance of the tax on manufactured articles and parts of articles mentioned in section 301, Congress established a standard, by comparison with which the fair dealing of the manufacturers might be tested. An article or part of an article owned by a manufacturer, whether his ownership be entire or qualified, has a value. The standard of value set up by the statute is the "fair market value." If the manufacturer, enjoying the full ownership of an article, or a part of it, sold, or, having but a qualified

ownership therein, disposed of, his entire interest for what that interest, whatever it might be, would fairly sell for on the market, he was taxable on the net profits only as the same were determined by section 302. If he sold or disposed of his interest for less than it would thus sell for on the market, his tax was to be computed for the taxable period on the gross amount received or accrued from the sale or disposition of such article or part thereof. Such is the significance of the term "the fair market price" occurring in section 303.

[7] That the Recording Company owned and furnished the raw material out of which plaintiff made parts of fuses is without controlling influence. The plaintiff had a lien for the work it performed, and that lien constituted in plaintiff's behalf a qualified right in and a right of control over whatever property the Recording Company had in the manufactured parts. *Advance Thresher Co. v. Beck*, 21 N. D. 55, 128 N. W. 315, Ann. Cas. 1913B, at page 519; *Rochester Distilling Co. v. O'Brien*, 72 Hun, 462, 25 N. Y. Supp. 281; *Re Ransford*, 194 Fed. 658, 660, 115 C. C. A. 560 (C. C. A. 6). The plaintiff's lien was within itself a right of property (*The Lottawanna*, 88 U. S. [21 Wall.] 558, 579, 22 L. Ed. 654; *The J. E. Rumbell*, 148 U. S. 1, 11, 13 Sup. Ct. 498, 37 L. Ed. 345), a proprietary interest, a qualified ownership (*Hollingsworth v. Dow*, 19 Pick. [Mass.] 228, 230; *Hamilton v. Buck*, 36 Me. 536, 539; *Stewart v. Flowers*, 44 Miss. 513, 7 Am. Rep. at page 710); the general ownership being in the Recording Company. The value of the labor expended on the raw materials, plus plaintiff's profits, represented the value of its ownership or interest, which value was measured by the price per pound to be paid by the Recording Company. Plaintiff, by its delivery of the manufactured parts to the Recording Company for a money consideration, disposed of its interest and qualified ownership in them, and thus in the articles themselves, at what has been treated by the parties as the market price for manufacturing, such as plaintiff did.

[8] If the plaintiff is entitled to interest, as it claims, on the penalty imposed on it for the period which elapsed between its payment and its return, it must be in the way of damages. The penalty, when repaid, was accepted without any agreement or reservation that its acceptance should not affect the question of the payment of interest or the right to demand the same. The recovery of interest on the penalty repaid must therefore be denied. *N. Y. Trust Co. v. Detroit, T. & I. Ry. Co.*, 251 Fed. 514, 519, 163 C. C. A. 508 (C. C. A. 6); *Tillotson v. Preston*, 3 Johns. (N. Y.) 229, cited with approval in *Stewart v. Barnes*, 153 U. S. 456, 463, 14 Sup. Ct. 849, 38 L. Ed. 781.

It follows, from the foregoing, that judgment must be entered for the defendant.

THE SAIGON MARU.

(District Court, D. Oregon. August 16, 1920.)

No. 7467.

1. Shipping ⚡58(2)—Evidence held to show chartered ship could have carried larger deck load.

On a libel by a charterer for damages occasioned by the ship's failure to carry a full cargo, evidence held to show that the ship could safely have carried a larger deck load than she did carry, notwithstanding the testimony of her master that a larger load would have been unsafe.

2. Shipping ⚡44—In determining size of deck load, much weight must be given to judgment of master.

In determining the size of the deck load which a vessel can safely carry, much weight must be given to the honestly exercised judgment of the master, who was familiar with the capabilities of his ship.

3. Shipping ⚡44—Chartered vessel cannot carry coal for own purposes other than fuel for voyage.

Where the entire vessel was chartered to carry lumber, she cannot for her own purposes carry coal not necessary for fuel during the voyage, and thereby diminish her capacity for carrying cargo.

4. Damages ⚡22—Measure of damages for breach of contract is loss under special circumstances, if known when contract was made.

The measure of damages for breach of contract is the loss which would naturally follow the breach under ordinary circumstances, or under the special circumstances of the case, if they were made known to the party guilty of the breach at the time the contract was entered into.

5. Shipping ⚡58(3)—General measure of damages for failure to carry not applicable under war conditions.

The general measure of damages for failure to transport goods as agreed, which is the difference between the market value at the time and place of delivery at destination and such value at the place of shipment, plus freight and other charges, is not applicable to a breach of charter, when existing war conditions made it impossible to secure other transportation, except at practically prohibitive rates.

6. Shipping ⚡58(3)—Charterer entitled to lost profits on sale known to vessel's agent.

Where a vessel breached her charter agreement to carry a full cargo of lumber, the charterer is entitled to recover as damages the profits he lost on a resale of the lumber, where the vessel's agent, at the time the charter was signed, knew that the lumber was to be shipped for such resale.

7. Shipping ⚡58(3)—Owner liable for loss of profits on contract for resale of cargo, closed after charter signed.

The charterer is not precluded from recovering from the vessel, which failed to carry a full load, his profits on a resale of the cargo, by the fact that his contract for resale was not closed until the day after the charter was signed, and the details were not communicated to the vessel's agent, where the fact that the ship was chartered to carry a cargo for such resale was generally communicated.

8. Shipping ⚡58(3)—Price at which lumber for cargo was purchased governs damages for failure to carry.

In figuring the loss of profits from resale of lumber, due to breach of charter to carry, the price at which the lumber was purchased for that cargo controls, though the market price at the place of shipment was greater at the time the vessel sailed.

9. Shipping ⚡58(3)—Charterer can recover damages for which he is liable on resale, known to owner.

Where a vessel's agent knew that the vessel was chartered to carry a cargo of lumber to fulfill a contract, the charterer can recover from the vessel the amount of his liability to his buyer for breach of contract of sale.

10. Shipping ⚡58(3)—Compensation for damages in foreign currency should be awarded in United States currency at going rates.

On a libel to recover the damages for which the charterer was liable, because of the ship's failure to carry the full amount sold, which damages were stated in foreign currency, the charterer can recover an amount in United States currency which, at the rate of exchange on the day of entry of decree, would be sufficient to pay the damages in the foreign currency.

In Admiralty. Libel by the Pacific Export Lumber Company against the Japanese steamer Saigon Maru, claimed by the Osaka Shosen Kaisha. Decree rendered for libellant.

Wood, Montague & Matthiessen, of Portland, Or., for libellant.

Huffer & Hayden, of Tacoma, Wash., for respondent and claimant.

WOLVERTON, District Judge. This is a libel, instituted by the Pacific Export Lumber Company against the Japanese steamer Saigon Maru, to recover damages alleged to have been sustained by the libellant by reason of the vessel's having refused to carry a full deck load of sawn lumber, which it had by charter party contracted to do.

On or about March 19, 1917, libellant and claimant, Osaka Shosen Kaisha, entered into a charter party, whereby libellant chartered the Saigon Maru to carry a full cargo of lumber or timber, including a full deck load, from a port on the Columbia or the Willamette river to Bombay, India. Pursuant to the charter party, the steamer came to Portland, and here received on board a full cargo of lumber within her hold, and 241,559 feet, board measure, on her deck, but refused to take any further amount.

The libellant, claiming that the vessel could safely carry on deck on her voyage 750,000 feet, and was about to depart without taking on the full cargo which she had contracted to carry, instituted this libel to recover the damages which libellant would sustain by reason of such default on the part of the ship. Libellant bases its damages upon loss of profits on its sale of lumber to lumber merchants in Bombay, that is to say, upon the portion sold and not delivered, and its liability to such lumber merchants for failure to deliver to them the amount contracted to be delivered at Bombay, relying upon the due fulfillment of the charter party on the part of the ship, for transportation of the lumber to that port, as agreed. Among other things, it is alleged that libellant had sold the cargo of lumber to be carried to Gillanders, Arbuthnot & Co., Bombay; the amount being 5,500 tons, 10 per cent. more or less, so that the minimum quantity to be delivered under the contract was 4,950 tons; that the owners and agents of the Saigon Maru knew, when they chartered her to libellant, that libellant had sold the cargo in Bombay, and was chartering the vessel for the express purpose of transporting such cargo to Bombay, and that a certain portion of said cargo would consist of timbers of long lengths.

[1] The vessel having agreed to carry a full cargo of lumber, including a full deck load, the question to be settled is whether she was of sufficient capacity to carry safely the amount on deck that libellant claims she should have carried, or any greater amount than she did carry, having in view the voyage which she undertook to make.

The Saigon Maru is a tramp steamer, in length 354 feet, breadth of beam 50.3, and depth of hold 28.2, with gross tonnage of 4,354, and net 2,740. The route of the voyage took the vessel through the North Pacific Ocean to Nagasaki, Japan, thence through the Strait of Formosa and the China Sea to Singapore, thence through the Strait of Malacca, by Achin Head, and through the Indian Ocean, up the coast by Colombo, and thence on to Bombay. The vessel left Portland June 5th, and arrived at Nagasaki July 2, at 2:30 p. m. She proceeded on her voyage July 4th, at 5 a. m., and arrived at Singapore July 17th, at 2:15 p. m. She weighed anchor at 5:30, and proceeded on to Bombay, arriving there at 12:50 p. m. August 2d. Her voyage took her through the North Pacific at the quiet season of the year, when rough seas were not to be expected, through the China Sea at a season when typhoons were to be expected, and through the Indian Ocean in the monsoon season. The voyage, however, was made without incident, or the encountering of unusual stress of weather anywhere on the route; the log indicating at the worst, "Sea rather rough," with a wind velocity of from 4 to 5.

The libellant produced, in support of its contention that the vessel did not take on a full deck load of lumber, Captains Emile C. Genereaux, Andrew Hoben, and W. C. McNaught, all marine surveyors of long experience in that line, as well as upon the sea in various capacities. All these men were present while the ship was taking on her cargo, and made a survey of her as to her seaworthiness. Genereaux and Hoben were of the opinion that she could have safely carried 700,000 feet of lumber on deck. The former seemed to have no doubt of it, while the latter was more conservative, but nevertheless rather firm in his view that such a load would not have endangered her navigation on the voyage. Capt. McNaught said:

"I considered, owing to the dimensions of the ship, that she ought not to have had less than 600,000 feet of lumber, not less, and then not been near to her marks, and had plenty of stability; possibly 700,000, I wouldn't say, but not less than 600,000 feet of lumber, * * * minimum deck load for ship of that size and dimensions."

These men were handicapped in determining what the stability of the vessel would have been with such a deck load upon her, for the reason that the captain of the vessel positively refused to permit any more lumber to be put aboard than the deck load with which she went to sea, nor would he allow any of the usual tests to be made to determine the vessel's stability as the loading continued.

Henry Rothschild, president and manager of Brown & McCabe, stevedores, who had loaded many lumber cargoes for all parts of the world, was of the view that the Saigon Maru should have carried 400,000 or 500,000 feet more in her deck load, "compared," as he says, "with other vessels that we have loaded."

Mr. W. D. Wheelwright, president of the libelant company, who has had long experience in shipping lumber to the Orient and the west coast of South America, and elsewhere, was of the opinion that the Saigon Maru should have carried, at that season of the year, a minimum deck load of 750,000 feet. He also gives a list of four vessels, of similar dimensions to the Saigon Maru, which carried deck loads ranging from 620,175 to 854,308 feet, being an average of 743,587 feet.

The stanchions were first put in, of sufficient length to accommodate the larger deck load. The captain directed these to be sawed off to suit the load which he had made up his mind to take. It should be observed in this connection that Capt. Hoben and Capt. McNaught, and perhaps Genereaux, had had large experience as seamen in the China Sea and the Indian Ocean, and, of course, had in mind the vessel's intended voyage. Capt. McNaught, in speaking of these seas for the months of June, July, and August, was of the view that they were not worse than numerous other parts of the oceans of the world, or that the storms are much more frequent.

Besides the cargo of lumber, the vessel carried 500 tons of coal on deck, 200 tons between decks, and somewhat over 500 tons in her hold. To be more particular, she left port with from 1,210 to 1,220 tons aboard. Her trimming tanks were all full; also her fresh-water tanks, except one small one, of 18 tons capacity, which was partially filled. These tanks have a capacity of 901 tons.

The captain's reasons for not taking more cargo on deck were two, namely: That the terrible seas through which he had to navigate would not permit of it, and that a higher deck load was liable to interfere with his steering rods, and thereby endanger the ship and cargo. The steering rods are carried, one on either side of the ship, on iron stanchions extended "approximately 3 feet 6 inches above the bulwark" rail, and strengthened by stays, some running from the bulwark rail and some from the deck, which the captain describes as very strong. The bulwark rail is about 4 feet in height. These steering rods, as described by the captain, run about 2 inches outside the lumber stanchions, being timbers 6x12 to 8x12, by which the deck load was secured to the ship. The witnesses for libelant place the rods at a greater distance. For instance, Genereaux says that, "if the deck load had been continued, it could have been kept 2 feet away from the steering rods without any trouble whatsoever." Cullum thought the sag would be anything up to 4 inches or over.

The danger which Capt. Yamamoto seemed to fear was from the sag in the load which might be produced by the wind and the sea constantly breaking against the ship; but the surveyors were sure that the load could and would have been so constructed and secured as to obviate any danger from sag that would affect the steering rods. A deck load of 700,000 to 750,000 feet would, according to Genereaux, have carried it up forward about 10 feet and aft about 8, and, of course, above the level of the steering rods. This witness also relates that, about a month previous to the loading of the Saigon Maru, there was loaded in this port the steamer Luckenbach, "with 11-foot deck load, with similar arrangement of steering rod as the Saigon Maru." The

deck cargo, as loaded, was 6 feet high forward and 4 feet aft. A sag, as the witnesses all agree, is not a shifting or a spreading of the load, but a settling to one side or the other, as a ship may be said to sag by the forces or stresses it encounters at sea.

Without attempting to discuss further the evidence bearing upon the objection to carrying a larger deck load because of the arrangement of the steering rods, I am firmly persuaded, from a careful survey of the whole testimony, that it is without potency or force. Now, as it pertains further to the loading of the ship, Capt. Yamamoto has been long on the sea, much of the time as captain, and had served 1 year and 7 months as master of the Saigon Maru. Describing the southwest monsoon in the Indian Ocean, he says it continues for about 5 months in the year, from June to October; that his course from Colombo to Bombay is generally northwest, and that the sea attacks his steamer from port beam.

"Generally," he proceeds, "on that ocean the strong southwest wind blows continuously, and blows with violent and vehement waves and high swell, at that season. Sometimes the wind in that season might be quiet, but generally it is continuously blowing hard, with much rain, continuous rain. It is called the rainy season." The swell "causes the rolling of the vessel, and that is most dangerous to the ship. * * * Of course there is a difference according to the wind and waves, but it rolls violently and tremendously. * * * Comparatively speaking, the wind is not so high. I might indicate that by the numbers 6 to 7. * * * The sea swell is harder than the power of the wind. Generally the wind and sea come together in the same degree, but on the Indian Ocean the sea swell is harder comparatively than the wind. * * * Continuously on the voyage the dashing of the waves is up on the deck."

Mr. Cullum describes a little more fully in this respect. He says, speaking of a ship the size of the Saigon Maru:

"Well, I doubt if the seas would come along and hit the lumber, you know. The spray would go all over it certainly. I don't say the seas would go over it. If it hit the lumber, the spray would go over it; yes. The sea would hit the lumber on the side. I dare say there would be squalls come along that the sea would go over her, but not all the time."

Describing the typhoon of the China Sea, Capt. Yamamoto goes on to say:

"I met with a typhoon on the China Sea very often. * * * With or without deck cargo, it is the same when the vessel meets the strong typhoon; it would not avoid a wrecking of the ship. I will correct my answer. With or without the deck cargo it is the same for any vessel which encounters the strong typhoon in that season, which might result in the wreck of the ship; that is, it may occur, because the typhoon is strong (if it is in the center of the typhoon); and I wish to emphasize the danger to the ship in such a season with a heavy deck load."

He says, further, that these typhoons occur about every 2 or 3 days in July, referring to "all kinds" of typhoons, "sometimes bad, sometimes not so dangerous, sometimes very dangerous." Being asked, "And how often do you expect to meet a terrible typhoon in July?" he answered, "That may be three or four times." He has taken voyages through the China Sea "very often"; six with the Saigon Maru, aside from the one from this port. Some of them were in the stormy season.

Witness relates that he met with a typhoon perhaps twice, but not heavy, and a strong southwest gale. He further relates that ships never carry deck loads from Japan to Singapore during the typhoon season. In this general statement he is corroborated, in the main, by Yamaguchi, and in some respects by Cullum. Being asked as to what he thought was a reasonably safe cargo for the Saigon Maru to carry on deck, with her hold full of lumber, the witness answered: "I think about 300 or 330 tons; something more than 300 tons on deck." Further, he states that the reasonable G. M. of a vessel like the Saigon Maru, carrying cargo, is "from one foot to two feet." This means the distance between the center of gravity and the metacenter.

Mr. Yamaguchi, who had had large experience as captain and master of a vessel, was asked to give his opinion as to what amount of cargo the Saigon Maru should have carried on her deck, and in effect answered that, with the bottom weight 150 tons heavier than the deck load, "that means both bunker coal and cargo, so that if bottom weight or water in tanks is 883 tons minus 150 tons, making 733 tons for the weight on deck, in the best condition; * * * deducting the bunker coal, 500 tons, the deck load would be 233 tons in weight." This on the basis that the ballast tanks were full, and the ship had 2,436,800 feet of lumber in her hold. He said, further, that he thought the maximum amount of cargo that could have been carried on deck was 383 tons, but that such an amount on deck would have made the ship a little tender.

Yamamoto further relates that an experiment was made at Nagasaki to ascertain the G. M., and it was found to be 1.36, with the coal and lumber cargo the same as at Portland, but with 150 tons less water in her fresh-water tanks. An estimate has been made from this basis, by Capt. Okuda, that the G. M. at Portland would decrease in proportion to the increases of the deck load, as follows: With 700,000 feet deck load, the G. M. would be .57; 600,000 feet, .83; 500,000 feet, 1.07; 400,000 feet, 1.09 (this should probably be increased by at least .26); 300,000 feet, 1.53; 241,000 feet, 1.67.

It is further in evidence that the ship's G. M. would increase for the first eight days of her voyage, by the consumption of her coal and fresh water from her tanks. From then on to Nagasaki, according to the estimate from her G. M. at Nagasaki, she would become more tender. The estimate of her consumption of coal was about 32 tons per day—from 30 to 32 tons. She took on 1,050 tons at Nagasaki, and then had on board for her further voyage 1,300 tons. This would indicate that she consumed about 950 tons between Portland and Nagasaki, or about 37 tons per day of her 26 days' voyage. This discrepancy has not been explained. It furthermore appears that, when the vessel reached Bombay, she had on board 500 tons of coal, making her consumption less on a distance of about 200 miles greater than from Portland to Nagasaki. It is to be remembered that her voyage between the latter ports was through comparatively smooth seas, and without unusual incident, and the consumption of coal should at least have been no greater than from Nagasaki to Bombay.

[2] But, to a consideration of the question whether Capt. Yamamoto

should have carried a larger deck load: He stated plainly that he would not have carried more than he did, regardless of the condition of the steering rods, because he seemed to think that it would affect the stability of his ship. He is a seaman of large experience, and much weight must be attached to his honest and sincere judgment as to the peculiarities of his ship and its capacity to carry deck loads upon a projected voyage, and we must not overlook this feature attending the controversy. *The Addison E. Bullard* (D. C.) 252 Fed. 241; *Weston et al. v. Foster et al.*, 29 Fed. Cas. 804, No. 17,452. He had, however, scarcely any practical experience in navigating ships with deck loads of lumber cargo. As to the anticipated typhoons and his dread of the monsoon, I am impelled to the view that he has very greatly exaggerated their terror to seamen. His own experience has called him upon many voyages through the China Sea, and frequently into the Indian Ocean, yet he relates but one or two incidents when he has encountered a typhoon, while he has more frequently encountered gales resulting from cyclonic conditions; but he has never met with any serious mishap. Furthermore, the mariner, perhaps universally, has 24 hours' notice of the coming of a typhoon, and is enabled thereby to avoid its disastrous effects. He may of necessity encounter at times the heavy seas and storms that result from the cyclonic conditions, but rarely the central disturbance that is so fatal to navigation. These resulting disturbances are perhaps no greater, nor more to be dreaded, than the seas elsewhere, where navigation is constantly under way.

As to the monsoon, it would seem to be not so perilous as Yamamoto was constrained to believe. It consists of a steady southwesterly wind, only occasionally of violent proportions, which continues for a considerable time, and blows up what is termed a "short chop" of sea swell. The monsoon is encountered only after passing Achin Head, from which point it is a 13 days' voyage to Bombay. From Achin Head to Colombo the course is mainly west, and the southwest breeze strikes the ship on its port bow. From Colombo to Bombay, the sea is on the ship's beam, or port quarter. Yamamoto's apprehension as to this sea was that it would cause a sag in the deck load, which might prove injurious to the ship and cargo. By the time, however, the vessel arrived at this last lap of the voyage, the deck load would have so settled and been drawn together by its lashings that a sag could hardly be expected in such proportions as to give trouble.

[3] Turning to the *G. M.*, Okuda's estimate gives the *G. M.* in Portland, on a deck load of 500,000 feet, as 1.07. This would be reduced, as the voyage proceeded to Nagasaki, by the consumption of water and coal from the lower hold, so that it would fall below 1 foot, and thus make the ship too tender, or unstable. In this relation, however, there is another condition to be considered. The coal required to carry the vessel to Nagasaki was 832 tons plus 25 per cent. to meet emergencies, making a total of 1,040 tons. The ship carried from 1,210 to 1,220 tons, an excess of from 170 to 180 tons. That amount in tonnage of lumber could have been carried on deck in place of the coal. Furthermore, Yamaguchi was of the opinion that the vessel could have carried 60 tons more on deck than she did carry. This would make a

very substantial addition to the deck load. The vessel cannot carry a quantity of coal for its own purposes, other than as fuel for the voyage, and thus deprive the charterer of space to which he is entitled. *Darling & Son v. Raeburn*, 10 Aspinnall (N. S.) 268, on appeal 429.

As to the water ballast, it is obvious that, while it seemed to be necessary to carry the trimming tanks full on account of their construction, to prevent the water from flowing from one side of the ship to the other, and thus add to the stability of the ship in navigation, No. 3 of the fresh-water tanks could have been filled at sea, to give more ballast if needed; that is, if it was found the ship was becoming too tender.

It is impossible, from the meager testimony that we have as to the ship's G. M., and the doubtful reliability of the deductions made from the G. M. ascertained at Nagasaki, considering the varying conditions of the ship's load, satisfactorily to determine from the G. M. basis the amount the ship could safely carry on deck. The testimony is of real value, however, as indicating a range of probability respecting the amount of deck cargo above which it would be unsafe for a ship to venture on the seas. Considered along with the testimony of the surveyors and other witnesses of experience in loading vessels, I am drawn irresistibly to the conclusion that, by proper loading, the *Saigon Maru* could have carried 550,000 feet of lumber on her deck, with reasonable safety, in view of the voyage contemplated. There was, undoubtedly, no ulterior motive impelling the captain to refuse to take on board a larger deck load, but obviously he was unduly timid, and committed an error in judgment, all in good faith on his part. See, in support of this conclusion, *The Helios* (D. C.) 108 Fed. 279, 284.

This brings us to a consideration of the liability of the vessel, if liable at all, for the damages the libellant has sustained. By the charter party the owner of the steamer *Saigon Maru*, or the steamer, we may say, agrees on the chartering of the whole of the vessel, including the deck, with certain exceptions not essential to the inquiry. The charter party was brought about through certain correspondence and conferences had between the libellant and the representative of the ship, namely, Edwin Orrett, local manager at Tacoma. The first inquiry was by Orrett of the libellant, touching whether there were any offers of lumber for Bombay. Libellant replied that it had an offer from friends in Bombay for a full cargo of Oregon pine lumber, not to exceed 4,500,000 feet, cargo to be furnished according to an inclosed schedule called "*Adneci*," and giving somewhat the proposed terms of loading, discharging, demurrage, etc. On March 13, 1917, Orrett advised that he had a cable from claimant that the *Saigon Maru* would be available for full load for April or May loading. Libellant answered on the same date, March 13th, and, after stating some conditions that would be agreeable to it, closed by saying:

"We are cabling Bombay, so as to be in position to close on receipt of your reply."

A day or two later—the date is not given—libellant wrote to Orrett:

"We have your telegram of to-day, and inclose copies of our two messages of this date to you; hoping that you and we may both receive cables to-morrow

from Japan and Bombay, respectively, that will enable us to close this matter up; so we hand you herewith a form of charter party into which should be filled, on lines 4 and 5, the location and the prospective voyage of the steamer, and on lines 83 and 84 the canceling date and the date when lay days are to begin."

On the 15th libelant telegraphed Orrett waiving "condition re extra insurance on deck; still awaiting reply from Bombay"; and on the 17th libelant telegraphed. "We accept Saigon on terms of charter party mailed 13th," noting some change of conditions suggested therein. Mr. Wheelwright states that the telegram was sent at 10 o'clock a. m., and closed everything except the conditions about lay days for discharging. Libelant wrote Orrett, also, on the 17th, confirming the telegram of acceptance. On the 19th Orrett wrote, returning the form of charter party, and indicating that the specification submitted was satisfactory; also advising that the ship would be found to be a fair lumber carrier, and requesting libelant to make up a charter party incorporating the conditions set forth in his letter. Libelant replied on the 20th, inclosing eight signed copies of the charter party for the signature of the local manager.

The negotiations leading up to the sale of the lumber by libelant to Gillanders, Arbuthnot & Co. began with a letter from that company, of date December 14, 1916, inclosing a schedule of 4,500,000 feet of lumber. The next step was a cable by libelant to them, of date March 3, 1917, saying:

"We think there is good prospect 7,500 loads of 50 cubic feet, 180 shillings per load basis c. i. f. per steamer Bombay March-April-May shipment."

Gillanders cabled March 10th:

"We give you firm offer as per your telegram of March 3, 7,500 loads of 50 cubic feet. * * * 180 shillings per load including war risk."

The price named is the one at which the parties finally closed. On the 12th libelant telegraphed Gillanders:

"Working. Understand 180 per load basis offer to stand good until advised to the contrary."

On the 13th libelant again cabled:

"Think can accept subject your approving charter Saigon Maru, estimated 3,300,000, Osaka Shosen Kaisha represent making April-May clearance; freight prepaid; option substitute another at least equally near loading port, not exceeding four and a half millions. Confirm quickly."

Gillanders cabled on the 17th:

"As per your telegram of 14th March we confirm the offer to stand good until advised to the contrary. Do your utmost to make maximum quantity 6,000 loads of 50 cubic feet."

On the same day they telegraphed again:

"Referring to your telegram of 14th we cannot consider terms of charter. Our offer is (stating it). On this understanding we agree to 5,500 tons, 3,300 thousand feet, but we cannot agree option of another steamer unless similar quantity."

The reference to telegram of 14th is to the above telegram sent to Gillanders of date the 13th. In this relation, Wheelwright testifies that he spoke to Orrett with reference to substituting another steamer up to 4,500,000, and that they did not favor it. On the same day, March 17th, at 5:40 p. m., libellant cabled:

"Your telegram to hand. We conform to contents. Expect close Saigon Maru estimated 5,500 loads of 50 cubic feet."

It was explained that "We conform to contents" means "We accept your offer." That was the contract finally with Gillanders, Arbuthnot & Co. All these cables were based on the Adneci schedule.

I have endeavored, by the references to the correspondence touching both relations, to give only so much as will fairly represent the trend of the negotiations, and the pertinent language essential to the present inquiry.

[4] The rule relating to damages attending a breach of contract is thus lucidly stated in *Hadley v. Baxendale*, 9 Exch. 341:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally (i. e., according to the usual course of things), from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

Mr. Benjamin deduces the following rule from the English cases, where goods have been bought for resale, and there is no market in which the buyer can readily obtain them:

"If, at the time of making the contract, the seller knows that the buyer buys the goods with the intention and for the purpose of reselling them, although he may or may not know of any particular subcontract existing or contemplated, the inference is that the seller contracts to be liable for the increased damages which will flow from a breach of the contract under the special circumstances; and, applying the second part of the rule laid down in *Hadley v. Baxendale*, those damages may readily be supposed to be within the contemplation of the parties."

The American doctrine is substantially the same, and is thus stated in *Hockersmith v. Hanley*, 29 Or. 27, 38, 44 Pac. 497, 500:

"A person injured by the breach of a contract to which he has become a party with another is entitled, upon principle, to recover damages commensurate with the injury he has sustained, and this will include gains prevented as well as losses sustained. They must be such, however, as naturally result from the breach, or may reasonably be considered to have been in the minds of the parties at the time of entering into the contract; the contract itself being, impliedly at least, formulated with reference thereto in the event of a violation

of its conditions. The intention of the parties is to be ascertained from a consideration of the contract taken in connection with the surrounding circumstances and conditions of which they are cognizant; and if the circumstances and conditions are such as to make it apparent that the contract was entered into and known by the contracting parties to have been consummated to enable one of them to serve or accomplish a particular purpose, the liability of the other for its violation will be determined and the damages ascertained with reference to the effect of the breach in hindering or defeating the contemplated object. They must also be certain, and flow directly and naturally from the breach; or, to put it in another way, they must not be the remote but the proximate consequence thereof, and not speculative or contingent."

Numerous cases are cited in support of the text. Among them see *Cockburn et al. v. Ashland Lumber Co.*, 54 Wis. 619, 12 N. W. 49. As relating to a contract to carry, see, further, *Cobb, Blasdel & Co. v. I. C. R. R. Co.*, 38 Iowa, 601.

The principle of just compensation is paramount, which means that it shall be commensurate with the loss or injury sustained, and, of course, not in excess thereof. 1 *Sutherland on Damages*, 47, 48. Further discussing the law of damages, the learned author says (page 203):

"Damages are not the primary purpose of contracts, but are given by law in place of and as a compensation and equivalent for something else which had been agreed to be done and has not been done. What the damages would ordinarily be on such a default is immaterial, if the contracting party assumed the obligation he has broken with a knowledge of a peculiar state of facts connected with the contract which indicated that other damages would result from a breach, and the latter are claimed. To confine the injured party's recovery in such case to the lighter damages which usually follow such a breach, where no such known special facts exist, and exclude those which were thus brought within the contemplation of the parties, would be to sacrifice substantial rights to arbitrary rule, to set aside the principle which entitles a party to compensation commensurate with his injury to give effect to a rule formulated to render that principle effectual; it would be to apply a subordinate rule where it has no application, instead of the principle, which is paramount and always applicable. What are the usual damages which result from the breach of a contract? There is certainly no customary amount, nor is there any rule of damages which is universal like the principle for allowance of due compensation. If it is a contract of sale, and the vendor refuses to complete it, one rule is to ascertain that compensation by the difference between the contract price and the market value, because if the article which is the subject of the contract can be obtained in market at a market price the vendee is thereby enabled to supply himself without loss unless the price has increased. That rule goes no further, but the principle does. Where the vendee cannot obtain the article in the market, nor at all if the vendor refuses to perform his contract, that rule is not applicable, and then resort must be had to other elements of value, and recourse is had to the principle to determine the measure of redress; even a contract of resale made by the vendee and of which the vendor had no notice may be considered."

See, also, *Strom Bruks Aktie Bolag v. Hutchison*, 10 *Aspinall*, 138, 140, 141.

The general rule respecting the measure of damages, on refusal to perform a contract for transportation, is:

"The difference between the market value at the destination when the goods should have arrived, if carried in accordance with the contract, and the value at the same time at the point of shipment, less what it would have cost the shipper under the contract to have had the goods transported; that is, freight charges and other necessary expenses." 6 *Cyc.* 525.

[5] This, like all general rules, however, is inapplicable in exceptional cases. It is a feature in the present case that, owing to war conditions, libelant was practically unable, at the time of default, to procure transportation to carry to Bombay the lumber left behind. If it could have been procured at all, it would have been at very greatly increased cost, and, if libelant had resorted to that means of invoking the general rule, the claimant would have suffered beyond what would seem to be reasonable damages.

[6] The facts disclose that claimant had practical knowledge that libelant was negotiating for a sale of the cargo, or at least a part of it, in Bombay, when negotiations for the charter party were under way. Orrett was advised at the very outset that libelant had an offer from friends in Bombay for a full cargo, not to exceed 4,500,000 feet, of lumber. Later, as the negotiations proceeded, Orrett was advised by libelant that it was "cabling Bombay so as to be in position to close on receipt of your [Orrett's] reply." Still later libelant expressed to Orrett a hope that—

"We may both receive cables to-morrow from Japan and Bombay, respectively, that will enable us to close this matter up."

And then on the 15th of March Orrett was advised that libelant was "still awaiting reply from Bombay." The contract with Gillanders, Arbuthnot & Co. was closed on the 17th by cable, dispatched at the hour of 5:30 p. m., and the negotiations with Orrett for the charter party were closed on the same day by dispatch forwarded at the hour of 10 a. m.

[7] It cannot alter the case that libelant closed with claimant a few hours previous to closing with correspondents at Bombay. The fact remains that claimant had full knowledge of libelant's purpose in securing the charter party, and entered into the charter party with a view of enabling libelant to further, and even to consummate, that purpose. Nor was it essential, under the authorities, that claimant should have been advised of the exact conditions of the contract of sale to Gillanders, Arbuthnot & Co. It was sufficient that it had knowledge of the fact that such a sale was in contemplation, dependent upon securing the charter party.

[8] The damage claimed under the first head is the loss of profits libelant sustained in not being able to deliver, under its contract, the cargo left at home to Gillanders, Arbuthnot & Co. at Bombay. The loss sustained was at the rate of \$7.955 per 1,000. I take this from Mr. Wheelwright's statement, which stands uncontradicted. The amount of lumber which claimant failed to carry that it should have carried is 308,441 feet, making the damages \$2,453.65. This seems a fair adjustment under the conditions prevailing.

Objection is made that libelant purchased the lumber in this port in March at a much lower figure than could have been procured in June, when the vessel sailed, or on August 2d, when the cargo arrived at Bombay. But it is a sufficient answer to this that the lumber was purchased for the Saigon Maru's cargo, and the rate of loss named was the actual damage sustained by the claimant's failure to carry. Such

are the damages that were legally in the contemplation of the parties when the charter party was entered into.

[9] The damage claimed under the second head is the amount claimed by Gillanders, Arbuthnot & Co. against libelant for a failure to deliver the lumber left at Portland. Libelant has not as yet paid these damages, but the same have been liquidated, and there can be no question as to libelant's liability to pay them. These damages have been ascertained at Bombay—one item of £1,075 sterling, and another of 4,550 rupees. These are the damages for which claimant, or rather the Saigon Maru, is liable to libelant under the second head.

[10] As libelant is enabled to discharge these damages in the money of the realm where payable, the decree should be for the amount, in money of the United States, that will enable libelant to discharge such liability at this date, being the date of the entry of the decree. As the court is not advised as to the present rate of exchange of pounds sterling or the rupee, the adjustment will be made on counsel's furnishing the necessary information. These last items of damages, as is obvious, are not so direct as the first; but it is apparent that they come within the general principles governing, as above ascertained.

The English statute alluded to in the evidence and argument can have no bearing on the present issues, especially as it has been repealed. I have reviewed the authorities presented on exceptions to the libel, and now again insisted upon, whereby the sufficiency of the libel is challenged, but am constrained to adhere to my former ruling.

The claims for damages as here ascertained will bear interest at the lawful rate of 6 per cent. per annum from August 2, 1917, and libelant will recover its proper costs and disbursements.

IN RE LEDBETTER.

(District Court, N. D. Georgia, E. D. August 12, 1920.)

No. 728.

1. Bankruptcy ☞317—Costs incurred in action by creditor before filing of petition only are provable.

Under Bankruptcy Act, § 63a (3), (5), being Comp. St. § 9647, costs incurred in good faith by a creditor before the filing of the petition, in an action to recover a provable debt, are provable; but costs afterwards incurred in the action are not.

2. Bankruptcy ☞317—Provable costs may include attorney's fees.

Under Bankruptcy Act, § 63a (3), being Comp. St. § 9647, providing that costs incurred in an action by a creditor on a provable debt before filing of the petition are provable, attorney's fees provided for by contract and the right to which has become fixed by the bringing of the action, under the state law, before filing of the petition, are provable as a part of the costs.

3. Time ☞11—Fractions of day regarded, where only one day is involved.

While fractions of a day are not to be regarded where a period fixed is measured by days, where one day only is involved, and the rights of litigants depend on priority in time of two occurrences on that day, and

the priority can be established, the courts will ascertain and regard the actual priority.

4. Bankruptcy. §317—Costs incurred by creditor on same day, but "before filing of petition," provable.

The words "before the filing," as used in Bankruptcy Act, § 63(3), being Comp. St. § 9647, authorizing the recovery of taxable costs incurred in good faith by a creditor "before the filing of the petition," mean the very instant of filing, if ascertainable; and costs incurred by a creditor in bringing an action against the bankrupt, which was commenced on the same day the petition was filed, but at an earlier hour, *held* provable.

In Bankruptcy. In the matter of W. F. Ledbetter, bankrupt. On review of order of referee. Modified.

See, also, (D. C.) 263 Fed. 1000.

H. H. Vandler, of Lavonia, Ga., for Bank of Lavonia.

H. M. Holden, of Athens, Ga., for trustee.

S. C. Upson, of Athens, Ga., for bankrupt.

SIBLEY, District Judge. Facts are stipulated as follows: First National Bank of Livonia, holding a note for a debt and interest "and all costs of collection, including 10 per cent. as attorney's fees," secured by a deed to land, gave 10 days' notice in writing of intention to sue at a named term of a named state court, and filed the suit in the forenoon of September 4, 1917. At 5:30 p. m. of same day the defendant filed his voluntary petition in bankruptcy. The bank sought to prove as a secured claim its note for principal, interest, attorney's fees, and court costs incurred in the suit. The question is whether the attorney's fees and court costs are provable.

[1] The court costs are expressly controlled by Bankruptcy Act, § 63(3), (5), being Comp. St. § 9647, declaring debts to be provable when "founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in action to recover a provable debt," and when "founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the entry of such judgments." The note here sued on was a provable debt, and costs which were incurred in good faith before the filing of the petition in bankruptcy are a provable debt against the bankrupt's estate. In re Allen (D. C.) 96 Fed. 512. But if, after the filing of the petition in bankruptcy, the creditor elects to pursue to judgment his remedy in the state court, instead of relying on that afforded by the bankrupt court, costs subsequently arising are not provable and will be disallowed.

[2] The attorney's fees stand upon a similar footing, if indeed they are not included in the very words of the statute. In former times the fees of attorneys and solicitors for services in connection with cases in court were a part of the "taxable costs"; these being regarded as officers of court equally with sheriffs and clerks. Such costs are recognized in the federal courts by R. S. §§ 823, 824 (Comp. St. §§ 1375, 1378). Though in Georgia these fees have not been taxed as costs for a long time (see McDonald v. Napier, 14 Ga. 89, 110) and

the attorney's fees are required at the hands of the opposite party only as a matter of contract, and are for many purposes treated as a principal obligation (see *Peeples v. Strickland*, 101 Ga. 829, 29 S. E. 22; *Evans v. Bank*, 147 Ga. 621, 95 S. E. 219), still they are strictly limited by law, and by Park's Code, § 4252, obligations in evidence of debt to pay attorney's fees in addition to interest are void, unless suit is actually brought after 10 days' written notice of intention to sue, and of the term and court to which suit will be brought; payment not having been made on or before the last day for suit to that term. A tender or payment within this time prevents the collection of the fee from the debtor (*Browne v. Edwards*, 122 Ga. 277, 50 S. E. 110); and the right to pay continues up to the actual filing of the suit on the last day for suit (*Harris v. Powers*, 129 Ga. 75, 88, 58 S. E. 1038). The collection of the fee also depends on success in the suit. *Smith v. Baker*, 137 Ga. 298, 72 S. E. 1093. It thus has many of the incidents of an item of costs, and it is not improbable that Congress intended attorney's fees so circumstanced to be dealt with as taxable costs for bankruptcy purposes, as well as those the amount of which is fixed by law as an item of costs. As the right to tax the defendant with attorney's fees is lost by payment or tender before suit, so also it is lost by the filing of a petition in bankruptcy. *In re Weiland* (D. C.) 197 Fed. 116. It was said in *Bank v. Sherman*, 101 U. S. 403, 406 (25 L. Ed. 866), of Act of March 2, 1867, c. 176:

"The filing of the petition was a caveat to all the world. It was in effect an attachment and injunction. * * * The bankrupt became, as it were, for many purposes, *civilitur mortuus*."

And the assertion is repeated of the present act in *Mueller v. Nugent*, 184 U. S. 1, 14, 21 Sup. Ct. 927, 45 L. Ed. 711. After the filing of the bankruptcy proceeding, no creditor may perfect his inchoate right to put upon the bankrupt an attorney's fee for the filing and conduct of a suit which he must know is unnecessary and will likely be futile. It may even be that under the quoted provision of section 63 good faith must exist when the creditor files his suit before the filing of the bankruptcy petition—that is, he must have a real purpose effectively to assert his debt against the debtor, rather than a purpose, knowing a bankruptcy to be imminent, to impose an unnecessary charge upon the bankrupt estate. No attack upon the good faith of this creditor is made, however, and good faith is to be presumed.

[3] But the contention is that fractions of a day are not regarded in law, and that this petition in bankruptcy is to be treated as filed on the first moment of September 4, 1917, and in consequence neither the attorney's fee nor any of the costs can in legal contemplation have been incurred "before the filing of the petition." It is a general rule that fractions of a day are not to be regarded, and the rule is fully applicable whenever a period is fixed, measured by days, in or after which a thing may or must be done. Section 31 of the Bankruptcy Act (Comp. St. § 9615), declaring that in such a case the first day is excluded and the last to be counted, fairly implies that fractions are to be disregarded. See *In re Warner* (D. C.) 144 Fed. 987. But where

one day only is involved, and the rights of litigants depend on priority in time of two occurrences on that day, and the priority can be established, the courts will ascertain and regard the actual priority. There is only a presumption that they occurred at the same time. *Levy v. Bank*, 158 Ill. 88, 42 N. E. 129, 30 L. R. A. 380. In 8 A. & E. Ency. Law (2d Ed.) 744, in stating the exceptions to the rule that fractions of a day are disregarded, a number of older English and American cases are cited under note 1, in which priority in time on the same day was investigated and given effect between bankruptcies and attachments, and attachments and bills of sale. Where the defendant died the day a decree was taken, the priority of the decree was investigated, and the decree upheld, in *Ex parte Massie*, 131 Ala. 62, 31 South. 438, 56 L. R. A. 671, 90 Am. St. Rep. 20. In *Louisville v. Savings Bank*, 104 U. S. 469, 26 L. Ed. 775, after reviewing many cases, a unanimous court held:

"When necessary to determine conflicting rights, courts of justice will take cognizance of the fractions of a day."

The validity of bonds voted in aid of a railroad was upheld, though on the same day a constitutional provision was adopted prohibiting such; it being held that the latter became effective only on the closing of the polls at sunset, and it appearing that the bonds were issued that morning. The doctrine was declared settled in *Taylor v. Brown*, 147 U. S. 645, 13 Sup. Ct. 549, 37 L. Ed. 313. Following these cases, when it appeared that the President signed a tariff act at 4:06 o'clock p. m., it was held that goods imported in the forenoon of that day were not taxable under it. *U. S. v. Stoddard* (C. C.) 89 Fed. 699, affirmed 91 Fed. 1005, 34 C. C. A. 175, and followed in cases cited in *Ellison v. U. S.*, 142 Fed. 732, 74 C. C. A. 64.

[4] In *Leidigh Co. v. Stengel*, 95 Fed. 637, 37 C. C. A. 210, the Circuit Court of Appeals of the Sixth Circuit said, through Judge Taft, in the absence of evidence of the exact time of its approval, the Bankruptcy Act was presumed to have been of force the entire day of its approval; but as the question related to the expiration of a four months period thereafter, and not to any question of occurrences on the same day, proof of the hour of approval would not have altered the result. Judge Taft laid stress on the point that fractions of a day were observed to avoid unjust retroaction. That is precisely what would occur in this case if, the creditor having in good faith employed an attorney and filed suit and incurred costs when no bankruptcy had been filed, the subsequent filing of one later in the day should by retroaction impose on him what was a lawful charge against his debtor.

By General Order 2 (89 Fed. iv, 32 C. C. A. vii), the clerk is required to indorse the day and hour of the filing of the petition. This requirement shows that the hour as well as the day of filing was esteemed likely to be of importance, and such importance exists in the application of such words as "before the filing" and "after the filing," in sections 63 and 68 (Comp. St. §§ 9647, 9652). These words do not mean the day before and after that of filing, leaving the day of filing unprovided for, but refer to the very instant of filing, if ascertainable.

The attorney's fees and such costs as were incurred prior to the filing of the petition in bankruptcy are provable. Subsequent costs are not. The referee will correct his order accordingly.

COMMERCIAL TRUST CO. OF HAGERSTOWN v. LAURENS COUNTY.
SAME v. SOUTHERN EXCHANGE BANK.

(District Court, S. D. Georgia, W. D. July 23, 1920.)

Nos. 57, 59.

1. Subrogation ⇨23(2)—Persons furnishing money by agreement with county to take up warrants subrogated to rights of payees.

Where a county, without legal authority executed and sold its negotiable notes under an arrangement with a bank, embodied in an agreement, signed by the bank, which accompanied the notes, that the bank should receive the proceeds and use the same only in taking up legal warrants of the county, which it would hold uncanceled for the benefit of the holders of the notes, until the notes were paid, warrants so taken up held by subrogation to become the property of the holders of the notes.

2. Equity ⇨39(1)—Jurisdiction for discovery retained to grant complete relief.

Where county warrants, which were by agreement with the county to be taken up by a bank and held uncanceled for the benefit of complainant which furnished the money, until it was repaid, were, in violation of the agreement, surrendered by the bank to the county, which refused to permit their examination to ascertain whether they were in such form as to vest the legal title in complainant, or whether they had been canceled, a court of equity, whose aid was properly invoked for discovery, held to have jurisdiction to grant complete relief.

3. Courts ⇨312(2)—Suit held directly on warrants, and not brought by assignee of notes.

A federal court held to have jurisdiction of a suit by the holder of notes of a county to enforce liability of the county on warrants taken up by a bank with the proceeds of the notes, and which were to be held uncanceled to secure their payment, although the payee of the notes could not have maintained a suit in that court; the suit being based on the warrants and not on the notes.

4. Counties ⇨170(1)—Warrants not required to be presented for audit before suit thereon.

Civ. Code Ga. 1910, § 411, providing that claims against a county must be presented for audit within 12 months, does not require warrants issued on audited claims to be again presented before suit thereon.

5. Banks and banking ⇨67—Equity has jurisdiction of suit to charge consolidated bank with liability of constituent bank.

Where a bank which became liable for breach of contract was consolidated with another bank, which assumed its liabilities, equity has jurisdiction of a suit to charge the latter with such liability.

6. Banks and banking ⇨90—Liability for breach of contract to hold securities.

A bank held subject to action for breach of a contract to hold uncanceled certain county warrants for complainant's security, regardless of the question whether the county could be held liable on the warrants, although they had been surrendered, which went only to the damages recoverable from the bank.

In Equity. Suits by the Commercial Trust Company of Hagerstown against Laurens County, and against the Southern Exchange Bank. On motion in each case to dismiss bill. Motion denied.

See, also, 267 Fed. 901.

Jones, Park & Johnston, of Macon, Ga., for plaintiff.

Hall, Grice & Bloch, of Macon, Ga., and M. H. Blackshear and Burch & Daley, all of Dublin, Ga., for defendants.

SIBLEY, District Judge. The plaintiff, as a corporation of Maryland brings this bill against Laurens county, Ga., setting up that on January 10, 1918, the commissioners of roads and revenues of Laurens county passed a resolution authorizing a loan of \$75,000 to supply a casual deficiency in revenue, but at the time no such deficiency really existed and the real purpose was to pay current expenses of the county, in anticipation of the taxes to be collected the current year; that an arrangement was made with Frank Scarboro Company, as a broker, to sell the notes to be given, and, knowing that the notes were really not binding on the county, the commissioners arranged with Scarboro Company and the Commercial Bank of Dublin that the latter should act as a special depository for the proceeds of the notes, and should use them only in the payment of county warrants representing valid claims against the county, which were to be held by the bank uncanceled as security for the notes until the latter should be paid and satisfied. The bank executed, under its corporate seal, a paper as follows:

"The county of Laurens, Georgia, having duly executed its notes aggregating in the sum of seventy-five thousand dollars, under and by virtue of a resolution adopted by the board of commissioners of roads and revenues of said county at regular meeting on January 10, 1918, said notes being executed by the treasurer and commissioners of Laurens county, Georgia, and bearing date of January 10, 1918, and payable to the order of Frank Scarboro Company on December 31, 1918, we hereby agree to honor and charge only warrants of the county of Laurens, Georgia, as drawn by the proper officer of said county, against the proceeds of these notes, and hold all of said warrants, uncanceled, subject to the order of Frank Scarboro Company, or the holder or holders of said notes, until the notes as above mentioned and referred to are fully paid and satisfied, after which, on presentation to us of the notes bearing evidence of due and proper cancellation, we will then cancel and turn over to the proper officer all of said warrants.

"This 10th day of January, 1918."

The plaintiff purchased of Scarboro Company \$30,000 of the notes, which were accompanied with copies of the above agreement, relying upon the faith thereof. The proceeds of the notes were deposited in the bank and were used as agreed in taking up warrants of the county. On August 14, 1918, said bank was consolidated with the Southern Exchange Bank, which took over the assets and assumed the liabilities of the Commercial Bank, receiving the warrants and the balance of the deposits. On December 30, 1918, the Exchange Bank delivered the uncanceled warrants to the county commissioners, and on December 31st plaintiff's notes were dishonored. The county officers are in possession of the warrants, and refuse to permit plaintiff to examine them, or to give a list of them. The prayers are for discovery with reference to the warrants, and for subrogation to the rights of the

former holders thereof, and for a decree for payment by the county of the amount due on the warrants. A separate bill in equity is filed by the plaintiff against Southern Exchange Bank, setting up facts substantially as above, alleging a breach of the duty to hold the warrants for the security of the plaintiff, and praying for an account for the value of said warrants wrongfully delivered to the commissioners of Laurens county, and for judgment and general relief. Motions to dismiss each bill are for decision.

[1] 1. The remedy at law by action for money had and received to charge the county for money obtained from an illegal loan, to the extent that it is actually applied to its lawful use, has been considered in another case between the parties. 267 Fed. 901. The equitable remedy by subrogation to the rights of those whose claims against the county were paid is here sought. The doctrine of subrogation is fully considered in *Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204, and applied to facts quite similar to those involved here in *Butts County v. Jackson Bank*, 129 Ga. 801, 60 S. E. 149, 15 L. R. A. (N. S.) 567, 121 Am. St. Rep. 244. As ruled in the former case, where the payment was made at the request of the debtor on the express understanding, or under circumstances from which such an understanding can be implied, that the person paying was to have the benefit of the claim paid, equity, though it were actually canceled, will set aside the cancellation and subrogate the payor thereto. Here there was an express understanding, to which all concerned were privy, that the warrants to be paid off should be preserved for the benefit of whoever should furnish the money. They were taken up by a third person, and not by the county, and were actually preserved uncanceled. That the warrants became, in equity, the property of the plaintiff to the extent that his money was used by the bank to pay for them seems unquestionable. Indeed, since the loan was, under the allegations, an unlawful one for the county to make, the money did not become the county's money, and the bank, in disbursing it, was more apparently the agent of the plaintiff than of the county.

[2] County warrants, by Code, § 583, "are negotiable by delivery or indorsement and the indorser liable according to the terms of his indorsement, as in commercial paper"; the county's right of set-off being reserved. In the absence of contrary allegations, these warrants may be assumed payable to bearer, and the serious question is whether the title to them was not fixed in the plaintiff, and whether his suit should not be at law upon them. In view of the discovery sought about them, jurisdiction as to which, in connection with other relief, will not be held to have ceased by reason of the discovery provided in equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), and the likelihood being that at last the legal title may prove not to be in plaintiff, or that cancellations of the warrants may have to be set aside, the case will not be transferred to the law side of the court.

[3] 2. The contention that plaintiff is an assignee of Frank Scarborough Company, who could not have sued in this court, and that in consequence jurisdiction does not appear, is overruled. The plaintiff is suing only in respect of the county warrants, which were never in the

name of, nor owned by, Scarboro Company. Its claim is a direct one against the county. The undertaking of the bank as to the payment of the money was not addressed to Scarboro Company, more than to any other holder of the notes, and was never transferred to plaintiff, nor is it the basis of the suit. It is only evidence in the case to define the relation between plaintiff and the bank, and to show the intent with which the warrants were taken up. It is likewise immaterial that this undertaking was never entered on the minutes of the county commissioners as a contract of the county, and that it does not purport to bind the county. Like immateriality exists as to the failure to allege that the arrangement with Scarboro Company to sell the notes was entered on the minutes, so as to bind the county. Such failure might affect the right of the Scarboro Company to collect compensation, but touches no right of plaintiff. The bill seeks substantially to enforce liabilities against the county, represented by its warrants, which the county owed independently of any dealings with or through Scarboro Company, and the equity of the plaintiff, so far from being destroyed by, arises out of, the invalidity of the proceedings with and through the Scarboro Company.

[4] 3. Though Code, § 411, requires all claims against the county to be presented for audit within 12 months from the time they accrue or are payable, and though this suit was served January 1, 1920, more than 12 months after the warrants were taken up by the bank and turned over to the county, and no other presentation is claimed, yet it is not barred, because its substance is the enforcement of the warrants. The equity of subrogation is but the means of enforcement. Under Code, § 410, when claims are audited and warrants issued for them, they are in the nature of judgments, establishing their validity. *Smith v. Fuller, Ordinary*, 135 Ga. 271, 69 S. E. 177, Ann. Cas. 1912A, 70. These warrants are presented to the treasurer, and by Code, § 579 and following, if funds for payment are not available, they may be marked "Presented," and thereafter are payable as funds come in, in the order of their original presentation. There is no occasion to reaudit the warrants, and they remain valid and enforceable, irrespective of the limitation provided in section 411, until paid or barred by some other provision of law. This was recognized in *Butts County v. Wright*, 136 Ga. 697, 71 S. E. 1046(5). The motion to dismiss this bill is accordingly overruled.

[5] 4. As regards the other bill, the undertaking of the bank which accompanied these notes was made for the purpose of inducing investors to buy them, and as offering them additional security for their money. It is in the nature of a general offer, which became a binding contract on acceptance by a purchaser of the notes; the consideration being, not only the furnishing of the money by the investor, but the deposit of it in the bank. The receiving of such deposits, payable only for specific purposes, is not unusual, and is within the powers of a bank. It would seem that for a breach of the agreement in this case, causing damage to the plaintiff, an action at law would lie upon the contract. A resort to equity, however, is justified, if not required, by the fact that the liability has been assumed by the Southern Exchange

Bank, between whom and the plaintiff no direct contract exists. To enforce against this bank its assumption of the liabilities of the original contractor, a resort to equity is proper. *Sheppard v. Bridges*, 137 Ga. 615, 74 S. E. 245; *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. Ed. 210.

[6] 5. The contention is made that the right of action against the bank is secondary to that against the county, and that it does not appear that the county is insolvent, or that the warrants cannot be enforced against it. While it is true that the amount of damage done the plaintiff depends upon its ability to enforce the warrants against the county notwithstanding the acts of the bank, that is a question which arises upon the trial. The liability of the bank is not secondary to that of the county, but arises upon a different and independent basis. The difficulty of establishing the damage would not hinder a suit upon the liability of the bank. Inasmuch, however, as both cases are pending in this court at the same time and relate to the same transaction, and the remedy against the bank must necessarily be affected by the result of the suit against the county, it will be ordered, unless good cause can be shown to the contrary, that the two suits be consolidated and tried together, that full justice may be done in the premises.

COMMERCIAL TRUST CO. OF HAGERSTOWN v. LAURENS COUNTY.

(District Court, S. D. Georgia, W. D. July 23, 1920.)

No. 171.

1. Courts ⇨312(2)—Indorser of notes held not "assignee," so as to preclude right to sue.

Where the payee of notes was merely a broker for their negotiation, and they became effective only when sold and indorsed, a purchaser is not an "assignee," within the meaning of Judicial Code, § 24, subd. 1 (Comp. St. § 991[1]), whose right to sue in a federal court is dependent on that of the indorser.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assignee.]

2. Estoppel ⇨62(6)—County held not concluded by recitals in promissory notes.

General recitals, in notes executed by a county in Georgia for borrowed money, that all things necessary to render the notes valid obligations of the county had been done, held not to estop the county to deny their validity, where such recitals also show that the money was borrowed to pay current expenses, which under the law of the state is unauthorized and beyond the powers of the county officers.

3. Counties ⇨151—What constitutes "casual deficiency," authorizing temporary loan.

Under the provision of Const. Ga. art. 7, § 7, prohibiting counties from incurring indebtedness unless authorized by vote of electors, except for a temporary loan "to supply casual deficiencies in revenue," such a deficiency occurs only when the taxes laid for a year prove insufficient to meet the expenses for that year, and such a loan is not authorized because the funds on hand are insufficient to meet current expenses.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Casual Deficiency.]

4. Counties ⚡171—Holder of notes exceeding debt limit not bona fide purchaser.

Where notes executed by a county show on their face, in connection with the public records, that they are in excess of the constitutional limit, a purchaser is not protected as a bona fide holder without notice, and while the county may be held liable to the extent of the indebtedness which it might legally contract, recovery on such liability must be apportioned among all note holders entitled to share therein.

5. Counties ⚡210—Money furnished to pay legal indebtedness recoverable as money received.

One who furnished money to a county, although under a contract which the county had no authority to make, which money it used in payment of legal indebtedness, may maintain an action for its recovery as for money had and received.

6. Counties ⚡203—Filing of suit, with service, sufficiently "presented for audit."

Under Civ. Code Ga. 1910, § 411, providing that claims against a county must be presented for audit within 12 months, the filing of suit against the county, followed by service on the auditing officers within the 12 months, is a sufficient presentation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Presented.]

7. Pleading ⚡320—Defendant not entitled to bill of particulars respecting papers in its possession.

A county *held* not entitled to a bill of particulars respecting warrants on which a suit against it is based, where the warrants are in its possession and have never been in the possession of plaintiff.

At.Law. Action by the Commercial Trust Company of Hagerstown against Laurens County. On demurrers to petition. Sustained, with leave to amend.

See, also, 267 Fed. 897.

Jones, Park & Johnston, of Macon, Ga., for plaintiff.

Hall, Grice & Bloch, of Macon, Ga., and M. H. Blackshear and Burch & Daley, all of Dublin, Ga., for defendants.

SIBLEY, District Judge. Commercial Trust Company of Hagerstown, as a corporation of Maryland, sues at law Laurens county, Ga., upon three promissory notes, each for \$10,000, dated January 10, 1918, due December 31, 1918, and payable to Frank Scarboro Company, or order, signed in the name of Laurens county, by its treasurer and county commissioners, and indorsed, "For value received without recourse," by Frank Scarboro Company. Each note, besides matters quoted hereafter, recites, "This note is issued in pursuance of a resolution duly adopted by the commissioners of the county of Laurens on January 10, 1918, and duly signed by the clerk of commissioners of said county, as required by law," and is accompanied by a copy of the resolution as follows:

"Whereas, there is a casual and temporary deficiency in the public funds in the treasury of the county of Laurens; and whereas, there is a casual and temporary need of money to meet the current expenses of the county government: Therefore be it resolved that to cover said casual and temporary deficiency, in order to meet the current expenses of the county government, we hereby authorize and empower the treasurer and county commissioners

of the county of Laurens to negotiate a temporary loan for the sum of seventy-five thousand dollars for the county of Laurens upon the best rate of interest possible. * * * Said notes to be payable thirty-first day of December, 1918."

There is exhibited, as accompanying the notes, a statement, signed by Laurens county, by its clerk, addressed to Frank Scarboro Company, purporting to be information given for the purpose of obtaining a loan of \$75,000, and showing, among other things, "Assessed valuation of property for 1917, \$9,360,654," and that the notes for the loan are issued under authority of article 7, § 7, of the Constitution of Georgia.

[1] 1. Jurisdiction rests on diverse citizenship, and is questioned by demurrer, because the citizenship of Frank Scarboro Company is not alleged, and Judicial Code, § 24, subd. 1 (Comp. St. § 991[1]), prevents suits in a federal court by an assignee of a note unless the assignor could have sued. The presumption is against jurisdiction, and the facts giving it must be clearly and positively averred. It must therefore be assumed that Frank Scarboro Company is a citizen of Georgia for purposes of jurisdiction. But the petition, as amplified by amendment, alleges that Scarboro Company was the mere broker and agent of Laurens county, employed to sell the notes, and never advanced any money or credit for the notes, or became at any time a creditor of the county, which owed no one anything until plaintiff paid its money for the notes to Scarboro Company as the county's agent. Such facts would constitute the plaintiff, though in form an assignee, in substance an original creditor, and as such it could maintain the suit. *Holmes v. Goldsmith*, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118; *Baltimore Trust Co. v. Screven County* (D. C.) 238 Fed. 834.

2. A plea to the jurisdiction alleges the Scarboro Company to be a corporation of Georgia, and denies that it was the agent of Laurens county in this transaction. The plea, if true, is good, and a motion to strike it will be overruled.

[2] 3. The general demurrers aver that no cause of action is set forth, because of a provision of article 7, § 7, of the Constitution of Georgia, as follows:

"And no such county, municipality, or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law."

The petition alleges no election, but does allege "a casual deficiency in revenue," and the notes, besides the reference to the resolution of the commissioners, contain recitals as follows:

"It is hereby certified and recited that each and every act, condition, and thing required to be done, to have happened, and to be performed precedent to and in the issuance of this note, has been done, has happened, and has been performed in full and strict compliance with the Constitution and laws of the state of Georgia, and that this note is within every debt and other limit prescribed by law, and the faith and credit of the county of Laurens are hereby irrevocably pledged to the punctual payment of the principal and interest of this note, according to its terms."

Where authority to make a loan exists or may arise upon certain conditions, that such recitals may be estoppels, conclusively establishing the validity of such obligations, notwithstanding constitutional provisions like that quoted, has been repeatedly adjudicated. The cases are reviewed in *Gunnison County v. E. H. Rollins & Sons*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689; *Waite v. Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552; *Stanly County v. Coler*, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126. The Constitution may thus be annulled by a lie. But there must be such explicit statements of fact as may easily deceive, they must be made by officers who have authority under the law to ascertain and state the facts, and the person claiming the estoppel must actually have been deceived to his hurt, or, as it is generally stated, must be "a bona fide holder for value." In Georgia, while counties are corporations, none of their officers have any general authority to borrow money. They have only such powers as are expressly given them by law. *Dent v. Cook*, Ordinary, 45 Ga. 323. In this they resemble officers of the federal government. *Floyd Acceptances*, 7 Wall. 667(5), 676, 19 L. Ed. 169. The authority to borrow money is given county officers only in the two situations stated in the quoted provision of the Constitution: First, to supply a casual deficiency in revenue; and, second, on the assent of two-thirds of the qualified voters.

Under the law of Georgia an election to ascertain such assent is called, conducted, and the result declared by the county commissioners. Code, § 440 et seq. So that a recital by them that the authority of an election existed, though false, would no doubt estop the county. The recital of these notes that every condition precedent to their issuance had happened, if it stood alone, would probably have this result; but this recital is preceded by the reference to the resolution of January 10, 1918, as the authority for making these notes and that resolution contains no allusion to an election. It must therefore be concluded that this special reference overrides the more general recital, and confines the authority intended to be asserted by the notes to this resolution, and excludes any reliance by the lender upon an election.

[3] Confining the inquiry, therefore, to the existence of an authority because of a casual deficiency in revenue, we find the estoppel unsustainable. These words have a definite and well-established significance in the law of Georgia. The constitutional scheme of county finance worked out in the statutes is that liabilities for lawful things and services may be incurred all through the fiscal, which is also the calendar, year, if there be no money on hand to pay for them, but that in the summer taxes shall be laid, to be collected in the fall, sufficient to cover all such liabilities. No debt, within the meaning of the Constitution, is thereby created. *Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S. E. 907; *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 60 S. E. 149, 15 L. R. A. (N. S.) 567, 121 Am. St. Rep. 244. If, after the levy of the taxes, it appears that they will, from a casual and unanticipated cause, not cover the liabilities for that year, then a casual deficiency in revenue arises, and a limited loan may be resorted

to to balance the annual budget. The resolution stated no such situation, but only that there was "a casual deficiency in the public funds and a temporary need of money to meet the current expenses of the county government," and that the money was borrowed "in order to meet the current expenses of the county government."

Under the scheme of county finances above outlined, a deficiency of ready money to meet current expenses is entirely normal and must be endured. It has always been held that the borrowing of money to pay current liabilities in cash, the money to be repaid out of the taxes of the year, exactly as was attempted here, is contrary to the Constitution, and the loan void. *Wood v. Commissioners of Greene County*, 60 Ga. 558; *Hall v. Greene County*, 119 Ga. 253, 46 S. E. 69. *Town of Wadley v. Lancaster*, 124 Ga. 354, 52 S. E. 335; *Butts County v. Jackson Bank*, 129 Ga. 801, 60 S. E. 149, 15 L. R. A. (N. S.) 567, 121 Am. St. Rep. 244; *McCord v. Jackson*, 135 Ga. 178, 69 S. E. 23(6). While, therefore, the county commissioners, as the fiscal officers of the county, no doubt are authorized to ascertain and declare the existence of a casual deficiency in revenue, and, had they done so, might have created an estoppel upon the county to deny it, in this case they have not so declared, but, on the contrary, have plainly stated an illegal purpose, which was fully known to the plaintiff in lending his money. It follows that the notes taken for the loan are invalid and unenforceable, if nothing further appears than is recited in the notes.

[4] But the petition alleges that in point of fact the notes were issued to supply a casual deficiency in the revenue, though it does not allege the extent of that deficiency. If such a deficiency existed, the power to borrow money arose in the county commissioners, but limited to one-fifth of 1 per cent. of the assessed taxable value of the property of the county. An exhibit to the petition places this value at \$9,360,654, one-fifth of 1 per centum of which would be \$18,720, and no contradiction of these figures is made in the petition. Not only has the Georgia Constitution, as it might do, refused to leave the ascertainment of the limit of indebtedness to the county commissioners, but has referred it to a fixed and accessible public record, for at the time the Constitution was adopted and ever since the law has required officers other than the commissioners to make up full digests of the taxable property of the county, filing a copy at the county courthouse and another at the State Capitol, both open to public inspection. The assessment so made for the year in which the casual deficiency in revenue occurred is the standard to which the Constitution refers. The lender was obliged to inspect it, and could not rely upon any statement of the commissioners in respect thereto. *Dixon County v. Field*, 111 U. S. 83, 95, 4 Sup. Ct. 315, 28 L. Ed. 360; *Sutliff v. Commissioners*, 147 U. S. 230, 13 Sup. Ct. 318, 37 L. Ed. 145. The lender here was referred to the applicable constitutional provision and informed as to the amount of taxable property. The amount of the indebtedness to be incurred was known to be \$75,000, and the plaintiff itself took \$30,000 of the notes. As to this matter plainly it could not have been deceived, nor can it be considered a bona fide holder without notice.

The facts being known, the county could obligate itself only to the extent of the actual casual deficiency, and then to an amount not exceeding \$18,720. Even in a suit at law, since the transaction is void merely for a defect in authority, and not because penalized by law, it is enforceable to the extent that the authority existed; and upon proper allegation and proof that no other person was interested in the liability of the county, the plaintiff might recover in this suit. *Francis v. Howard County* (C. C.) 50 Fed. 44, affirmed, 54 Fed. 487, 4 C. C. A. 460; *City of Columbus v. Woonsocket*, 114 Fed. 162, 52 C. C. A. 118. It appears, however, that notes other than those held by the plaintiff were to be issued, and in point of fact, though not appearing in this record, they are now sued in this court. Under this state of facts, resort to equity would be necessary to ascertain whether first negotiated notes alone should receive payment to the extent of the power of the county to contract debt (*Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026), or whether the notes were negotiated simultaneously and whether the liability should be prorated to all the notes (*Truman v. Harmony* [D. C.] 198 Fed. 557, 562). In view of the allegations of the petition that a casual deficiency really existed in the revenue, leave will be granted to file, within 30 days, an amendment setting up its amount, and that no other person is a creditor or is interested in the obligation of the county in regard to supplying it. In default of such an amendment, the petition will be dismissed.

[5] 4. Plaintiff has also brought a separate suit at law against Laurens county for money had and received, in which, omitting reference to any notes or formal loan, it is alleged that this money was received by the defendant on December 30, 1918, and used to pay off and retire certain county warrants theretofore duly issued by the county commissioners for lawful claims and charges against the county, but that the warrants cannot be fully specified, because they are in the hands of the commissioners and their clerk, who have refused permission to inspect them, or to furnish a list thereof. By Code, § 410, the fiscal officers must audit every claim against the county, and on its allowance the same is registered, and the claimant given a warrant on the treasury for its payment, specifying the fund against which it is drawn. These warrants are in the nature of judgments that the claim is valid, and establish validity at least *prima facie*. *Smith v. Fuller*, Ordinary, 135 Ga. 271, 69 S. E. 177(3), Ann. Cas. 1912A, 70. Money used by the county to pay them is thus well shown to have been applied to the lawful use of the county.

While, as we have seen, the county could not lawfully borrow money to meet these warrants, but must wait for the coming in of the taxes laid therefor, the loan is void only for the defect of power, and is not an act punished by any law. The maxim *in pari delicto* does not apply. While the money does not by its mere reception become public money, for the treasurer's sureties are not even liable for it on his bond (*Medlock v. Commissioners of Dekalb County*, 104 Ga. 35, 30 S. E. 513 [5]), nor is the treasurer entitled to commissions for handling it (*Hall v. Greene County*, 119 Ga. 253, 46 S. E. 69), yet when actually applied

by the county officers to its lawful use the county becomes liable for it, not on any express or inferred contract, but *ex æquo et bono* to the extent only that it is so used (*Butts County v. Jackson Bank*, 129 Ga. 801, 60 S. E. 149, 15 L. R. A. [N. S.] 567, 121 Am. St. Rep. 244; *Citizens' Bank v. Appleton*, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443; *Chapman v. County of Douglas*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378, and cases cited). This remedy seems appropriate, where the lender's money is directly used by the county through its proper officers in the extinguishment of lawful claims against the county, or in purchases it then might lawfully make.

[6] 5. But Code, § 411, requires that all claims against the county be presented for audit within 12 months after they accrue or become payable, or the same are barred. The statute applies to such a claim as this. *Butts County v. Wright*, 136 Ga. 697, 71 S. E. 1046. But the filing of a suit, followed by service on the auditing officers within the 12 months, is a sufficient presentation. *Pearson v. Newton County*, 119 Ga. 863, 47 S. E. 180. Since it is the actual application of the money to the lawful use of the county that first renders the county liable, and since this is alleged to have occurred December 30, 1918, this suit, served April 18, 1919, is in ample time.

[7] 6. The special demurrer calling for a bill of particulars of the warrants paid is not well taken, the knowledge thereof lying with the defendant, rather than the plaintiff, under the facts alleged; but that seeking an allegation as to what officer or officers of the county plaintiff dealt with is well taken (*Cherokee Mills v. Gate City Cotton Mills*, 122 Ga. 268, 50 S. E. 82), and, unless the omission is cured or excused by an amendment within 30 days, the petition will be dismissed.

COMMERCIAL TRUST CO. OF HAGERSTOWN v. BURCH et al.

(District Court, S. D. Georgia, W. D. July 23, 1920.)

No. 174.

1. Officers *§* 114—Public officers personally liable only for corrupt or malicious acts.

While public officers are agents, for reasons of public policy their individual liability is governed by rules different from those applying to other agents, and they may not be held personally on contracts made in behalf, of the public, in which they are required to exercise judgment and discretion, unless they act corruptly or maliciously.

2. Counties *§* 59—Commissioners not personally liable because of recitals in invalid notes of county.

County commissioners *held* not personally liable for deceit to a purchaser of notes caused by them to be executed by the county, because of general recitals in the notes that all things had been done to render them valid obligations of the county, where such recitals also contained statements of fact and references to provisions of the law which showed that, under the law as construed by the Supreme Court of the state, the notes were unauthorized and invalid.

3. Attorney and client ☞114—Attorney liable for deceit by knowingly giving false opinion.

An attorney, who was not an officer of the county, may be held liable for deceit to a purchaser of notes of the county for falsely certifying that in his opinion the notes were valid obligations of the county, when he knew they were not.

4. Counties ☞88—County officers personally liable for property taken without lawful authority.

Where a county executed notes, which were invalid and which it refused to pay, and by agreement the proceeds were paid to a bank, which used the same in part in taking up county warrants which it was to hold uncanceled until the notes were paid, such proceeds and the warrants so taken up did not become the property of the county, but was that of the note holders, and the taking possession of them for the county by its officers was without authority of law, and rendered such officers personally liable therefor.

5. Counties ☞88—County officers liable only to county for illegal payment of money.

County officers *held* not liable to a holder of notes of the county for negligently using money which should have been applied to payment of plaintiff's notes in paying other notes, which were not valid obligations of the county; such liability, if any, being to the county.

6. Conspiracy ☞18—Petition in action for conspiracy to defraud sufficient.

The petition in an action against county officers, alleging a conspiracy by defendants to defraud by the issuance and sale to plaintiff of invalid notes of the county *held* to state a cause of action.

7. Fraud ☞47—Allegation of damage sufficient.

In an action for damages against county officers for fraudulently causing the issuance and sale of invalid notes of the county, it is not necessary that the petition should allege that there can be no recovery from the county, where it sufficiently appears that even in such case plaintiff will sustain damage.

8. Abatement and revival ☞5—Action against county to enforce contract not inconsistent with one against officers for fraud inducing it.

A suit against a county to enforce its liability on account of notes executed by it *held* not a bar to a suit against its officers for fraudulently causing the execution of such notes.

At Law. Action by the Commercial Trust Company of Hagerstown against H. C. Burch and others. On plea in bar and demurrers. Plea overruled, and demurrers sustained in part.

Jones, Park & Johnston, of Macon, Ga., for plaintiff.

Hall, Grice & Bloch, of Macon, Ga., M. H. Blackshear and Burch & Daley, all of Dublin, Ga., for defendants.

SIBLEY, District Judge. In this suit at law in six counts the plaintiff seeks to hold personally liable the county commissioners, clerk, treasurer, and attorney of Laurens county because of their connections with the issuance of certain repudiated notes of the county given for borrowed money. Each count is demurred to. The main facts alleged in each are these:

On January 10, 1918, the county commissioners passed a resolution declaring that there was "a casual and temporary deficiency in the public funds in the treasury of the county of Laurens, and a casual and temporary need of money to meet the current expenses of the

county government" and authorizing a loan of \$75,000. Notes were executed in the name of the county by the treasurer and county commissioners, attested by the clerk, referring to the resolution as authority, and accompanied by a certified copy of it, and by a statement which referred to article 7, § 7, of the Georgia Constitution as the authority of law for the loan, and showed the assessed taxable property of the county to be \$9,380,654. The notes also contained general recitals to the effect that every required condition precedent had been performed, and that the note was within every debt limit prescribed by law. The defendant Blackshear, signing as attorney for the county, attached a certificate that "in his opinion the note is a binding obligation of the county." The Commercial Bank of Dublin offered, in a writing accompanying the notes, to hold their proceeds as a special fund to be disbursed only in taking up valid county warrants, which were to be surrendered to the county only after the notes were paid. These various papers are all exhibited in the petition, and are more fully set out in an accompanying opinion upon plaintiff's suit on the notes, which at maturity were refused payment. 267 Fed. 901.

[1] 1. While public officers are agents, for reasons of public policy their individual liability is governed by rules differing from those applying to other agents. They may not be held personally on contracts made in behalf of the public (Georgia Code, § 3612, *Tucker v. Shorter*, 17 Ga. 620), though executed in such form that the rule of descriptive personæ would render an ordinary agent suable (*Ghent v. Adams*, 2 Ga. 214); and if they act without or in excess of authority, personal liability does not follow (*Huthsing v. Bousquet* [C. C.] 7 Fed. 833; *Huthsing v. Bosquet* [C. C.] 17 Fed. 54; *N. Y. & Charleston S. S. Co. v. Harbison* [C. C.] 16 Fed. 688), for their authority is fixed by laws which those who deal with them are as much bound to know as are the officers themselves. Otherwise, not only would it be difficult to get responsible men to fill public office, but there would be constant temptation to yield officially to unlawful demands, lest private liability be asserted and enforced. But, although officers, they may not be rascals, and liability may arise for tortious conduct. In matters of ministerial duty they may even be liable for nonfeasance as well as misfeasance, for mistakes and neglects (11 Cyc. 410; *Amy v. Supervisors*, 11 Wall. 136, 20 L. Ed. 101); but in matters of judgment and discretion they are liable only if they act willfully, corruptly, or maliciously (11 Cyc. 411). In Georgia Code, § 901, a personal liability as to municipal officers is stated for "official acts * * * if done oppressively, maliciously, corruptly, or without authority of law"; the language being taken from the case of *Pruden v. Love*, 67 Ga. 190. The concluding expression, "without authority of law," does not refer to the making of unauthorized contracts or overturn the rules above announced, but refers to excesses of jurisdiction and to acts of unwarranted trespass, as will appear from the facts in the *Pruden Case*, where a house had been wrongfully destroyed. For willful fraud, therefore, officers may be personally liable. 20 Cyc. 86. These rules hold for county commissioners. 11 Cyc. 411, 412.

[2] 2. The first count is for deceit in the recital of the resolution that there was a casual deficiency in funds to meet current expenses. The negating allegations in paragraphs 8 and 12 are that there was in fact "no casual deficiency in revenue," as was well known to the defendants, and that in consequence the notes were not issued in conformity to the Constitution. As pointed out in the opinion in the suit upon the notes (267 Fed. 897), there is a vast and vital difference between a "deficiency of funds to meet current expenses" and a "casual deficiency in the revenue." The former is regarded by the Constitution as the normal and safe condition in which to keep the treasury during the fiscal year, and borrowing money to obviate it is forbidden. The latter is the unexpected failure of the revenue laid for the fiscal year to cover its expenses, and may be remedied by a limited temporary loan to balance the budget. Had the commissioners, their clerk, and the treasurer falsely and fraudulently asserted the latter, there would have been such a false statement of material fact as would support an action for deceit. But in that case there would also have been an estoppel on the county that would have prevented damage to the plaintiff, and for their misconduct the officers would have been answerable only to the county, if any damage accrued. The assertion of a deficiency in funds to meet current expenses, whether true or false, is of an immaterial matter, for such deficiency would give no validity to the loan. The very section of the Constitution which forbids the loan was referred to in the accompanying papers as the law under which it was made. The general recitals in the notes of a compliance with the Constitution, in view of the explicit facts disclosed as to what had really been done and its futility, amount to no more than an opinion of law that the Constitution did not mean what the Supreme Court of Georgia had always said it did mean. The plaintiff was equally bound with the defendants to know the law, and know it correctly, and cannot complain of incorrect statements about it. 20 Cyc. 19.

[3] The case of the attorney is somewhat different. He formally certified to an opinion that the notes were valid, when the petition alleges he knew they were not. He was not a county officer, and had no official duty in the premises. The validity of a public bond, like that of a title to land, may be ascertained with reasonable certainty by a skillful person, and a representation about it may be more than the mere expression of an opinion. See *Gordon v. Butler*, 105 U. S. 558, 26 L. Ed. 1166. That it purports to be only an opinion will not always save it from the penalty of deceit, if made the vehicle of successful fraud. 11 Cyc. 18; *Sniveley v. Meixsell*, 97 Ill. App. 365; *Scott v. Burnight*, 131 Iowa, 507, 107 N. W. 422. Knowledge of such matters is supposed to belong peculiarly to lawyers, and their opinion is commonly taken and acted on. This attorney was not the attorney of plaintiff, and owed it no duty of skill and diligence, and could not be held liable for want of either, nor for the grossest ignorance of fact or law regarding these notes. But if, posing as a lawyer, for the purpose of inducing investment in these notes, he deliberately and formally, though gratuitously, certified to an opinion that they were valid, when he knew they

were not, there is involved more than the mere expression of an opinion, for the opinion of an expert on such a subject has the value of a fact. It disarms suspicion and stifles inquiry. If it were falsely stated, with the purpose to deceive, that a reputable lawyer had said his opinion was that the notes were valid, it would unquestionably be a fraud. Why the less one when the lawyer himself, for the same purpose, says he has that opinion, when he has not? He misrepresents an important fact, though it be of an impalpable nature. This was not a casual but a formal opinion, carrying an implication of investigation, and that there was at least nothing known to the contrary of its correctness. However improbable, the allegations must be taken as true on demurrer. The count will be stricken as to all the defendants save the attorney. Standing alone against him, his demurrer for misjoinder is good, and for this cause it will also be stricken as to him.

3. The second count sets up that before the notes held by plaintiff were issued the entire \$75,000 authorized by the resolution had been issued and sold to others, and these were paid, and those held by plaintiff not paid, and that the statement in the notes that they were issued by authority of that resolution was false. We have seen, however, that the resolution on its face was no valid authority for borrowing any money. It would have helped the validity of plaintiff's notes not at all if no others had been issued. No reason, indeed, appears the county would not be estopped to deny that the plaintiff's notes were, as they stated, issued under the resolution. The count is stricken.

[4] 4. The third count sets up the deposit of the proceeds of the notes held by plaintiff, together with the proceeds of other notes, under the agreement with the bank, and the investment of part of the proceeds in county warrants as provided in the agreement, and finally the taking possession of the warrants and the balance of the cash by the county commissioners, through their clerk, without paying the notes of plaintiff, and with knowledge of all the facts. The notes were on their face invalid, and imposed no obligation on the county. In consequence the money of plaintiff paid into bank was not the money of the county. The warrants that were taken up with it and the balance of the money were in the bank, where the owners had authorized them to be. No one had the right to move them, unless these notes should be paid. The defendants may have taken them in right of the county and on an erroneous understanding of fact or law. But the fact remains that by their own contention in refusing to pay these notes the county cannot own this money or the warrants paid with it. The act of taking possession of them is an act of aggression against the property of plaintiff, which in the language of Georgia Code, § 901, is "without authority of law." They are individually liable therefor. Of course, there may be explanations and defenses, and all the defendants may not have joined in the act. Niceties of title and the exact measure of damages are not now considered. It is simply ruled that plaintiff by its allegations had an interest in the property in the hands of the bank, and defendants had none, and the latter are liable to the former for such damages as their interference

may have actually caused. There seems a strong tendency to visit officers with but slight damages, if they acted without bad motive, though unlawfully. *Dow v. Humbert*, 91 U. S. 294, 23 L. Ed. 368; *Newark Savings Inst. v. Panhorst*, 18 Fed. Cas. 36, No. 10,142.

[5] 5. The fourth count sets up that under the resolution of January 10, 1918, the defendants sent out first three notes, for \$25,000 each, which were not sold, and then substituted them by a series of smaller notes, amounting to \$75,000, some of which plaintiff bought, the proceeds going into the bank as above set forth, and that the defendants negligently failed to take up the three \$25,000 notes, but paid the same at maturity, instead of paying the substituted series, and then got the warrants and money from the bank, leaving plaintiff's notes unpaid. The count seeks recovery for the negligence. If the defendants have paid out the county's money for notes which it did not owe, as alleged, they may be liable to the county, but not to the plaintiff. Such act did not affect the county's liability to plaintiff, if any existed, and the county is not insolvent. So the mere negligent taking of the money and warrants from the bank, if followed by no refusal to return them, or other conversion, is not actionable against these officers, for it is no more than an error in a matter not ministerial. But the taking them with knowledge of plaintiff's rights and in disregard of them would be a conversion of them, for which defendants would be liable, as ruled in the preceding paragraph, as would be a willful withholding of them after demand for their return. This count is stricken.

6. The fifth count is similar to the third, except that it is alleged that the whole fund in bank arose from the proceeds of notes of plaintiff. What was said of the third count applies here.

[6] 7. The sixth count alleges fully a conspiracy of all the defendants to obtain a sum of money for the county by the means hereinbefore discussed. The allegations fairly bear the interpretation that the resolution passed was intended to create the impression that there was a casual deficiency in revenue rather than a mere deficiency in cash, that the double issue of notes, the deposit of the funds in the bank, the getting possession of the funds and warrants from the bank, and the subsequent repudiation of the notes of plaintiff were all parts of a successful conspiracy to deceive and defraud. Without going into further details, it is sufficient to say that, if such were the truth, there can be no doubt of the personal liability of these officers. The count is sustained.

[7] 8. Demurrers based on a want of a flat allegation that plaintiff has no remedy against the county in an action for money had and received, or otherwise, are overruled. Frauds and trespasses may give rise to a cause of action so soon as committed, though the amount of ultimate damage may be uncertain. This has been ruled of a fraud resulting in a loan on inadequate security (*Briggs v. Brushaber*, 43 Mich. 330, 5 N. W. 383, 38 Am. Rep. 187), and an investment in bad bonds (*Currier v. Poor*, 155 N. Y. 344, 49 N. E. 937; 20 Cyc. 90). It must, of course, appear that some damage has been sustained, for both fraud and damage are required to make a cause of action. Here the al-

legation is explicit that the notes are invalid, and that the money and warrants have been taken, and the county's liability denied, by these very defendants. An action for money had and received, particularly specified in the demurrers, could be good, not for what plaintiff parted with, but only for what may be shown to have been actually applied to the county's lawful uses. A loss of much of the interest promised in the notes is inevitable, and much of the principal likely. Litigation is itself a damage. The damage provable will probably not be all that is claimed in the counts, and the pleadings might have more definitely averred the damages suffered; but it cannot be said that they fail to show any damage resulting from the fraud.

[8] 9. A plea in bar is made, based on the pendency of the suits against the county and bank, which are dealt with in other opinions (267 Fed. 897, 901), which are said to be antagonistic to this suit. There is no antagonism, though the result of those against the county may greatly affect the damages recoverable in this. They are rather supplementary than antagonistic. In none of the suits does the plaintiff repudiate or seek to rescind the transaction. In all it seeks to follow the situation to its lawful results. We need not discuss the consistency of the suit against the county on the notes with that for money had and received, or to be subrogated to the warrants, for the county makes no such point and is no party here. In all of them the plaintiff is seeking a remedy on some part or in some view of the transactions which the defendants are said to have induced. The enforcement, so far as it may be enforced, of a contract, is not inconsistent with a suit for the fraud which induced it. 9 R. C. L. p. 959; *Union Life Ins. Co. v. Schidler*, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89; *Bowen v. Mandeville*, 95 N. Y. 237; *Sweet v. Montpelier*, 69 Kan. 641, 77 Pac. 538; *Dilley v. Simmons*, 108 Ark. 342, 158 S. W. 144.

"A plaintiff may pursue any number of consistent concurrent remedies against different persons until he obtains a satisfaction from some of them." Georgia Code, § 5522.

It is recognized, of course, that there can be but one satisfaction. The plea is stricken.

In re INTERBOROUGH CONSOL. CORPORATION.**Petition of H. CONTENT & CO. et al.**

(District Court, S. D. New York. June 21, 1920.)

1. Bankruptcy \S 389½—Stockholders of consolidating corporations may exchange stock after bankruptcy of new corporation.

Under Business Corporations Law N. Y. $\S\S$ 7, 8, on the consolidation of two corporations, stockholders of either have the right to exchange their stock for that of the consolidated corporation on the terms of the consolidation agreement until and unless their stock has been appraised and paid for by the consolidated corporation, as provided in section 8, and the bankruptcy of such corporation, such action not having been taken, does not affect that right.

2. Bankruptcy \S 140(3)—Money deposited to pay dividend declared becomes trust fund for stockholders.

Where a consolidated corporation periodically declared dividends on its preferred stock, each time depositing in bank in a special fund sufficient money to pay the dividend, such deposit became a trust fund held by it for the stockholders, which did not pass to its trustee in bankruptcy, and in which stockholders of the consolidating corporations, who had not yet exchanged their stock for that of the new corporation, but had the right to do so, with the right to the accumulated dividends, were entitled to share to the extent of their dividends on making such exchange.

In Bankruptcy. In the matter of the Interborough Consolidated Corporation, bankrupt. On petition of H. Content & Co. and others, claiming special fund. Decree for petitioners.

Harold A. Content, of New York City, for petitioners.

Alfred A. Cook, of New York City, for trustee.

MAYER, District Judge. On assuming his duties, the trustee of the bankrupt came into possession of a fund of \$57,330, which constituted practically all of the moneys on deposit with Guaranty Trust Company of New York in an account entitled "Interborough Consolidated Corporation Dividend Account—Interborough Consolidated Corporation Preferred Stock" (hereinafter referred to as dividend account). The present petition, advanced on behalf of petitioners and all persons similarly situated, sets up a claim to the fund and invites adjudication as to the rights of general creditors and of petitioners and those similarly situated.

The bankrupt was created by consolidation, pursuant to the provisions of section 7 of the Business Corporations Laws of New York (Consol Laws, c. 4), of Interborough-Metropolitan Company and Finance & Holding Corporation, both New York corporations. The agreement of consolidation was entered into on or about April 23, 1915, and at a special meeting of the board of directors of Interborough-Metropolitan, held on April 23, 1915, the execution of the agreement was authorized. At a special meeting of the stockholders of Interborough-Metropolitan, duly called for and held on June 1, 1915, the agreement of consolidation was approved, ratified, and adopted by more than the requisite statutory vote. By paragraph VIII of the consolidation agreement it was provided, inter alia:

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"The shares into which the capital stock of the corporation shall be divided shall be distributed to the preferred * * * stockholders of the Interborough-Metropolitan Company, * * * who shall surrender their respective certificates of stock indorsed for transfer, as follows: For each share of preferred stock of the Interborough-Metropolitan Company indorsed for transfer, so as to carry all accumulations of dividends and interest thereon as of the date when the consolidation becomes effective, one share of the preferred stock of the consolidated corporation."

On or about June 25, 1915, the Interborough Consolidated Corporation sent a notice the holders of stock of the Interborough-Metropolitan, which contained, inter alia, the following:

"Holders of preferred stock of Interborough-Metropolitan Company are hereby notified to deposit their stock duly indorsed with the secretary of this company at 165 Broadway, New York City, for exchange for the preferred stock of the Interborough-Consolidated Corporation. The preferred stock of Interborough Consolidated Corporation will be ready for delivery in exchange for preferred stock of the Interborough-Metropolitan Company on and after June 23, 1914."

Later, under date of July 17, 1915, a further notice was sent as follows:

"Notice to Holders of Preferred Stock and Preferred Stock Voting Trust Certificates of Interborough-Metropolitan Company. According to our records, the preferred stock of the Interborough-Metropolitan Company standing in your name has not yet been exchanged for stock of the Interborough-Consolidated Corporation. A dividend of 1½ per cent. has been declared on the latter, payable when and as the Interborough-Metropolitan preferred stock is exchanged for the preferred stock of the Interborough Consolidated Corporation. Stock certificates may be sent to the undersigned for that purpose."

Thereafter it was the general practice of the Consolidated Corporation to issue shares of its preferred stock upon presentation of a certificate for an equal number of shares of the preferred stock of Interborough-Metropolitan. No shares of preferred stock, however, were issued until the holder of Interborough-Metropolitan preferred stock actually presented and delivered his certificates for exchange. At the time of the adjudication of the Consolidated Corporation as a bankrupt, there remained 3,085 shares of preferred stock of the Interborough-Metropolitan which had not been exchanged for preferred stock of the Consolidated Corporation.

It is provided by paragraph X of the agreement of consolidation, supra, with respect to the preferred stock of the Consolidated Corporation, as follows:

"The holders of the preferred stock shall be entitled to receive or to have set aside in trust for the payment thereof during any fiscal year, when and as declared by the directors from the surplus, or net profits for such fiscal year, and before any dividends shall be paid to the common stockholders during such fiscal year, noncumulative dividends not exceeding 6 per centum per annum, payable yearly, half-yearly, or quarterly, and on dates to be determined by the directors."

The certificate of preferred stock of the Consolidated Corporation contains a similar provision in respect of the payment of dividends to the holders of preferred stock. Article VII of the by-laws of the Consolidated Corporation contains the same provisions in respect of

the dividends to be paid to the holders of preferred stock of the Consolidated Corporation.

The minutes of a meeting of the board of directors of Consolidated Corporation held on June 3, 1915, set forth:

"The president stated that in order to facilitate the disbursements of dividends and note and bond interest payments, it was desired to create special deposit accounts by the withdrawal from the general fund from time to time of sums sufficient to meet the different interest and dividend requirements, each such withdrawal to be accomplished by check regularly drawn and signed in accordance with the by-laws, and to comprise a separate and distinct deposit to cover the exact amount of one full interest payment, and that he had, subject to the approval of the board, appointed John M. Burnet deputy treasurer, with power, in conjunction with Edward W. Sayre, coupon or dividend clerk to sign checks against these special deposit accounts for the purpose of making the payments in question. Whereupon,

"On motion, duly seconded, it was resolved: That the appointment of John M. Burnet as deputy treasurer of this company, with power, in conjunction with Edward W. Sayre, to disburse special funds set apart for the payment of dividends and note and bond interest be and the same hereby is ratified, approved, and confirmed."

On June 23, 1915, at a meeting of the board of directors, the first dividend payable upon the preferred stock of the Consolidated Corporation was declared; the resolution reading:

"Resolved, that a dividend of one and one-half per centum (1½%) from the surplus of the corporation be declared upon the preferred stock of the corporation, said dividend to be paid on July 6, 1915, to all stockholders of record as of July 3, 1915, and thereafter to the holders of all such preferred stock of the corporation as may be issued and exchanged for preferred stock of the Interborough Metropolitan Company or the Finance & Holding Corporation."

On July 6, 1915, the treasurer of the Consolidated Corporation opened the dividend account with Guaranty Trust Company and deposited a sum sufficient to pay the aforesaid dividend on all preferred stock of the Consolidated Corporation then issued, or which might subsequently be issued, in exchange for preferred stock of the Interborough-Metropolitan Company. On July 6, 1915, the treasurer of the Consolidated Corporation wrote Guaranty Trust Company as follows:

"I inclose herewith this company's check to your order for \$686,107.50, with which we desire to open a check account with you, to be titled 'Interborough Consolidated Corporation Dividend Account Interborough Consolidated Corporation Preferred Stock,' against which we will draw our special dividend checks as per specimen inclosed. I have also to advise that, pursuant to resolution adopted June 3, 1915 (certified copy of which I hand you herewith), checks drawn on you against the above-mentioned account will be signed jointly by:

"John M. Burnet, Deputy Treasurer.

"Edward W. Sayre, Dividend Clerk.

"The resolution, however, does not take away the signing power of myself and certain other officers held under the by-laws, or any former resolution, and checks may be drawn on the account above referred to, signed by me as treasurer, jointly with either the deputy treasurer or dividend clerk above named. * * *

Thereafter, at the close of each quarter following, upon the declaration of the dividend of July 6, 1915, and up to and including the

quarter ending April 1, 1918, quarterly dividends of $1\frac{1}{2}$ per cent. each were declared and paid upon the preferred stock of the Consolidated Corporation; the resolutions declaring such dividends being substantially identical with the resolution above set forth in regard to the dividend declared on June 23, 1915. The treasurer of the Consolidated Corporation, a few days before these dividends became payable, would deposit the sum of \$686,107.50 in the Consolidated Dividend Account, and checks would be forwarded to the record holders of stock to whom such dividend was payable, signed by Burnet and Sayre.

The sum of \$57,330, which came into the possession of the trustee in bankruptcy, represents amounts which would have been used to pay the sum of \$18 upon each of the 3,085 shares of preferred stock of the Consolidated Corporation, with interest allowable by the depositary on balances. This sum has been reduced to \$55,530, by reason of the payment to one Milnor of \$1,800 upon a state of facts somewhat different from that in the case at bar.

Neither the petitioners nor others similarly situated had exchanged their shares of preferred stock of the Interborough-Metropolitan for the preferred stock of Consolidated Corporation prior to the adjudication in bankruptcy, and the trustee contends that the sum of \$55,530 is a part of the assets of the bankrupt, and is not impressed with any trust for the benefit of holders of shares of Interborough-Metropolitan preferred who had not, prior to the adjudication in bankruptcy, exchanged their shares for a like number of Consolidated Corporation preferred.

[1] The foregoing somewhat full statement of the facts shows that the petitioners were never stockholders of Consolidated Corporation, but that at any time prior to bankruptcy they were at liberty to exchange their stock under the terms of the agreement of consolidation. They could not be deprived of this right or privilege, except by statutory procedure, whereby either at the instance of the stockholders or of the new corporation (Business Corporations Law, § 8) the value of the stock is appraised and paid for.

1. As no such procedure was taken, and no such valuation of the old stock was had, or payment by the Consolidated Corporation was made, the first question is whether the proceedings in bankruptcy have in any manner affected the right of petitioners to have their shares of preferred stock of Interborough-Metropolitan exchanged for a like number of shares of preferred stock of the bankrupt corporation. Sections 7 and 8 of the New York Business Corporations Law (the essential features of which are quoted in the margin)¹ had in mind, among other things, the protection of nonassenting stockholders of the corporations concerned in a merger or consolidation. While there was no obligation upon the part of a stockholder of one of the merging corporations to exchange his stock, yet his right to such exchange under the agreement of consolidation, and probably under the statute, was a continuing right, which would survive after the consolidation, unless the stock was valued and paid for in the manner provided by the statute.

¹ See note at end of case.

These petitioners, therefore, clearly were entitled to exchange their stock at any time prior to the bankruptcy adjudication. I am unable to see that the bankruptcy adjudication in any manner changed or affected this right. The Consolidated Corporation still had the unexchanged shares, and the trustee, so far as this branch of the case is concerned, stands precisely in the same position as the bankrupt corporation stood prior to the bankruptcy. *Matter of Le Blanc*, 14 Hun, 8.

It is urged by the learned counsel for the trustee that a contract for the delivery of the shares of stock in a corporation is not, as a general rule, specifically enforceable, and that the remedy for a breach or failure to deliver must be sought in an action at law for damages. This proposition in a broad sense is true, although subject to certain limitations which need not here be discussed; but the rule, thus sought to be invoked, applies usually to executory agreements to sell stock of a corporation, or agreements such as in *Kennedy v. Thomson*, 97 App. Div. 296, 89 N. Y. Supp. 963, to issue stock in return for services or property. No case, however, has been called to my attention, where, as here, the rights or privileges, or both, of the parties, are fixed by statute and by an agreement of consolidation made in conformity therewith.

It must be remembered that the theory of the New York statute providing for consolidation is that the stockholder of the old company cannot be deprived of his stock by a consolidation. Such a stockholder has vested property rights, and he is left free to decide whether or not he shall give up what he has in exchange for what the consolidation offers. If he concludes, as in the case at bar, to remain quiescent, then the only way in which the new consolidation corporation could wipe out the stock of the old corporations, and remove whatever embarrassment might be connected therewith, was to pay the owner of the old stock the value thereof in the circumstances, and after the procedure provided by the statute. There is no question here of mutuality of remedy, because the statute has defined the rights of the parties, and the question is not of the character which usually arises where the relations of the parties are fixed by virtue of their own contract or agreement. The trustee has possession of the stock, which is physically unissued; but his act in issuing the same will be purely ministerial.

[2] 2. The fact that in this case the dividends were declared and set aside distinguishes it in principle from that class of cases where the trust fund question depends on the circumstances, and sometimes on the language used when the fund was created or deposited. The basic features which required decision in cases like *Rogers Locomotive Works v. Kelley et al.*, 88 N. Y. 235, on the one hand, and *Staten Island Cricket & Baseball Club v. Farmers' Loan & Trust Co.*, 41 App. Div. 321, 58 N. Y. Supp. 460, and *Noyes v. First National Bank of New York*, 180 App. Div. 162, 167 N. Y. Supp. 288, affirmed 224 N. Y. 542, 120 N. E. 870 on the other, are quite different from those in the case at bar; for in none of those cases had a dividend been declared and had a fund for the payment of dividends been set aside.

Where a dividend has been declared, and following such declaration,

in order to carry the declaration into effect, the corporation deposits a fund out of which the dividends are to be paid, that fund becomes a trust fund, and the corporation becomes the trustee of the fund. In other words, the debtor and creditor relation is transformed into a trust relation. *Matter of Le Blanc*, supra. In *Staats v. Biograph Co.*, 236 Fed. 454, at page 458, 149 C. C. A. 506, at page 510 (L. R. A. 1917B, 728), the court said:

"But if a board of directors should declare a cash dividend, and make a public announcement of the fact, the courts have held that thereafter the board has no right to reconsider and rescind its action. The reason seems to be that the declaration of the dividend sets apart from the profits of the corporation a sum which is to be paid to the stockholders in proportion to their shares, and that it creates a debt due from the corporation to each shareholder, resulting in the relation of debtor and creditor. A dividend divides the property which belongs to the corporation into that which the corporation retains and that which the corporation agrees to pay to the stockholders, and which it is thereby bound to pay. * * * And sometimes the corporation becomes not merely a debtor, but is a trustee, as where the corporation has not only declared a dividend, but has deposited a fund out of which the dividends are to be paid. *Le Roy v. Globe Insurance Co.*, 2 Edw. Ch. 657 (N. Y. 1836); *Van Dyck v. McQuade*, 86 N. Y. 38, 52 (1881)."

It has frequently been held, in one form or another:

"When a dividend has once been declared out of net earnings, the amount of such dividend is no longer a part of the assets of the company, but is appropriated or set apart for the shareholders. They receive credit for the dividends, and the corporation simply holds them as their trustee. Therefore, before a dividend has been declared, a share of stock represents the whole interest which the shareholder has in the corporation, and when he transfers his stock he transfers his entire interest, and dividends subsequently declared, without reference to the source from which or the time during which the funds divided were acquired by the corporation, necessarily belong to the holder of the stock at the time of the declaration. But when the dividend has once been declared, and credited to the shareholder, the amount thereof has been separated from the assets of the corporation and been appropriated to his use." *Jermain v. Lake Shore & Mich. So. Ry. Co.*, 91 N. Y. 483, 492.

It follows in the case at bar that, the dividend having been declared and a fund having been set aside for the payment of dividends, the trustee has no right to so much of the fund as is necessary to pay dividends to those who by exchange of stock become stockholders. The question of the status and disposition of any balance of the fund which may remain, because no claim is made thereto, is not passed upon, and will be reserved until the estate is finally wound up or such earlier time as the question may arise.

The petitioners may have an order in accordance herewith.

After the foregoing was prepared there was filed by stipulation of the parties an affidavit of Campbell, the treasurer of the bankrupt, to the effect that from time to time subsequent to the opening of the Dividend Account and prior to the adjudication in bankruptcy, the Guaranty Trust Company of New York allowed interest on balances. This interest was not credited to the Dividend Account, but was forwarded by checks to the treasurer of the Consolidated Corporation, and was deposited in its General Account, and employed for the general purposes of the corporation.

The reply memorandum submitted by counsel for the trustee, in his desire to assist the court by an exhaustive consideration of the subject-matter, emphasizes the point that there was no trust in favor of the petitioners because at no time prior to bankruptcy were the petitioners stockholders. The acts and transactions of the Consolidated Corporation must, of course, be considered together. It will be remembered that the notice of July 17, 1915, stated that the then declared dividend was payable "when and as the Interborough-Metropolitan preferred stock is exchanged for the preferred stock of the Interborough Consolidated Corporation," and such was the consistent procedure of the Consolidated Corporation. In other words, whatever else may be the refinements of the situation, the Dividend Account was set aside in such manner that automatically the dividend was payable on the preferred stock of the Consolidated Corporation as soon, in any event, as the holder of the preferred stock of the Interborough-Metropolitan, had by virtue of exchange, become a holder of the stock of the new consolidated corporation. The depository was not the trustee, but the corporation itself was the trustee, by virtue of the various acts which have been discussed in the main opinion.

Of course, the Consolidated Corporation was not under obligation to deposit this Dividend Account with a Trust Company on an arrangement for interest. Theoretically it could have placed the money in specie in its safe. The right to the payment of the dividend attached only "when and as" the stock was exchanged, and therefore interest would only run from such time, if any, as the Consolidated Corporation refused to carry out the condition precedent upon the basis of which it had deposited funds in this Dividend Account. The fact, therefore, that the interest paid by the Trust Company was treated by the Consolidated Corporation as belonging to it has no significance, other than to make clear that the petitioners are not entitled to any interest for the period during which they failed to avail of their right to exchange the stock.

NOTE.

Business Corporations Law.

"Sec. 7. *Consolidation of Corporations.*—Any two or more corporations organized under the laws of this state for the purpose of carrying on any kind of business of the same or of a similar nature, which a corporation organized under this chapter might carry on, may consolidate such corporations into a single corporation, as follows: The respective corporations may enter into and make an agreement signed by a majority of their respective boards of directors and under their respective corporate seals, for the consolidation of such corporations, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number of directors who shall manage its affairs, * * * the term of its existence, not exceeding fifty years, * * * the amount of its capital stock, which shall not be larger in amount than the fair aggregate value of the property, franchises and rights of such corporations, and the number of shares into which the same is to be divided, the manner of distributing such capital stock among the holders thereof. * * *

"Sec. 8. *Submission of Consolidation Agreement to Stockholders.*—Such agreement shall be submitted to the stockholders of each of such corporations, at a meeting thereof to be called upon notice * * * and if such agreement shall be approved at each of such meetings of the respective stockhold-

ers separately, by the vote by ballot of the stockholders owning at least two-thirds of the stock, the same shall be the agreement of such corporations, * * * and thereupon such corporation shall be merged into the new corporation specified in such agreement, to be known by the corporate name therein mentioned, and the provisions of such agreement shall be carried into effect as therein provided. If any stockholder, not voting in favor of such agreement to consolidate, shall at such meeting, or within twenty days thereafter, object to such consolidation and demand payment for his stock, such stockholder or such new corporation, if the consolidation takes effect at any time thereafter, may at any time within sixty days after such meeting apply to the supreme court at any special term thereof held in the district in which any county is situated in which such new corporation may have its place of business, upon at least eight days' notice to the new corporation, for the appointment of three persons to appraise the value of such stock, and the court shall appoint three such appraisers and designate the time and place of their first meeting, with such directions in regard to their proceedings as shall be deemed proper, and also direct the manner in which payment for such stock shall be made to such stockholder. * * * The appraisers shall meet at the time and place designated, and * * * after being duly sworn * * * shall estimate and certify the value of such stock at the time of such dissent. * * * When the new corporation shall have paid the amount of such appraisal, as directed by the court, such stockholder shall cease to have any interest in such stock and in the corporate property of such corporation, and such stock may be held or disposed of by such new corporation. Where any consolidation has been heretofore or shall be hereafter effected pursuant to the laws of this state, and the holders of ninety per centum of the capital stock of each of such corporations have voted in favor of such agreement to consolidate, if any stockholder not voting in favor of such consolidation shall fail to exchange his stock for stock of such new corporation within sixty days after this act shall go into effect, or, in case of a consolidation hereafter effected, within sixty days after he shall have become entitled to make such exchange, such new corporation may, at any time thereafter upon at least eight days' notice to such stockholder * * * apply to the court, as hereinbefore provided, for the appointment of three persons to appraise the value of such stock at the time of the expiration of such sixty days. Upon the completion of the appraisal in the manner hereinbefore provided for, and the payment by such new corporation of the amount of such appraisal, as directed by the court, such stockholder shall cease to have any interest in such stock, and in the corporate property of such corporation and such stock may be held or disposed of by such new corporation."

THE GEYSIR (two cases).

(District Court, E. D. Virginia. July 19, 1920.)

No. 2455.

1. Shipping ⚓—Charterer liable for expense and delay caused by furnishing unsafe ballast.

Where a charterer, pursuant to a requirement of the charter party that it should furnish ballast for stiffening the vessel while proceeding to the loading port, furnished 500 tons of coal, which was to be a part of her cargo, but which, because of its unfit condition, heated and was required by the government to be taken out, which on charterer's refusal was done by the owner at large expense and delay, and replaced with sand, the charterer *held* liable for the cost of such removal and the delay caused thereby.

2. Shipping ⚓—Charterer not liable for expense of discharging ballast.

Under a charter party requiring the charterer to furnish free ballast for stiffening the ship to enable her to proceed to her loading port, the charterer *held* not liable for the expense of removing the same on reaching that port; such expense in the absence of charter provision, devolving on the vessel.

3. Shipping ⚓—Ship not entitled to freight on cargo not carried.

Where the charterer of a ship to carry a coal cargo furnished 500 tons of coal for ballast to enable her to proceed to her loading port, with the understanding that it should be a part of her cargo, but because of its heating it was necessary to remove the same and substitute other ballast, which was afterward discharged and a full cargo loaded, the ship *held* not entitled to freight on the 500 tons in addition to the cargo carried.

In Admiralty. Suit by Christian Aaborg, master of steel sailing ship Geysir, against the Brazilian Traction, Light & Power Company, Limited, and others, with cross-libel. Decree for libellant for part of claim.

Hughes, Little & Seawell, of Norfolk, Va., and George Forbes and John Phelps, both of Baltimore, Md., for the Geysir.

Hughes, Vandeventer & Eggleston, of Norfolk, Va., and Burlingham, Veeder, Masten & Fearey, and John L. Galey, all of New York City, for Brazilian Traction, Light & Power Co., and others.

WADDILL, District Judge. These suits were instituted to recover damages growing out of the alleged breach of a charter party entered into by J. H. Winchester & Co., as agents for the owners of the Geysir, and the Pearson Engineering Corporation, agent for Brazilian Traction, Light & Power Company, Limited, on the 4th day of September, 1918, in the city of New York. The charter party in question was for the transportation of about 2,800 tons of coal for a voyage from Norfolk or Newport News, one port only, at charterer's option, to Rio Janiero, Brazil, at the price of \$19.50 per ton of 2,240 pounds. At the time of entering into the charter, the Geysir was upon the high seas, shortly due at Baltimore with a cargo, and after the discharge thereof was to proceed with all possible dispatch in ballast, to enter upon the new charter involved in these proceedings. The charter party in its fourteenth paragraph contains the following provision:

~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes~~

" * * * Charter to become null and void in the event of this ship being requisitioned by the Danish government. Owners to have the privilege of dry-docking and painting vessel at Baltimore. At Baltimore, charterers to furnish free stiffening when and where required by master. Charterers to pay vessel's towage from Baltimore to loading port."

The Geysir is a Norwegian square-rigged steel sailing ship, 283 feet long, 38½ feet beam, 1,918 gross tons, with three hatches opening into a common space below deck, for freight, without compartments. The construction of the Geysir required that, in order for her to stand up in the water, or navigate, she should have placed upon her ballast or stiffening, to weigh her down in the water. Pursuant to the provisions of the charter party, after duly discharging her cargo from her previous voyage, she gave notice to the charterers to furnish the stiffening required to enable her to proceed to Newport News, and thereafter 513 tons of coal were placed on board; the coal being treated as a part of the cargo to be taken on at Newport News. After the coal was placed aboard, and before the voyage was entered upon, the government forbade the vessel to sail, at least until the coal in question could be tested, with a view of determining whether it had become heated. The necessary steps were taken to that end, and it developed that the coal was heated, and in an unfit condition to be used for the purpose for which it was placed on board. The heating of the coal increased rapidly, and to such an extent that, upon the charterers being called upon to remove the same and their declining so to do, the master of the ship was forced to have it removed at great cost and expense to the owners of the vessel. Upon the coal stiffening being unloaded, the shipowner furnished 500 tons of sand for stiffening, which was put on board, and the vessel was towed from Baltimore to Newport News, as required by the charter party, where the cargo of coal for Rio was duly placed on board. Pending the loading of the vessel, and in order to take the sand ballast or stiffening from the ship, the vessel was transferred temporarily to Lambert's Point, where the same could be disposed of promptly, and the vessel then returned to Newport News, where the loading of the cargo was completed.

The Geysir seeks to recover as damages for the alleged breach of the charter party the sum of \$33,866.16, made up of the following four items:

1. Extra expenses in Baltimore.....	\$ 3,410.21
2. Extra expenses in Norfolk.....	1,852.45
3. Demurrage, 31 days at \$600 (Baltimore, October 4 to 26, 22 days; Norfolk, October 28 to November 7, 9 days).....	18,600.00
4. Freight, 513 tons at \$19.50.....	10,003.50
	<hr/>
	\$33,866.16

Respondent insists that no recovery can be had for any part of the claim in suit; the contention being briefly, as respects the expenses incurred in connection with the unloading of the heated coal at Baltimore, the time consumed in connection therewith, and detention on account thereof, that the same was caused by reason of the governmental order in question, inhibiting the use of coal as stiffening, and that the charterer had in all respects fulfilled its duty in con-

nection with furnishing such stiffening, by exercising due and proper diligence in procuring the coal; that is to say, that it acquired it from reputable coal dealers, and that at most the charge against it should be made as for losses arising under the doctrine of general average. Counsel cite in support of their position the decision of Judge Ward, in the United States District Court for the Southern District of New York, in the case of *Aktieselskabet Fido v. The Lloyd Brasileiro and others*, 267 Fed. 733, and 13 other cases all heard together, filed July 19, 1919, involving questions claimed to be similar to the one under consideration here.

The court's conclusion is:

[1] First. Even conceding the nonliability of the respondent for damages arising from the heating of the coal cargo, in the ordinary case of affreightment, and that for the reasons stated it would not ordinarily be held as guarantor of the quality of the coal furnished, or responsible for losses incident to and arising from the combustible character of the cargo, still those considerations should not control in this case. Undoubtedly the cost incurred for providing stiffening or ballast for a ship that could not stand up without such support would be upon the ship, and not on the charterer. The charterer could make itself liable for such charges, if it wanted to do so, as it could for the ballast, and also for the hire of the tug to take the chartered vessel from Baltimore, where it was discharging cargo, to Newport News, where it was to take on cargo. That the towage service was rendered is not disputed, nor is the fact that coal was furnished by the charterer for ballast, pursuant to the terms of the charter party in respect thereto. The coal so furnished proved to be unfit and unsuitable for the purpose of taking the vessel to Newport News. It had become heated, seriously endangering the vessel, so much so that at great cost and expense it was taken from the ship, and subsequently sold for what could be gotten for it, and upon suitable ballast being furnished by the shipowner the voyage to the port of loading was completed. The charterer refused to unload the burnt coal, and the *Gey-sir* was forced to remove the same at the ship's expense and with much trouble, inconvenience, and cost to her owners in unloading and disposing of the same. There seems to be no good reason why the losses arising from this source should not fall on the charterer, who contracted to furnish the stiffening, rather than upon the vessel, which was greatly inconvenienced and damaged by its failure to do so. Nor should the charterer be relieved of liability because the government forbade the use of the unfit stiffening thus furnished. The action of the government was caused solely by the failure of the respondent to perform its obligation to furnish proper stiffening, and in what it did it acted solely in behalf of the public good, and because the respondent had furnished an unsafe ballast.

The expenses incurred at Baltimore, in discharging and disposing of the heated cargo, amounted to \$3,410.21, which sum should be credited by \$2,325.13, the net proceeds of the sale of the damaged coal, leaving a balance due in favor of the *Geysir* of \$1,085.08. Likewise the vessel is entitled to recover for the time lost in the detention of the vessel,

caused by the respondent's fault, at Baltimore, in furnishing unsuitable stiffening; that is to say, the 22 days from October 4th to October 26th, at \$600 a day (the sum agreed to in the charter party for the vessel for detention), amounting to \$13,200. In this connection it may be said that in the time taken, as well as the cost incurred in the removal of the heated cargo at Baltimore, and the time consumed at Norfolk and Newport News, and the expenses there incurred, that generally the cost appears to be large, and the time consumed greater than was necessary; but when considered in the light of the testimony in this case, both items are readily accounted for. At the port of Baltimore, especially, the occurrences took place during the influenza epidemic, and it was next to impossible to secure labor. Many of the ship's crew were sick, and one had died, and both there and in Norfolk, during the war period, it was exceedingly difficult to secure barges or scows to load and unload stiffening or cargo of any sort.

Second. The charge for demurrage and detention at Newport News and Norfolk, 9 days, the court is disinclined to allow, as the same was caused largely by the inability of the vessel earlier to secure a berth at the piers, and the subsequent necessity of having to take the ship from Newport News to Lambert's Point and back to Newport News, with a view of expeditiously unloading the sand ballast. Unusual diligence was exercised by the charterer's agent in securing berth space at the pier as quickly as possible, and considerable delay was caused by the impossibility of securing barges and labor to unload the sand.

[2] Third. Considering the item of \$1,852.45, for extra expenses incurred at Newport News and Norfolk, the court's judgment is that the same should be disallowed. \$1,800 of the amount grows out of the necessity to discharge the 500 tons of sand ballast from Baltimore to Newport News; \$1,400 being the actual cost of removal of the same, and \$400 tug hire for towing the ship from Newport News to Lambert's Point, and returning her to Newport News. This item involves the question of upon whom should fall the cost of discharging the ballast at Norfolk, in the light of the provisions of the charter party respecting the same, and the court is influenced in its conclusion by the fact that stiffening or ballast is necessarily incident to the operation of the vessel, and when the charterer furnished the ballast, under the special contract, to carry the ship to Newport News, it discharged its obligation in that respect.

But for the special provision of the charter, whereby the charterer contracted to "furnish free stiffening when and where required by the master," and "to pay the vessel's towage from Baltimore to the loading port," the vessel would have been required to provide for her proper ballast, as well for the purpose of navigation to the port of taking on cargo, as to enable her to load preparatory to her final voyage. The fact that the charterer contracted to furnish ballast to carry the vessel to Newport News did not, in the absence of like obligation to do so, impose upon him the obligation to remove the same on arrival there, after it was no longer necessary to the safety of the vessel. Upon the vessel's placing enough of her cargo on board to make ballast unnecessary, it became desirable to remove the sand ballast, with

a view of providing the necessary cargo space to enable the ship to perform its contract of affreightment, and carry its full capacity of 2,800 tons. Manifestly this expense should be borne by the ship, as between it and the charterer. Carver's Carriage of Goods by Sea (5th Ed.) § 262; Scrutton on Charter Parties and Bills of Lading, pp. 79, 126, and notes; Poor on Time Charters, §§ 4 and 22; Wier v. Union S. S. Co., [1900] L. R. 1 App. Cas. 525. The last citation, a decision of the House of Lords, contains a full and interesting discussion of the ship's liability for ballast, and is quite conclusive of the subject. In *The Port Adelaide* (D. C.) 59 Fed. 174, and *Ruprecht v. Delacamp and others* (D. C.) 165 Fed. 381 (affirmed 169 Fed. 1022, 95 C. C. A. 333), will be found incidentally a further consideration of the same subject.

[3] Fourth. This leaves for consideration the last-named item of libellant's claim for \$10,003.50, freight on 513 tons of coal, at \$19.50 per ton. This apparently arises in this way: At the time of the loading of the coal stiffening at Baltimore, it was understood between the parties that it would be treated as part of the cargo of coal from Newport News to Rio; that is to say, having on board that much coal on arrival at Newport News, she would take up a supply sufficient to make the full cargo of 2,800 tons there, which was done, a bill of lading issued for the 513 tons, and the charterer paid the freight thereon at Baltimore. Subsequently, and before the ship's departure, this coal had to be taken off for reasons hereinbefore stated, and sand ballast supplied in its stead, the ship taken to Newport News, where it took on the full cargo of 2,800 tons of coal, and freight was paid on that quantity, less the 513 tons, the subject of this dispute. The libellant seeks to recover for the full cargo of 2,800 tons transported from Newport News, as well as that taken on board at Baltimore, and afterwards removed. To state this claim is to answer it, as the effect of what the libellant would do is to receive payment as well for the 513 tons not carried as for that which made up a part of the 2,800 tons taken on at Newport News. The claim is wholly without merit, in the court's judgment.

A decree in accordance with the foregoing views will be entered on presentation.

DAHLEN v. HINES, Director General of Railroads.

(District Court, E. D. Wisconsin. August 11, 1920.)

No. 960.

Master and servant — 243 (11) — Contributing negligence imputable to workman disobeying safety rule.

A railroad employé, injured while working about cars standing on a track, which were struck by moving cars, held chargeable with contributory negligence in failing to obey a rule of the company, familiar to him and which he fully understood to be applicable in the circumstances, requiring him to put out a blue flag signal to warn those moving cars to keep off such track.

At Law. Action by Edward Dahlen against Walker D. Hines, Director General of Railroads. On motion of plaintiff for new trial. Denied.

Henry Mahoney and Irving Fish, both of Milwaukee, Wis., for plaintiff.

H. J. Killilea and C. H. Van Alstine, both of Milwaukee, Wis., for defendant.

GEIGER, District Judge. I think there are two matters to be considered, on the motion for a new trial:

(1) The terms and effectiveness of rule 26; and, if interpreted as binding on the plaintiff, the effect of his failure to observe it.

(2) Whether, if his failure to observe such rule is contributory negligence, there was anything for the jury in this case to consider.

In dealing with the terms of the rule, the outstanding fact in the case is that the plaintiff himself understood it to mean just what it says; that is, the rule had been long in use by railroads, and when it was promulgated by the defendant, and the plaintiff's attention called thereto, he had no misgiving as to its meaning, nor in the slightest degree as to its application to just such situation in which he was at the time of his injury. Indeed, his contentions respecting orders not to observe the rule on outgoing trains—assuming that such orders may have been attempted to be given by the foreman, Jendusa—necessarily imply that, except for such attempted orders or directions, the rule would be conceived to be plainly applicable to the plaintiff and the work he was doing. It therefore seems quite aside from anything pertinent to the case to consider the terms and effectiveness of the rule, or whether it was or is doubtful or ambiguous, making resort to circumstances under which it was applied as an aid to interpretation.

So, when it is suggested by counsel that "the defendant had not prescribed by rule the circumstances under which the blue flag was to be put out, but had left that to the oral direction of their foreman," it is a sufficient reply to say that the rule on its face discloses the circumstance, and the plaintiff so apprehended it; and this leads us to reiterate the observation, made upon the trial, that the rule discloses what in effect is an abdication by the company, to its workmen, of its and its train operatives' power over train movements, whenever such workmen are under or about cars. It places in the hands of the latter the means of challenging and superseding the authority and power ordinarily possessed by train operatives, to initiate a train movement on a track occupied by cars under or about which there are workmen; and no matter what the emergency, the category established by the rule is a broad one, leaving it solely to the operatives to use the instrumentality of the blue flag, and to make its use effective until removed by themselves. If the rule does not mean this, it does not mean anything, and its consideration by courts, which has led to a recognition of that meaning, has certainly been gravely mistaken.

It is idle, upon the testimony of this case, to consider whether the rule, effective upon plain reading, as above indicated, was abrogated or abandoned upon either the express direction of any one having au-

thority to bind the defendant company, or upon assent—by like authority—to be presumed from incessant or long-continued failure to observe it. The testimony is wholly to the contrary. This conclusion involves the further consideration that Jendusa was under the duty of observing, and not violating or directing the violation of the rule. It was not within his competency, upon any consideration, to direct non-observance of the rule, and, if he did so, the consequences were for himself, and those acting upon his directions, to hazard and to bear at their peril. If such cannot be the conclusion, it is, of course, useless for carriers to make, or attempt to enforce, rules.

If, therefore, the rule be thus interpreted, and as such be capable, as it is, of attaining the objective, it cannot be that it carries with it the implication of a right to violate it, upon the hypothesis that the carrier will use ordinary care; that is, the rule not only gives to the workmen under cars the power, but imposes upon them the duty, of preventing train movements upon the track where the cars are thus standing. That power, and the duty to exercise it, is vested, not for the purpose of preventing train movements which might result in "violent bumps," but all train movements. It is framed to preclude the possibility of workmen's speculatively hazarding their refusal to invoke it as against either the ordinary or negligent conduct of train movements against the cars under which they are working; and it may be observed that the plaintiff's own testimony discloses that in this very case he had an entire consciousness—because he says that once or twice, while between the cars, he looked for the approach of the additional cars which he knew must, sooner or later, come in the make-up of the train—a precise consciousness of the imminence of a danger comprehended, and to be avoided in the manner prescribed, by the rule.

But, granting that an issue might nevertheless be framed, which would permit a jury to consider both the contributory negligence of the plaintiff and negligence of the defendant, I am satisfied to adhere to the disposition made of this case because of the quality of the evidence on the issue of the defendant's negligence. The plaintiff, for some reason, introduced the rule as a part of his case, and, as I supposed, intended to rest upon the theory that the defendant had made inadequate provision by such rule for the safety of employes circumstanced as was the plaintiff at the time of his injury. Possibly there was involved the ordinary notion of making a train movement without adequate warning or safeguard to employes whom the defendant with reason should expect to be in a place of danger. But upon the issue of negligence in the train operation the plaintiff introduced testimony respecting the violence of the impact. Upon disposing of the motion, reference was made to the character of this testimony, and I have not changed my views.

Certain facts respecting the train movement are not, and cannot be, contradicted. They are not, and could not be, within the cognizance of those who, like the policeman, presumed to estimate the rate of speed. These facts deal with the stopping of the train shortly before making the attempted coupling. They are testified to by operatives who explain in detail the whole train movement, and, in my judgment,

so fully negative the mere suggestion of developing almost instantly thereafter a rate of speed of 15 miles an hour, within the short distance to be made, as to leave the testimony of the policeman and of another witness, respecting the rate of speed, in the realm of mere guesswork. There is no suggestion that any such rate of speed was maintained after the first impact, and upon the testimony, even assuming that there was negligence, its force and effectiveness at the time of the second impact, as a result of which the plaintiff claims to have been injured, rest wholly in conjecture.

The motion for a new trial will be denied, and an order will be entered accordingly.

THE GLORIA.
THE FREEDOM.

(District Court, S. D. New York. July 17, 1919.)

Nos. 68-379, 68-291.

1. Admiralty ⚓43—Immunity from arrest because of government ownership not ground for dismissal of cross-libel.

That a vessel against which a cross-libel in rem for collision is filed is owned and being used by the United States for purposes connected with the war, and is therefore immune from arrest *held* ground for refusing to issue process against her, but not ground for dismissing the cross-libel, which may be prosecuted at any time possession by the United States ceases.

2. Admiralty ⚓58—Cross-libelant entitled to security.

Assuming that the claimant of a vessel libeled for collision is within the meaning of "respondent," as used in admiralty rule 53 (29 Sup. Ct. xiv), such a claimant, which filed a cross-libel in rem, but could not arrest the other vessel because owned by the United States, *held* entitled to a stay of the suit until security is given under such rule.

In Admiralty. Suit for collision by the United States against the steamship Gloria, the Aktiebolaget Urania, claimant, with cross-libel against the steamship Freedom. On motion by libelant to declare the Freedom immune from arrest and to dismiss cross-libel, and by cross-libelant for stay until the giving of security. Libelant's motion sustained in part, and stay granted.

These are two motions; the first by the United States to declare the steamship Freedom immune from arrest under the cross-libel, and to dismiss the same; the second by the claimant in the first libel (cross-libelant in the second) for a stay of all proceedings under the principal libel until the United States shall give security under Supreme Court admiralty rule 53 (29 Sup. Ct. xiv). The facts, which appear by stipulation and by the pleadings, are as follows:

Under the joint resolution of Congress, signed by the President on March 12, 1917, and the executive order of the President on June 30, 1917, the German steamer Wittekind was seized by the United States, and her title thereupon became vested in that corporation sovereign. Her name was changed to the Iroquois, and she was "documented" in the name of the United States, through the United States Shipping Board. Later her name was changed to the Freedom, under which she sails at present. On May 5, 1919, and from

then on, she was a part of the United States navy navigated and manned by officers and a crew of the navy and used solely in the transportation of troops of the United States army from ports in France to ports in the United States.

The steamer Gloria, owned by the cross-libelant, came into collision with the Freedom on May 5, 1919, in a fog off the coast of the United States. On May 8, 1919, the United States libeled the Gloria in this court in rem for this collision, and arrested her under process of this court on July 9, 1919. On May 21, 1919, the cross-libelant which had appeared as claimant of the Gloria in the first libel filed a second libel in rem, called the cross-libel, in the District Court, praying process and arrest of the Freedom, which was not and is not yet, within the jurisdiction of this court, and of which, therefore no arrest has been attempted.

Herbert K. Stockton, of New York City, for the Aktiebolaget Urania.

John Hunter, Jr., of New York City, and DeLancey Nicoll, Jr., of Merrick, N. Y., for the United States.

LEARNED HAND, District Judge (after stating the facts as above).

[1] The cross-libel, though in rem, is directed against a vessel which for the present is immune from any possible process of this court, not alone because it is outside the jurisdiction, but because it is a ship owned by and in the possession of the United States. The Siren, 7 Wall. 152, 19 L. Ed. 129. It is true that a valid lien has arisen against her if the allegations of the cross-libel be true, and that that lien would survive the transfer of possession by the United States; but for the present the libel hangs in the air. The libelant's motion to declare the ship immune must therefore be granted, if limited to the period of possession by the United States.

The motion to dismiss the cross-libel will be denied. I know of no reason why the cross-libel should be dismissed because the prayer for process cannot at the present time be granted. As I have said, an arrest would be within the power of this court, should the United States lose possession of the Freedom. This court always has jurisdiction over the subject-matter, and may proceed as soon as the arrest becomes legal.

[2] There remains the cross-libelant's motion for a stay under the 53d rule. The use of the word "respondent" suggests that the cross-libel was to be in personam; but it is not a conclusive consideration, for the terminology of the rules is not scrupulously accurate. Thus the word "defendant" is used throughout the earlier rules for "respondent," and the word "respondent" itself occurs only in rule 53. That it might have been used to include "claimant" as well seems to me quite possible. Now it will generally be the case that the respondent or claimant in the principal case can be protected, if he have an option to sue the libelant in personam and get security for his claim. It may even be assumed that, if he sues in rem, he expects to arrest the ship, which will of itself give him security. Yet there are cases, of which this is one, and *The Newbattle*, L. R. 10 P. D. 33, was another, in which the respondent or claimant in the principal cause has at best a very doubtful claim against the libelant in personam, but a perfectly good claim against the ship, if he could only arrest her. This is generally the case when the ship of a sovereign has committed a tort.

The purpose of the rule, which is only to subject the original libellant to just conditions in the prosecution of his libel, cannot possibly be realized unless in such cases he be compelled to consent to give the same security which he would have had to give, had the cross-libellant been able to arrest the ship. This, of course, does not trench upon the libellant's immunity from process, if he have any, because the rule does not attempt to acquire jurisdiction over him at all, though that is the uniform practice in equity. Street's Federal Equity Practice, § 1066. It operates only through the sanction of a stay of his main suit, leaving him free to abandon, though he has begun, his own libel without remaining liable under the cross-libel.

Upon authority it must be owned that, two years after the rule was passed, Mr. Justice Blatchford, then District Judge, squarely decided that the rule did not apply to cross-libels in rem. *The Bristol*, 4 Ben. 55, Fed. Cas. No. 1,889. But Judge Longyear, in *The Toledo*, 23 Fed. Cas. 1355, No. 14,077, reached an opposite conclusion with Judge Blatchford's ruling before him, and the subsequent tendency has been in general to treat the rule with some liberality. *Empresa, etc., Co. v. North, etc., Co.* (D. C.) 16 Fed. 502, 504. Judge Hough, in *The F. J. Luckenbach*, on October 7, 1918, held, though without opinion, that a suit should be stayed until security was given upon the cross-libel in rem, and Benedict, in his Admiralty Practice, § 394, lays it down unconditionally. It seems to me that the law is not yet definitely settled against the broader interpretation, and that every consideration of justice makes for the allowance of the motion.

The suits, it is true, have not yet been formally consolidated; but this motion may be taken to indicate that they are to be treated hereafter as libel and cross-libel.

The motion for a stay is granted.

THE F. J. LUCKENBACH.

(District Court, S. D. New York. January 7, 1920.)

1. United States ☞125—Submits to jurisdiction by filing bond for stay of proceedings in admiralty.

The United States submitted fully to the jurisdiction of the admiralty court by causing to be filed the bond required to prevent a stay of proceedings in a libel to which it had been admitted as a collibellant.

2. Admiralty ☞43—Vessel liable in rem, though immune from process.

A vessel is liable in rem, and subject to a lien, notwithstanding its use as a government vessel for strictly governmental purposes at the time of the collision, though the vessel cannot be seized during control by the government.

Libel by Jens Samuelson and another against the steamship *F. J. Luckenbach*. Cross-libel sustained, and reference to assess damages ordered.

Haight, Sanford, Smith & Griffin, of New York City, for Samuelson.
Carter & Carter, of New York City, for *The Luckenbach*.

MACK, Circuit Judge. Agreeing entirely with the conclusions and the reasoning of Judge Hand in *The Florence H.* (D. C.) 248 Fed. 1012, and in the decision on motions in *Re Steamship Gloria*, 267 Fed. 929, I hold:

[1] First. That the United States submitted fully to the jurisdiction of this court, by filing or causing to be filed the bond required to prevent a stay of all proceedings in the libel suit to which it had been admitted as a colibellant.

[2] Second. That, while not subject to seizure during its control by the government, the vessel itself was nevertheless liable in rem and subject to a lien therefor, notwithstanding its use as a government vessel for strictly governmental purposes at the time of the collision.

Third. That the cross-libel must therefore be sustained, and reference ordered to assess the damages.

JACKSON v. SMJETANKA, Internal Revenue Collector.

(District Court, N. D. Illinois, E. D. January 7, 1920.)

No. 33109.

Internal revenue — Compensation of receiver, not fixed in advance, taxable as income during the year received.

Additional compensation awarded a receiver on his resignation is taxable as income for the year in which it was allowed and paid, though thereafter the court allotted the amount as having been earned during preceding years, under Revenue Act 1918, §§ 212, 213 (Comp. St. Ann. Supp. 1919, §§ 6336 $\frac{1}{2}$ f, 6336 $\frac{1}{2}$ ff); section 206 (section 6336 $\frac{1}{2}$ dd), providing for taxation on income subject to different rates for different years, not being applicable to such situation, in view of sections 201, 205 (sections 6336 $\frac{1}{2}$ b, 6336 $\frac{1}{2}$ d), and Treasury Regulations, art. 1641.

Action by William J. Jackson against Julius F. Smietanka, Collector of Internal Revenue. On demurrer to the declaration. Demurrer sustained.

Gallagher, Kohlsaat & Rinaker, of Chicago, Ill., for plaintiff.
Charles F. Clyne, U. S. Atty., of Chicago, Ill., for defendant.

PAGE, Circuit Judge. This is a demurrer to the declaration. The sole question involved in this case is: Was plaintiff erroneously taxed under the revenue law of 1918, or should he have been taxed under the several laws of the years 1913 to 1918? as plaintiff contends, on an income received as follows:

Plaintiff was on May 27, 1913, appointed a receiver of the Chicago & Eastern Illinois Railroad Company, and served until April 27, 1918, for which he received, under the order of the District Court dated August 4, 1913, \$2,000 per month commencing July, 1913, to be received on account, with the liberty on his discharge to apply for further compensation. When he resigned, a general order was entered, on April 27, 1918, allowing him an additional compensation of \$100,000. That general order was amended by order of April 22, 1919, as follows:

That said services of said William J. Jackson as receiver were rendered continuously from May 27, 1913, to and including April 27, 1918, and the compensation therefor now allowed was earned and accrued as follows: In the year 1913, \$12,144.85; in the year 1914, \$20,334.26; in the year 1915, \$20,334.26; in the year 1916, \$20,334.26; in the year 1917, \$20,334.26; in the year 1918, \$6,518.11.

That amendment was entered as of April 27, 1918. The petition for the amended order was filed and the order made long after the tax was assessed. The government was not a party thereto.

Plaintiff cites section 206 of the Revenue Law of 1918 (Comp. St. Ann. Supp. 1919, § 6336 $\frac{1}{8}$ dd) as a basis for his contention, and says:

"If that section cannot reasonably be applied to such a case as that of plaintiff, we ask to what sort of a case it does apply?"

Article 1641 of Treasury Department regulation 45, under the Revenue Act of 1918, says that section 206 refers to other and wholly different matters, and this interpretation is supported, and in the opinion of the court conclusively, by sections 201 and 205 of the same act (sections 6336 $\frac{1}{8}$ b, 6336 $\frac{1}{8}$ d), in the former of which direct reference is made to said section 206. After specifying in detail what the gross income includes, section 213 (section 6336 $\frac{1}{8}$ ff) provides:

The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period.

Subdivision (b) of section 212 (section 6336 $\frac{1}{8}$ f) provides:

The net income shall be computed upon the basis of taxpayer's annual accounting period * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer.

Plaintiff kept no books, so that clause does not apply. It further provides that—

If no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income.

The only language which might apply to plaintiff is—

If no such method of accounting has been so employed * * * computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income.

This seems to leave the burden upon the plaintiff here to show that the method of accounting insisted upon by him has been prescribed as a basis by the commissioner. Article 52 of regulations 45 provides:

Gains, profits, and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included when they accrue to him in accordance with the approved method of accounting followed by him.

Article 32 of said regulations 45 states:

Where no determination of compensation is had until the completion of the services, the amount received is income for the calendar year of its determination.

The demurrer is sustained.

ELLICOTT MACHINE CORPORATION v. VOGT BROS. MFG. CO.

(District Court, W. D. Kentucky. February 21, 1920.)

1. Appeal and error ⇨361(5)—Right to writ of error must be passed on when question raised.

Under section 1 of rule 13 of the Circuit Court of Appeals for the Sixth Circuit (202 Fed. viii, 118 C. C. A. viii), authorizing District Judges to allow writs of error, when objection to such allowance is made on the ground that the time therefor has expired, the question must be passed on by the District Judge.

2. Courts ⇨354—Signing judgment on separate paper, and not on order book, sufficient conformity to state practice.

Signing of judgment on a separate paper handed to the clerk for entry in the order book conforms to the Kentucky practice "as near as may be," as required by Rev. St. § 914 (Comp. St. § 1537), without signing the entry on the order book, in view of the impracticability of signing the order books kept at the different places at which court is held, and also in view of section 918 (section 1544), authorizing District Courts to make rules regulating their own practice.

3. Courts ⇨339—State practice, to which federal court must conform, contained in state Code of Practice.

In Kentucky, the practice, pleadings, and forms and modes of proceeding in civil causes, to which federal courts are required to conform as near as may be by Rev. St. § 914 (Comp. St. § 1537), are those prescribed by the Kentucky Civil Code of Practice.

4. Courts ⇨354—Statute requiring signing of proceedings by judge not binding on federal courts.

Ky. St. § 378, which is contained in a chapter devoted to the duties of the clerk of the court, and which provides that the proceedings of each day shall be drawn up from the minutes in a plain, legible manner and, after being corrected as ordered by the court and read in an audible voice, signed by the presiding judge, is not a part of the pleadings and practice in civil cases, to which the federal District Court is required to conform by Rev. St. § 914 (Comp. St. § 1537).

5. Appeal and error ⇨347(1)—Time for taking runs from signing of judgment, though entry subsequently signed.

Where judgment was signed on June 3, 1919, and handed to the clerk for entry in the order book, but several months later the order book was signed by the judge as a precautionary measure, the six months after entry of the judgment, allowed by Act March 3, 1891, § 11 (Comp. St. § 1647), for suing out a writ of error, ran from June 3, 1919.

At Law. Action by the Ellicott Machine Corporation against the Vogt Bros. Manufacturing Company. On petition for allowance of writ of error. Petition denied.

Judgment affirmed (C. C. A.) 267 Fed. 945.

Humphrey, Crawford, Middleton & Humphrey, of Louisville, Ky., for plaintiff.

Barret, Allen & Akinson and Helm Bruce, all of Louisville, Ky., for defendant.

WALTER EVANS, District Judge. The trial of this case was concluded at the last March term. The jury returned its verdict on June 3, 1919, the judgment of the court thereon in the regular course was drawn up on a separate paper, was then signed by the judge and

passed to the clerk, with directions to enter it. It was then and there entered upon the order book of the court, and is as follows:

No. 283.

In the District Court of the United States,
for the Western District of Kentucky.

Ellicott Machine Corporation, Plaintiff, v. Vogt Brothers Manufacturing Company, Defendant.

Judgment.

This cause coming on again this day for hearing, the jury appeared and also the parties by their respective counsel. The jury, after being instructed by the court, retired to their room to consider of their verdict, and returned into court the following verdict:

"We, the jury, find for the plaintiff for the sum of \$17,440.00 damages—
\$1,532.40 advanced money. P. I. Burks, Foreman."

Pursuant to the foregoing verdict, it is now ordered, considered, and adjudged by the court that the plaintiff, Ellicott Machine Corporation, do recover of the defendant, Vogt Brothers Manufacturing Company, the sum of \$18,972.40, with interest thereon at the rate of six per cent. per annum from this 3d day of June, 1919, until paid, and their costs herein expended, as the same may be properly taxed by the clerk.

Time is given the defendant to and including September 15, 1919, to prepare and tender its bill of exceptions herein.

June 3, 1919.

Walter Evans, Judge.

On the 15th day of September, 1919, the defendant filed its assignment of errors over the signatures of its counsel. Its closing paragraph was in this language:

"Wherefore the defendant prays that the judgment of the court entered herein on the 3d day of June, 1919, be reversed."

It also tendered its bill of exceptions, but action upon it was postponed from time to time upon the agreement of the parties, as shown by orders entered of record. On January 15, 1920, the defendant, in a written motion filed and entered of record, asked the court "to proceed to settle the bill of exceptions heretofore tendered herein." To this motion plaintiff filed objections, based upon the alleged ground that, the defendant having delayed more than six months from the date of the judgment to sue out a writ of error, the settling of the bill of exceptions would be futile. After much argument this objection was overruled, as not bearing upon the mere motion to settle the bill, which was all that was then before the court. The effect to be given to it when settled was not under discussion, and was not for us, but for a higher tribunal.

[1] A settlement of the bill of exceptions had not been reached, when, on January 27, 1920, the defendant filed a petition asking for the allowance of a writ of error to the Circuit Court of Appeals. To this the plaintiff objected. Ordinarily a writ of error is likely to be granted as of course, thereby leaving the question of its jurisdiction to be determined by the appellate tribunal; but the plaintiff has raised the question here, thus making it necessary for us to determine whether the defendant has the right to the writ. This follows from section 1 of rule 13 prescribed by the Circuit Court of Appeals of this Circuit (202 Fed. viii, 118 C. C. A. viii) which is as follows:

"An appeal from or writ of error to a District Court in the cases provided for in sections 128, 129 and 130 of the Judicial Code approved March 3, 1911, may be allowed in term time or in vacation by the Circuit Justice, wherever acting, or by any Circuit Judge acting within the circuit, or by any District Judge acting within the district where the case was heard and authorized to hold court in that district; and the proper security may be taken and the citation be signed by him and he may also grant a supersedeas and stay of execution or of proceedings pending such a writ of error or appeal."

The controlling statute of the United States in this situation is section 11 of the act approved March 3, 1891 (26 Stats. 829 [section 1647, 3 Comp. Stats. 1916, p. 3266]), which reads thus:

"No appeal or *writ of error* by which any order, *judgment*, or decree may be reviewed in the Circuit Court of Appeals under the provisions of this act shall be taken or sued out except *within six months after the entry of the order, judgment, or decree sought to be reviewed*: Provided however, That in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the Circuit Courts of Appeals."

This statute (the specially applicable clauses of which we have italicized) has been construed by the Supreme Court in *Old Nick Williams Co. v. United States*, 215 U. S. 541, 543, 544, 545, 30 Sup. Ct. 221, 54 L. Ed. 318, and its opinion and those therein referred to, including that of the Circuit Court of Appeals in that case (152 Fed. 925, 82 C. C. A. 73), leave nothing to be said, except that it is explicitly ruled that the courts have no power to extend the time fixed by the statute.

Nor may we forget that in cases like *Butt v. United States* (C. C.) 126 Fed. 794, *Born v. Schneider* (C. C.) 128 Fed. 179, and *Threadgill v. Platt* (C. C.) 71 Fed. 1, it was held that a judge has no right to issue a writ of error after the expiration of the six months named in the statute, though this rule is qualified where there has been a motion for a new trial which consumed part of the period.

For present purposes the facts here are: (1) That on June 3, 1919, as stated by defendant in its assignment of errors, and as is otherwise clearly shown, there was an "entry" of the judgment of the court made by its order in writing, signed by the judge and based upon the verdict of the jury then returned; (2) that no motion for a new trial, staying the operation of the judgment thus entered, was ever made, nor was any effort made otherwise to stay it; (3) that an assignment of errors was filed on September 15, 1919, as provided in the judgment; and (4) that the writ of error was applied for on the 27th day of January, 1920, and at no previous time.

These undisputed facts, viewed in connection with the statute and judicial construction of its terms, demonstrate, *prima facie*, that the application for a writ of error should have been made prior to December 4, 1919. That was not done. The failure to do it, considered with reference to the facts just stated, and those which will presently be mentioned, would seem clearly to bar the defendant's right to the writ. Notwithstanding this almost necessary result, the defendant, as we have seen, filed a petition for its allowance; and it must not be forgotten that certain rights of the plaintiff may have matured, of which it

cannot lawfully or justly be deprived by any delay of the defendant or of the court. Nor, when the time of asking for a writ of error has expired, can it be arrested or called back by any order of the court. 215 U. S. 544, 30 Sup. Ct. 221, 54 L. Ed. 318, citing *Credit Co. v. Arkansas Central Railway*, 128 U. S. 261, 9 Sup. Ct. 107, 32 L. Ed. 448. Otherwise, said the court, the law which limits the time within which appellate proceedings can be taken would be a dead letter. Meantime, as we have seen, on the 15th of September, 1919, the defendant filed its bill of exceptions to what had taken place at the trial, and on January 15, 1920, in a written motion, had asked the court "to proceed to settle the bill of exceptions heretofore tendered herein."

The argument upon plaintiff's objections to settling the bill of exceptions took a very wide range, extending, not only to the question of the futility of settling the bill of exceptions, but to the time in which a writ of error might be allowed, including a discussion of the effect of the statement, then in that way only and for the first time made, that the judge had not signed on the order book the record of the proceedings of June 3, 1919. This argument took place on January 20, 1920. After consideration, the court, while overruling, upon the grounds indicated, the objection made to settling the bill of exceptions, contemplated the possibility that the plaintiff might desire to sue out a writ of *feri facias* to enforce collection of its judgment, entry of which had been made on June 3, 1919, and might, in such event, be embarrassed by the contention that the record of that day's proceedings had not been signed on the order book by the judge. To provide against delays or other possible embarrassments on a mere collateral contingency or issue like that, in the event of a proceeding to enjoin the execution of such a writ, and for no other reason, the judge, as then explained, made and signed the following entry on the order book, viz.:

"For special reasons the record of the proceedings of June 3, 1919, is signed this January 22, 1920."

In doing this upon these special reasons the court in no way intended to disregard or to set aside its unwritten rule, adopted in April, 1899, and acted upon ever since, not to sign on the order book the record of the proceedings of each day. This construction of the law and this course were decided upon after careful consideration, and have been adhered to ever since. No case taken in the meantime from this to a higher court has ever been based upon any condition of the record which did not conform to that construction. All entries upon what the Kentucky practice generally calls the order book are made under the court's directions. They constitute its records of all its proceedings. Those records are in the custody of the clerk, and must be and are regarded as authentic, and open to everybody interested, and the rule of the court in respect to not signing the record of each day's proceedings is known to all who are presumed to know or to have notice of the public records of the courts. This is the first instance in which the rule of the court in this respect has been called in question

in the nearly 21 years of its existence. In this instance the question has been raised only in the way indicated, viz., in an argument on a motion to settle a bill of exceptions, and which argument spread over to objections to granting a writ of error as out of time.

In view of that discussion, it becomes appropriate to vindicate the authenticity of the whole body of our records by stating our construction in 1899 of the law in respect to signing our records on the order books and the grounds upon which that construction is based, for, as is well known, no federal statute in terms requires it, nor did any practice at common law do so.

Previous to April, 1899, four different places had been designated by law for holding terms of the District and Circuit Courts of the United States in the District of Kentucky, namely, Louisville, Covington, Frankfort, and Paducah, each located many miles from the other. Each of these had a separate clerk and a separate clerk's office. All of the four were presided over by a single judge, and the terms were continuous from the beginning of one to the beginning of another at each of the places named. Business might be done at each on each day, and in fact was largely so done, and the judge, at whichever of these places he might be, could properly direct the entry of orders or judgments at any of the other places, because he was in the district and not disabled by being out of it. For this and other reasons equally cogent, and in view of the impossibility at the close of each day's work of drawing up, entering, and signing the day's proceedings on all the order books, it was obviously absurd to attempt anything of the kind, and especially as there was as much obligation to sign on the order book the record of each day's proceedings at each and all of the four places referred to as there was to sign it at any one of them. When the judge was present at these several places, holding terms, the business of each day was large, and many times it was not possible for the clerk to get all the appropriate entries made on the order book during the day, or at any time before the judge would be compelled to leave that place for some other at which work was to be done. It would have kept the court's order book at each of those cities in constant journeyings to the judge. Only an aeroplane service could have met the requirements of such a situation, and none was at our command.

[2] The situation thus confronting us in April, 1899, demanded a careful consideration of all applicable provisions of law. The result of this was a construction then made that the course then determined upon and ever since pursued was and is as "near as may be" in conformity with the Kentucky "practice, pleadings, and forms and modes of proceeding" in civil causes, as these words are properly construed; absolute conformity in many respects being entirely impossible or impracticable. That was all we were required to do under any reasonable or practicable construction of those laws, and furthermore was subject to our power under the last clause of section 918 of the Revised Statutes (Comp. St. § 1544), hereinafter set out. That course thus determined upon has been followed ever since, as the records show, and as all must be presumed to know. It requires always the

previous signing by the judge of the judgments entered; that signature being put upon the judgment as drawn up on a separate paper, which paper, thus signed, was then passed to the clerk by the judge, to be entered on the order book. That paper is filed with the other papers in the case, and thereafter remains a part of the record therein, showing to all the exact situation with respect thereto.

However, since our construction of the statutes, we have had a habit of formally signing afterwards the record of the proceedings of the last day of each term at each place where they were held. This was not required, but it was not regarded as inappropriate to do this, as it was suggestive of a formal rounding out and winding up of all the entries that had been made during the entire term by the judge who signed.

On July 1, 1901, Kentucky was divided into two districts, but that division did not change the situation nor our course under our construction of its requirements, as there were still, in our district, four widely separated places, in each of which two continuous terms of court were held in each year, viz., Louisville, Paducah, Owensboro, and Bowling Green, at each of which was a clerk's office in charge of a deputy of the clerk at Louisville.

Section 914 of the United States Statutes at Large, vol. 17, p. 197 (section 1537, Comp. Stats. 1916, vol. 3, p. 2912), is and has long been in the following language:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the [Circuit and] District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such [Circuit or] District Courts are held, any rule of court to the contrary notwithstanding."

Undoubtedly this section provides substantial rights for the litigants upon both sides of an action at law. That general proposition probably has never been questioned, though sometimes the courts may differ as to what the practice and modes of proceeding of a particular state may be; but, when they are ascertained, the result is cared for, as near as may be, by the statute just cited, and known as the Conformity Act, as modified by section 918.

[3] Our view in this connection explicitly was and still is that the "practice, pleadings, and forms and modes of proceeding" in civil actions in Kentucky are those prescribed by the Kentucky Code of Practice. But in any event the court should construe section 914, R. S., in connection with section 918, R. S., which is as follows:

"Sec. 918. The several * * * District Courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

See Atchison, etc., Co. v. Hamble, 177 Fed. 644, 652, 101 C. C. A. 270; Van Doren v. Pennsylvania R. R., 93 Fed. 260, 269, 35 C. C. A.

232; Importers', etc., *Bank v. Lyons* (C. C.) 134 Fed. 510, 572; *Ewing v. Burnham* (C. C.) 74 Fed. 384, 385. As to the principle which applies to and upholds as binding a long-established practice, even if no written rule of the court has been formulated, see *Detroit Heating & Lighting Co. v. Kemp* (C. C.) 182 Fed. 847.

The rule we adopted, as stated, in 1899, and which has ever since been followed, would quite fully meet the intention of the statutes, and at the same time would as adequately authenticate our judgments as would any signing of the record of the day's proceedings on the order book; such authentication at last being the essential result to be obtained. That the judgment in this case was adequately authenticated is clearly shown by the statement of the defendant in the last sentence of its assignment of errors, which we have already copied; and, indeed, this circumstance, coupled with the fact that pursuant to its requirements the defendant filed its assignment of errors and tendered its bill of exceptions on September 15, 1919, might well be construed as a waiver by it of the objections it now urges.

The present Code of Practice of Kentucky has been in force since January 1, 1877, as provided in its last section, namely, section 839. A careful, but brief, analysis of the provisions of the Code becomes most important, inasmuch as it will accurately develop the exact situation and bring into view the precise questions to be determined.

At the outset, in title 1 it recognizes the distinction between common-law actions and equitable actions. The first are ordinary actions, and the second equitable actions, though both are called "civil actions." In section 4, embraced in title 2, it provides that there shall be but one form of civil action. Title 3 prescribes who shall be made parties to such actions; title 4 regulates the manner of commencing a civil action by the filing of a petition, stating the facts, and also regulates the manner of issuing and serving process; title 5 regulates the venue of civil actions; title 6 prescribes what actions may be joined; title 7 regulates the pleadings and the rules applicable thereto; title 8 provides for provisional remedies, that is, attachments, injunctions, etc.; and title 9 prescribes the rules for the trial of civil actions, namely, jury trials in common-law actions, and trial by the court of equity cases. Section 368, embraced in title 9, reads thus:

"A judgment is a final determination of a right of a party in an action or proceeding."

Section 384 is as follows:

"After a jury trial, the clerk shall enter judgment in conformity to the verdict, unless it be special as to one or more questions of fact, or unless the court reserve the case for consideration."

Section 390 regulates the manner of entry of such judgment on the record in this language:

"The judgment must be entered on the order book and specify clearly the relief granted or other determination of the action."

Finally section 838 in unambiguous terms declares that:

"The provisions of this Code shall regulate pleadings and practice in civil cases commenced hereafter in courts which now exist, or [which] may here-

after be created; and, as to such cases, laws within the purview of those provisions are repealed; and this repeal does not revive any law which may have been repealed by laws which are hereby repealed."

In short, the Code of Practice of this state, in express and unmistakable terms, regulates the practice, pleadings, and modes of proceeding in a common-law action from its commencement to its termination by the entry of the judgment on the order book of the trial court, as directed by sections 384, 390. The practice and proceedings thus prescribed, not only fully regulate that practice, but have continuously done so without change since January 1, 1877.

True, the words "forms and modes of proceeding" are not found in that collocation in section 838 of the Kentucky Code, but necessarily they are included in all that is meant by the phrase "regulate pleadings and practice in civil actions," prescribed in that section. Those words are ample to meet the provisions of section 914, R. S., though that section uses words sufficiently general to reach all the forms of expression that might be used in the Codes of the many states of the Union.

The Kentucky Code of Practice in no way requires the state court judges to sign each day's proceedings, though it may be remarked that the Code of Practice of Louisiana did require such action, and hence the decision of the Supreme Court in *Yznaga v. Harrison*, 93 U. S. 233-235, 23 L. Ed. 892. That requirement of the Code of Practice of Louisiana apparently was overlooked by the District Court in that case with the result that its judgment was reversed by the Supreme Court. That was the precise case decided by the Supreme Court, and the well-established maxim is that the language of the court's opinion in that case must be limited to the very case under discussion. See *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 574, 15 Sup. Ct. 673, 39 L. Ed. 759, where reference was made to the opinion of Chief Justice Marshall in *Cohen v. Virginia*, 6 Wheat. 264, 399, 5 L. Ed. 257.

Practically the same propositions apply to the case of *Morrison v. Bernards Township* (C. C.) 35 Fed. 400, 402. At the time of that decision the state of New Jersey had no Code of Practice by that name, but had statutory provisions intended to cover exactly the same field. Those provisions were made in the act approved March 27, 1874 (Rev. St. 1874, p. 594), which specifically and in terms regulated the practice in the courts of law—those provisions being a codification of numerous statutes previously enacted regulating practice in those courts. Thus it will be seen that these provisions were in effect the New Jersey Code of Practice, though not so called. Hence these statutory provisions in New Jersey were the precise equivalent of a Code of Practice, and were so intended. Included in this system of practice thus created was one provision which required the judge to approve and sign the record of the proceedings on the order book.

[4] In Kentucky, however, the Legislature found it wise to meet and provide for certain conditions other than those relating to "pleadings and practice in civil cases" which were fully regulated by the Code of Practice, and to that end it devoted one entire chapter (the

twenty-first) of the Kentucky Statutes, containing 17 sections (372 to 388, inclusive) to prescribing, generally, the duties of the clerks of the various courts. An analysis of its various sections may elucidate the proposition before us, and certainly will show that it relates, for the most part, to matters entirely outside of lawsuits of any kind.

Section 372 requires every clerk to take an oath in the form therein prescribed. Section 373 prescribes the form of bond each clerk is to give. Section 374 requires each clerk to deliver to his successor the records of his office. Section 375 requires a record to be made of executions issued and the returns thereon. Section 376 requires a record of these matters to be kept by every clerk. Section 377 forbids the clerk of an inferior court to take the records of his court outside of his county, with certain specified exceptions to that rule. Section 378 provides that—

"The proceedings of each day shall be drawn up by the clerk from his minutes in a plain, legible manner, which, after being corrected as ordered by the court, and read in an audible voice, shall be signed by the presiding judge."¹

Section 379 requires every clerk to indorse certain memoranda on the inner envelope to be filed with the papers. Section 380 authorizes the clerk to administer certain oaths. Section 381 makes it his duty to issue subpoenas under certain circumstances. Section 382 requires him to certify and affix the seal of his office to soldiers' claims on the government in certain circumstances. Section 383 requires clerks to enter witness fees on the proper book with the taxation of costs. Section 384 requires the clerk of one of the courts without unreasonable delay to discharge certain duties with respect to the tax books. Section 385 requires the clerk to make a report of suits and indictments. Section 386 requires him to keep a general index. Section 387 provides that—

"The failure of a clerk to discharge the duties, or any of them, required by law, shall, in addition to any other penalty imposed, be a contempt of court, and may be punished accordingly."

Section 388 authorizes the clerk to procure the books needed for his office, and prescribes how payment therefor shall be made.

This analysis, bringing into close view all the provisions of the chapter, unmistakably shows that it was the intention of the Legislature to regulate, in some detail, the personal duties of the clerk in the administration of the affairs of his office and nothing else, though in one respect that administration by the clerk was required to be verified by the signature of the judge, and to this extent it regulated the administration by the judge of certain of the duties of his office also. These provisions were not to regulate the proceedings in litigation between parties. They were not prescribed by the Code of

¹The substance of this legislation has been on the statute books of Kentucky for nearly a century. Its history makes its purposes altogether clear. It had its origin in the exposure of the acts of clerks who had committed serious frauds or at least wrongs which were the subjects of judicial condemnation in cases like *Commonwealth v. Chambers*, 1 J. J. Marsh. 108, and others which might be cited.

Practice, but were regulations to be observed by the clerk in doing his work, and to secure the correctness of that work the minutes of the court's records as kept by him were required to be written out, read in an audible voice, and signed by the judge on the order book. If the latter was not done, the record was not verified, and counted for nothing as part of the state court's records. This requirement was entirely outside of anything with which the parties had to do in practicing their cases. In other words, it was entirely outside of the practice and proceedings in a case *inter partes*. The parties to the action would have no control over these things. Our view was and clearly is that these provisions are not and were not intended to be embraced in the Code of Practice, which regulates the "practice and pleadings in civil cases," as between the parties thereto, within the contemplation of section 914, R. S.

It may serve to make the matter clearer if we analyze section 378, regulating in one respect the official conduct of the clerks. That section provides (1) that the proceedings of each day shall be drawn up by the clerk from his minutes, (2) in a plain, legible manner, (3) and after being corrected as ordered by the court, must (4) be read in an audible voice, and then (5) be signed by the presiding judge. Is it not obvious that this section was meant to secure the proper discharge by the clerk of his duties as such? Would the proceedings be void if the handwriting of the clerk was not plain and legible, or if the minutes were not read in an audible voice?

Manifestly these were not requirements that affected anything except the clerk's work, which, as such, must come up to the prescribed standard, and then be authenticated by the judge's signature by which the clerk's work was approved. This, we may repeat, illustrates strongly the proposition that none of the requirements of that section were intended to do anything except to secure the due administration by the clerk of the duties of his office and the verification of that fact by the judge's signature. After the clerk had discharged his duty the signature of the judge authenticated the fact.

In many cases in Kentucky, in construing section 378 of the Kentucky Statutes, it has been held that unless the presiding judge signs the record of the day's proceedings as drawn up by the clerk, including the judgments in any cases heard, all that was done on that day becomes ineffective and cannot be enforced. This is because that section, being a positive law of the state, and as construed by her courts, explicitly requires that course to be pursued by her judges and her clerks. But that provision of the law of the state has no force as a law of the United States, unless the duty of the judge to sign the record of the entire day's proceedings comes fairly and properly within the terms of section 914 of the Revised Statutes of the United States as parts of the "practice and pleadings in civil actions" prescribed by the law of Kentucky. We have shown that that is not the case, because those matters are fully regulated by the Code of Practice from the commencement of the action to its close. This being so, its provisions were not intended to be affected by section 378 of the Kentucky Statutes which had reference to entirely different mat-

ters, namely, the personal conduct of the clerk and judge in recording and signing the record of the entire proceedings of the day, and not to their conduct in the trial of any given case.

At this point it may be observed that a most suggestive analogy is afforded by the thoroughly established rule in the federal courts that a judge in his personal administration of the duties of his office is not bound by any law of the state in which he sits, because that work of the judge does not come within the purview of the provisions of section 914. This general rule, especially as it regards the manner of charging juries (for example), has been announced in many cases. *Lincoln v. Power*, 151 U. S. 436, 442, 443, 14 Sup. Ct. 387, 38 L. Ed. 224; *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *Indianapolis, etc., R. R. v. Horst*, 93 U. S. 291, 23 L. Ed. 898.

Of course, if section 378 of the Kentucky Statutes had come within the purview of section 838 of the Kentucky Code of Practice (as did the Code provisions in Louisiana and New Jersey in the cases already referred to) it might possibly be different. But for reasons deemed sufficient by the Legislature, section 378 of the Kentucky Statutes was a separate and independent enactment to meet an entirely different need. It clearly was no part of the practice and pleadings of the parties to a civil action.

[5] After very careful consideration we have reached the conclusion that the period of six months from the entry, on June 3, 1919, of the judgment herein expired with December 3, 1919, and that the subsequent signing on January 22, 1920, on the order book of the court, of the record of the proceedings of June 3, 1919, upon the special reasons stated therefor, in no way changed the rights of either of the parties.

It is neither our habit nor our desire at any time to prevent appellate proceedings upon our judgments, but in this instance we are left no alternative but to deny the writ of error sought by defendant's petition therefor, and accordingly that is done.

ELLICOTT MACHINE CORPORATION v. VOGT BROS. MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1920.)

1. Courts ⇐354—Judgment not invalid because not entered in conformity with state practice.

Under a long-continued and well-understood practice of a federal court in Kentucky for the judge to approve and sign judgments and orders for entry by the clerk, and to sign the journal only at the close of the term, usually kept open until the beginning of the next term, a judgment so signed and entered *held* valid and effective from the date of its entry, notwithstanding Ky. St. § 378, which requires each day's proceedings to be signed by the judge, and under which, as construed by the state Court of Appeals, there is no valid judgment until the journal, or "order book," is signed by the judge.

2. Courts ⇐339—Conformity statute does not apply to manner of keeping and signing record.

Conformity statute (Rev. St. § 914 [Comp. St. § 1537]), which requires federal courts to conform "as near as may be" to the state practice, does not apply to the manner in which a judge shall perform his personal duties, and where, because of the number of terms a judge is required to hold in his district at different places, it is necessary or expedient for the prompt dispatch of business, it is within his discretion to keep one term open until the beginning of the next at the same place, and to sign the journal only at the close of the term, although a state statute requires that it be signed each day.

Application for Allowance of Writ of Error to the District Court, of the United States for the Western District of Kentucky; Walter Evans, Judge.

Action at law by the Ellicott Machine Corporation against the Vogt Brothers Manufacturing Company. Judgment for plaintiff, defendant's application for writ of error denied by trial court (267 Fed. 934), and defendant applies to the Circuit Court of Appeals for allowance of writ of error. Allowance refused.

Writ of error, certiorari, and mandamus denied 254 U. S. —, 41 Sup. Ct. 8, 64 L. Ed. —.

Alex P. Humphrey and Humphrey, Crawford & Middleton, all of Louisville, Ky., and Piper, Carey & Hall, of Baltimore, Md., for plaintiff.

Helm Bruce and Alex. G. Barrett, both of Louisville, Ky., for defendant.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. [1] A judgment having been rendered in favor of the Ellicott Company and against the Vogt Company, by the United States District Court for the Western District of Kentucky, and the District Judge having refused to allow a writ of error (267 Fed. 934), application is now made to this court therefor. It appears that the case was tried by jury, which rendered judgment for plaintiff on June 3, 1919. On the same day, a complete judgment in due form was written out, signed by the District Judge, and filed with the clerk, as part of the files in the case. Thereupon, and upon the same day,

the clerk entered the judgment at length upon the journal of the court, called, in Kentucky, the "Order Book," but did not (as we infer from the record) copy the signature of the judge. At the end of the then current term, and under date of October 11, 1919, immediately after the entry of the adjournment of the term, there appears upon the order book the signature of the District Judge. Upon the face of the judgment record of June 3d, there is also found the indorsement:

"For special reasons, the record of the proceedings of June 3, 1919, is signed this January 22, 1920. Walter Evans, Judge."

While the parties were engaged in the settlement of a bill of exceptions, the period of 6 months from and after June 3, 1919, expired. Thereafter the application for allowance of writ of error was made to the District Judge, and was denied by him, because he thought the application was too late under section 11 of the Circuit Court of Appeals Act (section 1647, U. S. Comp. St. 1916). Obviously he was right, unless for the effect of the further facts now to be stated. Section 378 of the Kentucky Statutes is as follows:

"The proceedings of each day shall be drawn up by the clerk from his minutes in a plain, legible manner, which, after being corrected as ordered by the court, and read in an audible voice, shall be signed by the presiding judge."

Construing this statute, the Court of Appeals of Kentucky has held that, giving due effect thereto, there is no valid judgment in existence until the day on which the judgment is signed by the judge on the order book. *Ewell v. Jackson*, 129 Ky. 214, 110 S. W. 860; *Farris v. Matthews*, 149 Ky. 455, 149 S. W. 896; *Interstate Co. v. Farris*, 159 Ky. 820, 169 S. W. 535. It is said that the effect of the familiar provisions of the Conformity Act (section 914, R. S.; section 1537, U. S. Comp. St. 1916) is to carry over into the court below the Kentucky statute as interpreted in these decisions, with the result that no valid judgment ever existed until October 11, 1919, or, more probably, until January 22, 1920, and that, since the application for writ of error was within 6 months after the earlier of these dates, it should have been allowed.

A situation at least superficially similar arose in *Del Valle v. Harrison*, 93 U. S. 233, 23 L. Ed. 892, in which it was held that no valid judgment existed in the District Court of Louisiana until it had been signed by the judge as required by the Louisiana Code (Code Prac. art. 546). If this decision is rightly applicable to the facts and circumstances here existing, the writ of error must be allowed.

It should be stated that Tennessee has a statute (sections 5852, subd. 5, and 5913 of Shan. Code of 1917-18) very similar to the above-quoted statute of Kentucky, although we do not find that it has been construed by the Supreme Court of Tennessee, and that, as we learn by inquiring of the District Judges, neither in Kentucky nor in Tennessee, for 20 years or more, has any judgment been signed by the judge upon the order book or journal of the court at the time of its rendition or thereafter, save as a signature sometimes made at the close of the term might take effect upon all judgments rendered during the term. In each of the districts in each of these two states, the

law requires sessions of the court to be held at least twice a year in each of from three to seven places scattered through the district. The practice has been universally to hold each term open at each place until the beginning of the next term. It has also been the practice, in every case where a judgment or order became ripe for entry after the judge had finished actual hearings and gone to another place, for him to authenticate by his signature a draft of the proper judgment entry or order and send it by mail to the clerk at the place of holding court, whereupon it was entered by the clerk and considered and treated as taking effect from the day of such entry. The general practice has been approved by the Supreme Court, but without reference to the point now involved. *U. S. v. Finnell*, 185 U. S. 236, 22 Sup. Ct. 633, 46 L. Ed. 890. It is clear that to sustain the contention of the applicants for this writ will, in one or perhaps both of these states, overturn a long-settled practice, and—as it would seem—invalidate all the law judgments and orders which have been entered in at least the Kentucky federal districts. This situation admonishes us that the Del Valle Case should be most carefully considered, before it is so applied as to have this effect.

With more specific reference to the practice in the district now immediately involved, the District Judge, in his memorandum, states that, upon his appointment, in 1899, he found himself confronted with the necessity of holding two terms each year in four different places; that it was often impracticable to have the order books ready for signature before he was compelled to leave for business at some other place in the district; that, in order to prevent delays, it was found to be necessary to keep each term of court open at each place until the next term there began; that it was not feasible to be continually sending the order books to him for his signature at whatever part of the district he might be; and that, after careful consideration of the subject-matter, he adopted, and has ever since pursued, the practice by which each judgment and order at law, which is to appear upon the order book, is written out upon a separate paper, and, when approved as to form, is signed by him. In so far as these matters are ready for entry from day to day while the judge remains at this place, they are handed to the clerk to file as a part of the record in the case, and are, by the clerk, transcribed upon the order book. Those which are not ready when the session at that place is suspended are thereafter in the same way approved and signed by the judge, sent by mail to the clerk, and by him filed and entered. This practice was not covered by any printed or published rule, but it was followed without exception, and has been familiar to, and understood by, all counsel practicing in the court, and its propriety and sufficiency have never been in any way questioned.

[2] We do not find that the Del Valle Case has ever been cited or applied by the Supreme or any federal court. In view of the fact that the Louisiana statute related to an act to be performed by the judge, and as it has now come to be the settled rule of the federal courts that the conformity statute does not apply to the manner in which the judge

shall perform his personal duties on the bench,¹ nor at all to appellate or review proceedings,² but only to the manner in which the parties shall bring the case to issue and to trial,³ or to substantial rights which the state statute gives to a party,⁴ it is suggested that the Del Valle Case, if originally intended to rest upon its construction of the Conformity Act, must be considered, to that extent, overruled; but we find no necessity for considering this question. Section 914 of the Revised Statutes directs that the state practice shall be followed by the federal courts as near as may be, any rule of the federal court notwithstanding. Revised Statutes, § 918 (section 1544, U. S. Comp. St. 1916), expressly grants to the federal trial courts power to make rules to "regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." There seems no way of reconciling these seemingly inconsistent provisions, unless through the effect of the "as near as may be" clause. There is ample room to say that where, in the judgment of the federal *nisi prius* court, the adoption of a particular practice is necessary or convenient to meet the particular needs of that court, and when there is reasonable basis for that judgment, the "as near as may be" clause will take effect, precise conformity will not be required, and the particular federal practice or rule will prevail. This seems to be the conclusion reached in *Shepard v. Adams*, 168 U. S. 618, 623-627, 18 Sup. Ct. 214, 42 L. Ed. 602. The substance of the decision is thus stated:

"We think it is sufficiently made to appear, by these citations from the statutes, that while it was the purpose of Congress to bring about a general uniformity in federal and state proceedings in civil cases * * * yet that it was also the intention to reach such uniformity often largely through the discretion of the federal courts, exercised in the form of general rules, adopted from time to time, and so regulating their own practice as may be necessary

¹*Nudd v. Burrows*, 91 U. S. 426, 441, 23 L. Ed. 286, charge to jury; *Indianapolis Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898, findings by jury; *Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224, charge to jury; *Mutual Ass'n v. Barry*, 131 U. S. 100, 119, 9 Sup. Ct. 755, 33 L. Ed. 60, and *Grimes Co. v. Malcolm*, 164 U. S. 483, 491, 17 Sup. Ct. 158, 41 L. Ed. 524, special verdicts; *Western Union v. Burgess* (C. C. A. 6) 108 Fed. 26, 32, 47 C. C. A. 168, charge to jury; *Insurance Co. v. Friedman* (C. C. A. 6) 133 Fed. 713, 726, 66 C. C. A. 543, keeping jury together; *Toledo Co. v. Reardon* (C. C. A. 6) 159 Fed. 366, 368, 86 C. C. A. 366, special questions; *Yates v. Coke Co.* (C. C. A. 6) 221 Fed. 603, 608, 137 C. C. A. 327, charge to jury.

²*Newcomb v. Wood*, 97 U. S. 581, 24 L. Ed. 1085, compulsory new trial; *Re Chateaugay Co.*, 128 U. S. 544, 553, 9 Sup. Ct. 150, 32 L. Ed. 508, bill of exceptions; *St. Clair v. U. S.*, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936, taking exceptions; *McDonald v. Pless*, 238 U. S. 264, 266, 35 Sup. Ct. 783, 59 L. Ed. 1300, impeaching a verdict; *Bristol Co. v. Boy* (C. C. A. 6) 261 Fed. 297, 302, remittitur.

³*Re Chateaugay Co.*, 128 U. S. 544, 554, 9 Sup. Ct. 150, 32 L. Ed. 508, bill of exceptions; *Insurance Co. v. Friedman* (C. C. A. 6) 133 Fed. 713, 726, 66 C. C. A. 543.

⁴*Sawin v. Kenny*, 93 U. S. 289, 23 L. Ed. 926, joint liability; *Equator Co. v. Hall*, 106 U. S. 86, 1 Sup. Ct. 128, 27 L. Ed. 114; and *Smale v. Mitchell*, 143 U. S. 99, 12 Sup. Ct. 353, 36 L. Ed. 90, compulsory second trial; *Barrett v. Virginian Co.*, 250 U. S. 473, 478, 39 Sup. Ct. 540, 63 L. Ed. 1092, and *Knight v. I. C. R. R.* (C. C. A. 6) 180 Fed. 370, 103 C. C. A. 514, voluntary nonsuits.

or convenient for the advancement of justice and the prevention of delays in proceedings."

The subject-matter was a rule for the service of process, and since it was not unreasonable to think that the powers and duties given to and imposed upon the federal court by Congress could be exercised more conveniently by disregarding the state practice and following the practice of the federal court, the adoption of the latter plan was held to be justified.

We think the present situation is within the principle according to which *Shepard v. Adams* was decided. It cannot be material that the long-established and thoroughly understood practice, followed and observed by every one, had never been formulated and published in a code of rules. Congress had required that the District Judge should hold the court in four different places. To be able to exercise this jurisdiction, and insure that the federal laws could be promptly executed wherever the aid of the court was required, it was at least convenient, if not reasonably necessary, that no term of court should be finally closed until the next term had arrived; it would be often inconvenient, and sometimes impracticable, for the District Judge to sign the order book in open court; and the practice adopted by the District Judge clearly tends to "the advancement of justice and the prevention of delays in proceedings," and so supports the exercise of the power conferred by section 918. It does not depart from that "as near as may be" conformity which is all that is required by section 914. It is not without importance that Congress contemplates the holding of court in this district by any District Judge within the circuit, and District Courts in Kentucky may be, and often have been, held by judges from Michigan, Ohio, and Tennessee. If one of these judges presides at a trial in Kentucky, it is hardly to be inferred that the effect of the conformity statute alone can make it necessary for him to return to the district in order to sign the order book, if the judgment is to be entered after denial of motion for new trial, or any other steps taken which commonly occur after the judge has finished his hearings and gone home. This emphasizes the thought that entire conformity is not practicable.

There is no inconsistency between the *Del Valle Case* and our conclusion that the present case is within *Shepard v. Adams*. Louisiana then had only one place of holding the federal court, the city of New Orleans, and the judge was presumptively always present. There would therefore have been no such basis as here existed for the adoption of a rule like the one in the court below; and not only was this true, but the Louisiana District Court had adopted, as its own rule, the rule of the Louisiana Code, and the *Del Valle Case* presents no possible question of reconciliation between sections 914 and 918. In view of *Shepard v. Adams* and the other cases to the same effect,⁵

⁵*Indianapolis Co. v. Horst*, 92 U. S. 291, 300, 23 L. Ed. 898 (no duty to follow subordinate state rules which incumber, act is to some extent only advisory); *Mexican Ry. v. Pinkney*, 149 U. S. 194, 207, 13 Sup. Ct. 859, 37 L. Ed. 699 (act leaves the federal courts some degree of discretion); *Southern Co. v. Denton*, 146 U. S. 202, 208, 13 Sup. Ct. 44, 36 L. Ed. 912 (act not followed where it

we think it right to assume that if the situation in Louisiana had justified such a federal court rule as is here involved, and if such a rule had been made and observed without question as to all the judgments of the court for 20 years, the decision in the Del Valle Case would have been the other way.

We conclude that the judgment below was validly rendered on June 3, 1919, and it follows that the application for the writ was too late. Allowance is refused.

WITHERELL & DOBBINS CO. v. UNITED SHOE MACHINERY CO.

(Circuit Court of Appeals, First Circuit. June 18, 1919. On Rehearing, November 9, 1920.)

No. 1387.

1. Pleading \S 8(3)—Averment of illegal combination held a conclusion of pleader.

Allegations of answer relative to plaintiff being an illegal combination under Anti-Trust Act July 2, 1890 (Comp. St. §§ 8820-8823, 8827-8830), and the leases of shoe machines sued on being direct and material parts of the combination and themselves illegal, held mere conclusions of pleader.

2. Pleading \S 8(3)—Averment of transaction in interstate commerce held a conclusion.

Relative to leases of shoe machinery being transactions in the course of interstate commerce, which alone are made unlawful by Clayton Act Oct. 15, 1914, § 3 (Comp. St. § 8835c), allegation of answer merely that they were made in the course of such commerce is a conclusion of the pleader.

3. Pleading \S 214(4)—Demurrer does not admit conclusions.

A demurrer admits only facts well pleaded, and not conclusions of law.

On Rehearing.

4. Monopolies \S 12(2)—Requirement of royalties on output of other machines not prohibition of other machines.

The requirement in a lease of shoe machinery that the lessee shall operate the machines to capacity limited only by his total output, and shall pay a royalty on all shoes made by him, without proof that the burden thereby imposed on the manufacturer was so great as to prevent him from obtaining machines from others, is not void under Acts Mass. 1907, c. 469, § 1, prohibiting provision in a lease of machinery that the lessee shall not use machinery of any person other than the lessor, which is a penal statute and must be strictly construed.

In Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

Action by the United Shoe Machinery Company against the Withere'll & Dobbins Company. Demurrer to answer was sustained, and defendant brings error. Judgment vacated, and case remanded on rehearing.

brings conflict with approved rule of general federal practice); Chappell v. U. S., 160 U. S. 499, 514, 16 Sup. Ct. 397, 40 L. Ed. 510 (similar act not followed into an unnecessary and unwise incumbrance of federal practice); Hills v. Hoover, 220 U. S. 329, 336, 31 Sup. Ct. 402, 55 L. Ed. 485, Ann. Cas. 1912C, 562 (act will not be followed when it defeats or incumbers the administration of federal laws); McDonald v. Pless, 238 U. S. 264, 35 Sup. Ct. 783, 59 L. Ed. 1300 (federal courts must adopt their own self-preserving rules).

Richard M. Walsh, of Boston, Mass. (Danforth W. Comins, of Boston, Mass., on the brief), for plaintiff in error.

Charles F. Choate, Jr., of Boston, Mass. (Malcolm Donald and James Garfield, both of Boston, Mass., on the brief), for defendant in error.

Before BINGHAM and JOHNSON, Circuit Judges, and ALDRICH, District Judge.

BINGHAM, Circuit Judge. This is an action of contract brought by the United Shoe Machinery Company, a New Jersey corporation, against the Witherell & Dobbins Company, a Massachusetts corporation, to recover royalties for the use of five Goodyear welt and turn shoe machines, model K, numbered 67, 58, 216, 628, and 740, leased by the plaintiff to the defendant on September 10, 1912, January 9, 1913, and February 25, 1913. In all of the leases the material conditions and provisions are the same, and the machines leased are of the same model. The machines are patented, and are designed to sew the welt to the upper on welted boots and shoes, and to sew the sole to the upper on turned boots and shoes. The patents, at the date of the leases, were and ever since have been owned by the plaintiff.

In the declaration the material conditions and provisions of the leases are set forth, and the leases are annexed and made a part thereof. It is alleged that the leases are in full force and effect; that the defendant, since July 1, 1913, to and including October, 1916, has manufactured and prepared large quantities of turn boots, shoes, and other footwear, the soles of which have been sewed to the uppers by the use of sewing or stitching machinery; that the defendant, although requested, has failed to pay the plaintiff the sum of 1 cent for each pair of children's boots, shoes, and other footwear, and 1½ cents for each pair of men's, boys', youths', women's and misses' boots, shoes, or other footwear, or any sums whatsoever, as required by its agreements; that it has failed to comply with its agreements to use the machines to their full capacity, and, instead of so doing, has, to a considerable extent, at least, used machines obtained from others on the shoes which it manufactured.

The machines were to be used in the defendant's factory at Haverhill, Mass. The leases contain the following provisions:

"(7) Said machinery shall be used for no other purposes than for performing the operations for which it is designed in the manufacture of 'Goodyear Welts' and 'Goodyear Turns' made by or for the licensee and for that purpose the licensee shall use the said machinery to its full capacity limited only by the number of welted or turned boots, shoes and other footwear made by or for the licensee.

"(8) The licensee until such time as he shall have redelivered all of said machinery to the United Company as hereinafter provided shall pay to the United Company the respective amounts set forth in the following schedule in respect to each pair of welted boots, shoes or other footwear or portions thereof, manufactured or prepared by or for him which shall have been welted in whole or in part or the soles of which shall have been in whole or in part attached to welts by the use of any welting or stitching or sewing machinery and in respect to each pair of 'turned' boots, shoes or other footwear, or portions thereof, manufactured or prepared by or for him, the soles of which have been sewed or attached to their uppers in whole or in part by the use

of any sewing or stitching machinery, viz.: [Then follows a schedule of payments per pair.]”

“(10) All payments and the guaranty in this agreement provided for are independent of and in addition to all payments and guaranties provided for in any other leases or licenses or agreements between the United Company and the licensee; provided, however, that (excepting in so far as is required by the guaranties herein contained in other lease and license agreements between the United Company and the licensee), in case under any ‘Goodyear Department’ lease and license agreement between the United Company and the licensee and covering any one or more Goodyear welt and turn shoe machines, Goodyear universal inseam sewing machines or Goodyear outsole rapid lock-stitch machines, the licensee shall have paid to the United Company the amount set forth in the schedule of payments in such lease and license agreement contained in respect to any pair of boots, shoes or other footwear, then the licensee shall be relieved from said payment hereunder in respect to that pair of boots, shoes or other footwear.”

“(12) The lease of and license to use the said machinery may be terminated either by the United Company or by the licensee at any time upon thirty (30) days’ notice in writing to the other of such termination. If terminated by the licensee in the exercise of his right hereunder the notice of the licensee to the United Company shall be accompanied by payment to the United Company of the amount in respect to each machine set opposite the name thereof in column ‘II’ in the foregoing schedule of machines [\$150], otherwise such notice shall be of no effect; and he shall also pay in respect to all broken or missing parts as hereinafter provided.

“(13) The United Company shall also have the right to terminate the lease of and license to use the said machines forthwith in case at any time any breach or default shall be made in the observance or performance of any of the conditions contained in any other lease or license or agreement between the United Company and the licensee, or if the licensee shall become bankrupt or insolvent or a receiving order shall be made against him or he shall make or execute any bill of sale, deed of trust or assignment for the benefit of creditors, or if a sale, mortgage, lease or removal of said machinery or any part thereof shall be made or attempted, or if any distress, execution or attachment be levied thereon and this notwithstanding that previous instances may have been unnoticed, waived or condoned by the United Company.”

In its answer the defendant admits that it entered into the agreements of September 23, 1912, January 9, 1913, and February 25, 1913; that all the machines leased thereunder were of model K, but deny that the leases were of any legal force or effect. It admits that it has manufactured shoes and other footwear which have had their soles attached to their uppers by the use of machines not obtained from the plaintiff, and that it has not paid the plaintiff royalties upon such footwear, but avers that it has paid the plaintiff royalties upon all footwear made upon machines of the plaintiff leased by it. It avers: (1) That the plaintiff is and at all times during the period covered by said agreements has been an unlawful combination in restraint of interstate trade and commerce in the manufacture and distribution of machinery used in the manufacture of shoes and other footwear and more especially of bottoming shoe machinery; that it has been and is engaged in an attempt to unlawfully monopolize, and has unlawfully monopolized, the manufacture and distribution in interstate commerce to the extent of 95 per cent. of all bottoming shoe machinery, and the machinery of the kind involved in the agreements sued upon; that said leases here sued upon are a part of a system of leases whereby said unlawful acts are being accomplished and said unlawful monopoly is

being maintained, and themselves unreasonably restrain interstate trade and commerce; and that by reason of the unlawful monopoly and attempt to monopolize, and unlawful combination hereinbefore described, the defendant has been compelled to enter into the agreements upon which the plaintiff is here suing, or in the alternative discontinue business.

It further avers: (2) That the agreements are illegal and void: In that they are made in the course of interstate commerce and constitute contracts upon the condition, agreement, and understanding that the lessee shall not use or deal in the machinery of a competitor or competitors of the lessor, the effect of such leases, and the agreement, understanding, and condition governing them, being to substantially lessen competition and to tend to create a monopoly in the manufacture and distribution in interstate commerce of shoe machinery, and more especially bottoming shoe machinery; and further (3) that the leases sued upon are leases of machinery upon the condition and provision that the lessee shall not buy, lease, or use machinery of any person, firm, corporation, or association other than the lessor, and are illegal and void, as being in contravention of chapter 469 of the Acts and Resolves of the Commonwealth of Massachusetts for the year 1907.

To the defendant's answer the plaintiff demurred and assigned the following causes:

"(1) Because the answer does not set forth any legal defense to the plaintiff's claim.

"(2) If it should be proved, as the defendant claims, that the plaintiff was an unlawful combination of the character described in the answer, such fact would not be a defense in a suit for the collection of royalties for the use of its machines which the defendant has agreed to pay.

"(3) The agreements sued on are not contracts upon the condition, agreement, or understanding that the lessee shall not use or deal in the machinery of a competitor, and the effect of said agreements is not to substantially lessen competition, nor do they tend to create a monopoly.

"(4) The agreements sued on are not contracts upon the condition or provision that the purchaser or lessee thereof shall not buy, lease, or use machinery of any person other than the lessor."

In the District Court the demurrer was sustained, and by agreement of the parties judgment was entered for the plaintiff in the sum of \$8,315.34, subject to the defendant's right to prosecute this writ of error.

[1] The first question to be considered is whether subdivision (1) of the answer, as here set out, states facts sufficient to support the conclusion of the pleader that the plaintiff is an unlawful combination and conspiracy in restraint of interstate trade and was formed for the purpose of monopolizing and restraining trade in violation of the act of July 2, 1890 (26 Stat. 209, c. 647 [Comp. St. §§ 8820-8823, 8827-8830]), and that the leases sued upon are constituent parts of that unlawful combination and conspiracy and are therefore illegal in themselves.

The most recent case in the Supreme Court, where a like question was considered and in which the prior decisions of that court in *Connolly v. Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679,

and *Continental Wall Paper Co. v. Voight & Sons*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486, are reviewed, is *Wilder Mfg. Co. v. Corn Products Co.*, 236 U. S. 169, 35 Sup. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118. That case was an action brought by the Products Company to recover the price of corn syrup which it had sold to the Wilder Company, and which the latter had consumed and not paid for. One of the grounds on which the Wilder Company defended was that the Products Company had no legal existence; that it was a combination composed of all the manufacturers of corn syrup in the United States, and was illegally organized with the object of controlling all the dealings in such products, in violation of the Anti-Trust Act; that, having illegally brought into one organization all the manufacturers of corn syrup, it had unreasonably advanced the price of the products of its manufacture to the injury of the public; that, having accomplished this, it sought to perpetuate its monopoly by rendering it difficult or impossible for competitors to go into the business of producing corn syrup by devising a so-called profit-sharing scheme, by which it proposed to give those who purchased from the combination a certain percentage of the amount of purchases made in one year, to be paid at the end of the following year, on condition that during such time they dealt with no one else but the combination; and that the scheme proved successful and deterred purchasers from buying from others at a less price through fear of losing the percentage which they would receive from the combination if they continued to make all of their purchases from it alone.

The defense there set out will be seen to be more specific in its allegations of fact than the answer here under consideration. It was held (1) that the contract of sale was not inherently illegal because it contained the condition which made payment of the proposed profit-sharing percentage depend on dealing alone with the alleged combination, and (2) that the contention that these stipulations in the contract, though intrinsically legal, became illegal as a result of the duty to consider them from the point of view that one of the parties was an illegal combination, interested in inserting such conditions as an efficient means of sustaining its wrongdoing and therefore giving power to accomplish the baneful and prohibited results of its illegal organization, could not be sustained, (a) because it was not consistent with reason, and (b) was repugnant to the Anti-Trust Act; that under that act the Attorney General of the United States and the district attorneys of the United States in their respective districts, under his authority and direction, are charged with the responsibility of enforcing its provisions, and that any individual, as a means to the defense of a suit brought against him on his otherwise inherently legal and enforceable contract, could not assert that the corporation or combination bringing the suit had no legal existence because of the Anti-Trust Act; that the contention of the defendant that it was held in the *Continental Wall Paper Case* that that which was inherently legal could be rendered illegal by considering it in connection with the illegal corporation, with which it had no right to consider it, was clearly not so; that—

"The ruling in that case was based not upon any supposed right to import into a legal and valid contract elements of wrong which there was no right to consider, but was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case, which elements of illegality may be thus summarized: (a) The relations of the contracting parties to the goods sold; (b) the want of real ownership in the seller; (c) the peculiar obligations which were imposed upon the buyer; and (d) the fact that to allow the nominal seller to enforce the payment of the price would have been in and of itself directly to sanction and give effect to a violation of the Anti-Trust Act inhering in the sale."

It has not been pointed out to us, and we are unable to see, that the answer states facts from which it can be concluded that the plaintiff is an illegal combination under the Anti-Trust Act, and that the leases sued on are direct and material parts of the combination, and themselves illegal within the above decisions. Such allegations as the answer contains with reference to these matters are conclusions of the pleader, and not admitted by the demurrer. *Southern Railway Co. v. King*, 217 U. S. 524, 536, 537, 30 Sup. Ct. 594, 54 L. Ed. 868; *Pierce Oil Corp. v. City of Hope* (decided January 27, 1919) 248 U. S. 498, 39 Sup. Ct. 172, 63 L. Ed. 381. We think, therefore, that the District Court was right in sustaining the demurrer as to this part of the answer.

[2] It remains to be considered whether, in view of the allegations of the answer, the leases are illegal and void either under the Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730) or chapter 469 of the Acts and Resolves of Massachusetts of 1907.

Section 3 of the Clayton Act (Comp. St. § 8835c) provides:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease * * * machinery, * * * whether patented or unpatented, for use * * * within the United States, * * * or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee * * * there-of shall not use * * * the * * * machinery * * * of a competitor * * * of the lessor, * * * where the effect of such lease * * * or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The lease or transaction made unlawful by this act is one made in the course of interstate commerce. *International Text-Book Co. v. Pigg*, 217 U. S. 91, 107, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; *Butler Bros. Shoe Co. v. United States*, 156 Fed. 1, 17, 84 C. C. A. 167.

[3] The answer alleges that the leases are illegal and void for the reason that they "were made in the course of interstate commerce and constitute contracts upon the condition, agreement, and understanding that the lessee shall not use or deal in the machinery of a competitor or competitors of the lessor," etc. No facts are set out in the answer showing wherein the leases were transactions made in the course of interstate commerce. The allegation that they were made in the course of such commerce is a conclusion of the pleader, and, being such, is not admitted by the demurrer. The demurrer admits all material statements of fact contained in the answer which are well pleaded, but

not inferences or conclusions of law incorporated therein. *Williams v. Mathewson*, 73 N. H. 242, 243, 60 Atl. 687, and cases before cited.

Indeed it would seem from provisions contained in the leases that facts did not exist which could have been alleged in the answer showing that the leases were transactions in the course of interstate commerce, for it there appears that the machines were to be delivered to the defendant at Haverhill, Mass., for use in its factory at that place, and that, upon the termination of the leases, the defendant was to redeliver the machines to the plaintiff at Beverly, Mass. We have no occasion, therefore, to consider the question whether the leases, if they had been transactions made in the course of interstate commerce, were illegal and void as being in violation of the provisions of section 3.

Chapter 469 of the Acts and Resolves of Massachusetts of 1907, is as follows:

"Section 1. No person, firm, corporation or association shall insert in or make it a condition or provision of any sale or lease of any tool, implement, appliance or machinery that the purchaser or lessee thereof shall not buy, lease or use machinery, tools, implements or appliances or material or merchandise of any person, firm, corporation or association other than such vendor, or lessor; but this provision shall not impair the right, if any, of the vendor or lessor of any tool, implement, appliance or machinery protected by a lawful patent right vested in such vendor or lessor to require by virtue of such patent right the vendee or lessee to purchase or lease from such vendor or lessor such component and constituent parts of said tool, implement, appliance or machinery as the vendee or lessee may thereafter require during the continuance of such patent right: Provided, that nothing in this act shall be construed to prohibit the appointment of agents or sole agents to sell or lease machinery, tools, implements or appliances.

"Sec. 2. Any person, firm, corporation or association, * * * that violates the provisions of this act shall be punished for each offense by a fine not exceeding five thousand dollars.

"All leases, sales or agreements therefor hereafter made in violation of any of the provisions of this act shall be void as to any and all of the terms or conditions thereof in violation of said provisions."

In its answer the defendant says that the leases are rendered illegal and void by this statute, in that they are leases of machinery upon the condition and provision that the lessee shall not buy, lease, or use the machinery of any person, firm, association, or corporation other than the lessor. But the last paragraph of the act is apparently less broad than the defendant would seem to think, for it says that leases made in violation of its provisions shall be void as to the "terms or conditions thereof in violation of said provisions."

The question therefore is whether the leases contain provisions or conditions which in terms or in effect provide that the defendant will not use the machines of others, and, if so, whether the obligation to pay royalties is such an integral part of or so dependent upon such conditions or provisions that the obligation to pay the same is rendered void by the statute.

The leases contain provisions that the defendant shall use the leased machines to their full capacity, and shall pay therefor as royalties so much per pair on its output. The declaration alleges that the defendant has failed to pay the price agreed per pair on its output; that the

exact number of shoes on which it has failed to pay the plaintiff as agreed is unknown to it, but is in excess of 600,000 pairs; that said shoes have had their soles attached to their uppers by the use of machines not obtained from the plaintiff, although during a considerable part, if not all, of the time when said shoes were being manufactured, the leased machines were idle or not used to capacity, and said shoes or a greater part thereof could have had their soles attached to the uppers by said machines if the defendant had complied with its agreement to use such machines to their full capacity.

In the defendant's answer it is admitted that it has manufactured shoes which have had the soles attached to their uppers by the use of machines not obtained from the plaintiff, and that it has not paid the plaintiff royalties therefor, but has paid royalties on all the shoes made upon the leased machines.

The defendant contends that, inasmuch as what the plaintiff is here seeking to recover are royalties based upon the use made by the defendant of machines of others—all royalties based on the use of the leased machines having been paid—and the use of machines of others is, as alleged in the declaration, a breach of the covenant to use the leased machines to their full capacity, the full capacity covenant is in substance and effect a provision or condition binding the defendant not to use the machines of others upon its output.

On the other hand, the plaintiff contends that the leases do not contain provisions that in terms obligate the defendant not to use the machines of others, and that no such obligation can be implied from the provisions or conditions imposed.

While the covenant to use the leased machines to their full capacity is in terms affirmative, its operative effect, as disclosed in the declaration, is negative, and requires the defendant not to use the machines of others, to the extent that the leased machines are capable of performing its work, or suffer a forfeiture; and, as the agreement of the defendant to pay royalties on its output was evidently inserted, not only for the purpose of requiring the defendant to fulfill the above-described obligation, but to further enlarge and extend its scope, we think it thus became so related thereto that it is in violation of the Massachusetts statute, and the demurrer should be overruled. The plaintiff, however, will be permitted to withdraw its demurrer and plead over if it so desires.

The demurrer is overruled, and the case is remanded to the District Court for further proceedings not inconsistent with this opinion, with costs in this court to the plaintiff in error.

On Rehearing.

After our former opinion of June 18, 1919, was handed down the plaintiff moved for a rehearing, and on October 21, 1919, further argument was invited "as to the meaning of the provisions of chapter 469 of the Acts and Resolves of Massachusetts of 1907 and their application to and effect upon the provisions of the leases in question in

this action." Since then additional briefs have been filed and arguments had.

The plaintiff bases its right to recover for the use of its machines upon what is called the factory output provision, the terms of which are stated in paragraphs 8, 9, and 10 of the leases. Under it the lessee is required to pay for the use of a machine a certain sum "in respect to each pair of welted boots, shoes or other foot wear or portions thereof, manufactured or prepared by or for him which shall have been welted in whole or in part or the soles of which shall have been in whole or in part attached to welts by the use of any welting or stitching or sewing machinery, and in respect to each pair of 'turned' boots, shoes or other footwear, or portions thereof, manufactured or prepared by or for him, the soles of which have been sewed or attached to their uppers in whole or in part by the use of any sewing or stitching machinery." It was provided, however, that in case the lessee had paid the amount set out in the schedule of payments of a given lease in respect to any pair of boots, shoes, or other footwear, then he should be relieved from paying under any other of its leases in respect to that pair of boots, shoes, or other footwear. In other words, a lessee is required to pay for the use of a given machine royalties based on his entire output even though the leased machine is incapable of performing the work required for the output, but may have other machines from the plaintiff to perform this additional work without increased expense. He may, if he desires, upon 30 days' notice and the payment of \$150, cancel his lease; but if he does not cancel the lease and obtains the additional machines elsewhere he subjects himself to paying the plaintiff on the output of the mill for the use of its machine, as well as paying for the use of machines obtained elsewhere to perform the additional work.

The question therefore is whether the factory output provision amounts to a condition or provision that the lessee "shall not buy, lease or use machinery * * * of any person, firm, corporation or association other than" the lessor within the meaning of section 1 of chapter 469 of the Acts and Resolves of Massachusetts of 1907.

[4] It is plain that the operative effect of this undertaking is to induce the defendant to take the necessary additional machines from the plaintiff and to refrain from taking them from others; but it is not in terms an agreement or undertaking that it will do so, and we cannot say, as matter of law, that the burden imposed is so great that the parties must have understood that the lessee was not to obtain machines from others. The Massachusetts act is a penal statute and is to be strictly construed, and so construed it contemplates that a lease, in order to be within its provisions, shall be made upon the condition or agreement that the lessee shall not buy, lease, or use the machinery of others. As the output clause does not in terms impose such a condition or agreement, and the answer does not allege facts showing such to be its legal and necessary effect, we cannot say that under it a lessee is required to procure machines only from the plaintiff.

Whether the leases contain other provisions in violation of the act we are not called upon to consider, as this is the only provision relied

upon, and the Massachusetts act renders leases void only to the extent that the terms or conditions thereof violate the provisions of the act.

As it is not alleged in the answer that the burden imposed by the output clause is so great as to require the defendant to obtain all its machines from the plaintiff, it may be accorded an opportunity to amend its answer in this respect, if it so desires; otherwise judgment should be entered for the plaintiff.

Our previous order in this case is modified to read as follows:

The judgment of the District Court is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion, with costs to the defendant in error.

In re MORGAN et al.

(Circuit Court of Appeals, Second Circuit. June 2, 1920.)

No. 228.

1. Bankruptcy §407(5)—False statement to obtain credit which will bar discharge.

A false statement on which a bankrupt obtained money or property on credit, which will bar his discharge, under Bankruptcy Act, § 14b, subd. 3 (Comp. St. § 9598), must be a financial statement, as distinguished from a mere misrepresentation.

2. Bankruptcy §407(5)—Fraudulent contracting of debt not bar to discharge.

A discharge does not release a bankrupt from debts fraudulently contracted, and it was not intended that he should be refused discharge from all of his debts, because he may have contracted one or more fraudulently.

3. Bankruptcy §407(5)—Discharge; "obtaining money or property on credit."

That purchasers of stock in a newly formed corporation organized by bankrupts instead of the stock, were given receipts which entitled them to certificates of stock when issued, held not to constitute the obtaining by bankrupts of money or property on credit, within the meaning of Bankruptcy Act, § 14b, subd. 3 (Comp. St. § 9598).

4. Bankruptcy §407(5)—"Obtained money or property on credit on a materially false statement" as ground for denial of discharge construed.

The phrase "obtained money or credit on a materially false statement," as used in Bankruptcy Act, § 14b, subd. 3 (Comp. St. § 9598), stating ground for denial of discharge, was intended to require the falsity to be tested as to its materiality to the obtaining of credit.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Obtaining Credit on False Statement.]

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of Morgan, Truett & Co., a partnership, and Daniel H. Morgan, Edward P. Truett, and Frederick H. Hovey, individually, bankrupts. On appeal by Daniel H. Morgan and Edward P. Truett, from an order denying them discharge. Reversed.

Rabenold & Scribner, of New York City (Allan R. Campbell, of New York City, of counsel), for appellants.

Arthur F. Gotthold, of New York City (Arthur F. Gotthold and Meyer Boskey, both of New York City, of counsel), for appellee Miner.

Hunt, Hill & Betts, of New York City (George C. Sprague, of New York City, of counsel), for objecting creditor.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On April 24, 1918, the stock brokerage firm of Morgan, Truett & Co. was adjudicated a bankrupt. The individual partners, Daniel H. Morgan, Edward P. Truett, and Frederick H. Hovey, were also adjudicated bankrupts. They applied for their discharge, and in April and May, 1919, objections to their discharge were filed. The action of the District Court resulted in the discharge of Frederick H. Hovey; the appellants were denied their discharge. The objections to the discharge, which were sustained by the District Court, specified that the appellants obtained money or property on credit upon a false statement made for the purpose of obtaining credit.

The claim of obtaining money or property on credit is based on three transactions in the sale of stock. Morgan and Truett acted as organization managers of the Iowa Securities Company, a corporation formed in 1915. Morgan and Truett contracted to buy, for \$108,000, blocks of stock of the Iowa State Savings Bank and the Farmers' Live Stock Loan Company from Mr. Montgomery, who was the president of each company. The savings bank was paying dividends on its stock. The live stock company was loaning money to Western cattle raisers upon their notes, with chattel mortgages upon the cattle. It, too, was making profits. Morgan and Truett organized the Iowa Securities Corporation, intending it to be a holding company to take the stock of the bank and that of the live stock company, intending to turn over all the stock to it. The corporation issued \$125,000, par value, preferred stock, and a like amount of common stock. The stock was offered for sale on the basis of \$110 for a share of preferred, together with a quarter share or half share of common. It was intended to use the money secured in the sale of the Iowa Securities Company stock to make good on the contract with Montgomery, thus paying for the stock of the savings bank and the live stock company. Morgan and Truett had obligated themselves to Montgomery for the payment of these stocks. This plan of financing and of doing business was carried out to the extent indicated, and then the Iowa Securities Corporation stock was offered for sale. It resulted in the three transactions with which we are concerned in the determination of the issues here.

In April, 1917, at the organization meeting of the Iowa Securities Corporation, the offer of the firm to transfer to the corporation the blocks of stock of the bank and loan companies was accepted, and the officers of the corporation were authorized by resolution to issue to Morgan, Truett & Co. certificates for the stock of the corporation on receiving the securities also offered. The securities were still in the name of Morgan and Truett, and were still held as collateral by the

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The contention of the appellees is that the bankrupt obtained money on credit on a materially false statement in writing, which was made to both Mrs. Wilson and Mr. Gartz. The false statement is said to be contained in the representation of ownership of the underlying securities and the promise by the organization managers to deliver stock in the future. The statute (section 14b, subd. 3, of the Bankruptcy Act [Comp. St. § 9598]) provides that the judge shall discharge, unless the bankrupt has obtained money or property on credit on a materially false statement in writing for the purpose of obtaining credit from such person.

[1] The argument of the appellee seems to be that the bankrupts obtained money upon the statement referred to; that they thereby obtained credit, and thereafter they obtained the money on credit upon the statement. But the language of the statute limits the refusal to discharge to obtaining money or property on credit upon a materially false statement in writing by him to any person or his representative for the purpose of obtaining credit from such person. It is plain that the intention of Congress was to extend not the statute to all cases of false written statements where credit happens to be given, and the thought being to confine the statute to cases where the decision to give credit was induced by the false statement. Such statement must be a financial statement, as distinguished from a mere misrepresentation.

[2] A debt fraudulently contracted by the bankrupt will not be released by his discharge. Therefore the debts in question, which the court below found were contracted fraudulently, may fall within this provision of the act. Congress, however, never intended to refuse a bankrupt his release from all of his debts because he had contracted one or more fraudulently. The phrase "for the purpose of obtaining credit" contemplates a statement fitted to such purpose. It is intended to mean "to obtain money or property on credit." Each of the phrases in the statute must be given its appropriate meaning. The phrases "on credit" and "for the purpose of obtaining credit" should not be treated as redundant. The phrase "upon a materially false statement" follows immediately after "on credit," and therefore it is apparent that Congress intended to qualify the whole clause, to "obtain money or property on credit." We think it was intended to mean that the credit obtained upon a materially false statement required the falsity to be tested as to its materiality to the obtaining of the credit.

[3] The statute, in using both terms, is limited to statements made for such a purpose. Morgan, Truett & Co. and Mrs. Wilson and Mr. Gartz, the creditors, contracted for the purchase of stock. It is true there was no delivery of the certificate of stock, but there was a receipt given. It was a present purchase. The stock certificate was agreed to be delivered after preparation of engraved certificates. This did not make it an executory transaction. The sale was completed upon the signing of the contract and delivery of the subscription receipt. A discharge in bankruptcy is refused when the bankrupt has made false written statements as to his financial standing and thereby obtained money or property from any one relying on the statement. Fire-

stone v. Harvey, 174 Fed. 574, 98 C. C. A. 420; *In re Bleyer*, 215 Fed. 896, 132 C. C. A. 236.

In refusing a discharge, the court should never take into consideration the conduct or misstatements which could never have had anything to do with the extension of credit; nor do we think that Mrs. Wilson or Mr. Gartz were induced by anything contained in the statement to make the purchase. The testimony, of both shows that, if anything they were misled in investing, and that they were not misled into giving credit. Mrs. Wilson says she did not rely upon any false statement of the appellants, or of the corporation's financial standing. She accepted the receipt and treated it as a consummated sale of stock. She said she relied upon the fact that she had already received a dividend when she bought the second block of stock. Mr. Gartz says that his interest was in learning about the financial responsibility of the brokerage house. He said he thought that, if the brokerage house came up to the standard of probity and honesty that the agent, Henry, gave them, they would not take anything which was "fishy."

[4] There is nothing in the record indicating that, at the time either of the investors made their decision to invest, the taking of a subscription receipt rather than a stock certificate was contemplated, or even suggested. Nor is there any evidence indicating that the investors had in mind a distinction between a subscription receipt and the stock certificate. Nor does the evidence indicate that the statements made, and now complained of as false, could have influenced the investors to disregard this difference. It may be that the bankrupts obtained money upon the statement. They did not, however, obtain credit upon the statement, and therefore did not obtain money on credit upon the statement. The Bankruptcy Act limited the cases where so severe a penalty is inflicted as a refusal to grant a discharge from the bankrupt's provable debts upon the objection of a creditor to moneys or property obtained on false statements made for the purpose of obtaining credit. It is intended that acts done prior to the bankruptcy proceeding, which amount to a fraud on the system of commercial credit, shall be regulated by the Bankruptcy Law, such as falsification, destruction or omission to keep books of account; the obtaining of credit by fraud; the transfer or concealment of property in fraud of creditors prior to the bankruptcy.

The bankruptcy proceedings here were brought against the brokerage firm, because of its failure in that business. The transaction of Morgan and Truett respecting Iowa Securities Corporation was carried on by them in a separate enterprise, with which the stock exchange firm had nothing to do. No act done by them in their stock exchange business is alleged in opposition to their discharge. They are denied a discharge for misconduct in an outside matter, which was not essentially connected with their obtaining of credit, and nothing whatever to do with their bankruptcy. If it is immaterial whether the question of giving credit was considered at all by the creditors defrauded, then it should make no difference in the application of the statute whether the credit given is intended or unintended; for, if that be so, then the statute extends to any extension in which the bankrupt obtains money

or property on a false written statement. A person who thus parts with his money is left with an unsecured claim against the bankrupt, whether in contract or for deceit, and has fraudulently or otherwise given him credit.

To give the construction of the statute as contended for by the appellees, the words "upon credit" in the statute must be deemed superfluous. We think Congress intended that the bankrupt should be discharged, unless the statutory grounds of objection to the discharge are made out clearly. We are satisfied that the sale was not obtained by a materially false statement in writing, within the meaning of the act, and we fail to perceive any sufficient ground for refusing the discharge of the appellants. It would be at variance with the general policy of the bankruptcy court to deny the discharge under the proof here.

The order is reversed, and the District Court directed to grant a discharge.

FEATHERS OF WILD BIRDS (ARBIB, Claimant) v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 26, 1920.)

No. 162.

1. Customs duties ☞130—Prohibited article "imported" and knowingly brought in, subject to forfeiture.

Under Rev. St. § 3082 (Comp. St. § 5785), providing for forfeiture of merchandise fraudulently or knowingly imported contrary to law, articles prohibited from importation, if actually brought into the county, are "imported," and, if knowingly brought in, are subject to forfeiture.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Import.]

2. Customs duties ☞130—Evidence warranting forfeiture of prohibited articles.

The finding of feathers of a kind the importation of which is prohibited in the possession of claimant, in the absence of a consistent explanation, held probable cause, and to sustain a judgment of forfeiture, under Rev. St. § 3082 (Comp. St. § 5785), and Tariff Act, § 3, par. T (Comp. St. § 5791).

3. Customs duties ☞130—Suit for forfeiture, ground for suspicion is "probable cause."

In Tariff Act, § 3, par. T (Comp. St. § 5791), providing that in suits for forfeiture the burden of proof shall be on the claimant, "provided that probable cause is shown for such prosecution to be judged of by the court," "probable cause" means no more than present circumstances creating suspicion.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Probable Cause.]

Appeal from the District Court of the United States for the Southern District of New York.

Libel by the United States against nine cartons and eight cartons of Feathers of Wild Birds; Rene Arbib, claimant. Decree for libellant, and claimant appeals. Affirmed.

☞For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Libel filed for forfeiture of certain cartons containing feathers of birds of paradise and ghoura pigeons. Decree for libellant. Claimant appeals.

Seabury, Massey & Lowe, of New York City (Albert Massey and L. Hamilton Rainey, both of New York City, of counsel), for appellant.

Francis G. Caffey, U. S. Atty., of New York City (Harold Harper, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. After seizure of two lots of feathers of foreign birds, a libel of information for the forfeiture of them was filed by the government under section 3082, United States Revised Statutes (Comp. St. § 5785), and Schedule N, par. 347, and paragraph T of section 3 of the Tariff Act of October 3, 1913, c. 16 (Comp. St. § 5791). The libel consists of two counts. The first count charges that the merchandise in question, which had been seized, was prohibited to be imported by paragraph 347 of the Tariff Act of October 3, 1913, and that it was so imported knowingly and fraudulently between October 3, 1913, the date of the passage of the act, and December 4, 1917, and therefore was imported contrary to law, within section 3082 of the Revised Statutes, which provides for the forfeiture of merchandise in such case.

The second cause of action alleged that the claimant, doing business under the name of Diana Feather Company, knowingly and fraudulently received and sold the merchandise, knowing it to have been imported contrary to law at the time and between the dates above mentioned. As the trial proceeded, the second count was withdrawn from the consideration of the jury, pursuant to the court's charge, upon the ground that there was no evidence to support it. The decree therefore rests upon the allegations of the first count.

[1] The sections of the statutes referred to are as follows:

"Sec. 3082. If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported, contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

Paragraph 347: "Provided, that the importation of aigrettes, egret plumes or so-called osprey plumes, and the feathers, quills, heads, wings, tails, skins, or parts of skins, of wild birds, either raw or manufactured and not for scientific or educational purposes is hereby prohibited; but this provision shall not apply to the feathers or plumes of ostriches, or to the feathers or plumes of domestic fowls of any kind."

Subdivision. T. § III: "That in all suits or informations brought, where any seizure has been made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall be upon such claimant, and in all actions or

proceedings for the recovery of the value of merchandise imported contrary to any act providing for or regulating the collection of duties on imports or tonnage, the burden of proof shall be upon the defendant: Provided, that probable cause is shown for such prosecution, to be judged of by the court."

[2] Since it is admitted that the feathers were from birds not found in the United States and there is no contention that they were brought into this country after October 3, 1913, for scientific or educational purposes, it must be concluded that they were unlawfully in this country. The evidence offered in behalf of the government consisted of circumstances surrounding the finding of the feathers in this country, the claimant's possession of them, and his inconsistent statements made to the customs agents of the Treasury Department as to his possession and ownership of the feathers. His testimony, given in resisting the libel, indicates sufficient to make out a case of probable cause and justifies the ruling of the district judge that probable cause existed. His several explanations were wholly inconsistent with each other as to how the feathers came into his possession.

[3] Probable cause as the term is used in paragraph T of section 3 of the Tariff Act of October 3, 1913, means no more than present circumstances creating suspicion. *United States v. Certain Jewelry* (D. C.) 59 Fed. 684. The evidence required the District Judge to submit the question of the presence of the feathers in this country as imported contrary to law, to the jury as a question of fact. Upon this writ of error, we cannot review the weight of evidence. The burden of proof was upon the claimant since paragraph T of section 3 above referred to, which is invoked in support of the libel, has application to this case. Section 3082 has been held to apply to goods imported. We sustained the conviction in the case of *Ruehl v. United States* (C. C. A.) 263 Fed. 376 (decided January 14, 1920), holding that section 3082 applied to the importation of goods in the United States lawfully, but imported by a person legally incapacitated because of his employment by the federal government from importing into the United States, even though his business otherwise was lawful. We also held there that section 3082, although not complete in itself (*Keck v. United States*, 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505), can only be completed by referring to some other statute operating on goods, and making their importation illegal, and not by referring to a statute that operates in personam only. We said:

"The only obligation on one filing libel for condemnation under section 3082 is to allege and prove that the act of importation was knowingly 'contrary to law,' on the part of 'any person' so importing."

In *United States v. One Bag of Paradise Feathers*, 256 Fed. 301, 167 C. C. A. 473, this court held that seized goods which were absolutely prohibited from importation at the time when they were brought into this country, were properly seized under section 3082 and section 3, paragraph T, of the Tariff Act. Importation we held to mean bringing into this country from foreign parts. *Ruehl v. United States*, *supra*.

In *Goldman v. United States* (C. C. A.) 263 Fed. 340, a conviction for knowingly receiving a coil of rope, which had been landed from a

foreign port without permit from the collector of internal revenue, was affirmed. There the court considered section 3082 of the Revised Statutes, and said:

"We think section 3082 was not intended to be limited to cases of smuggling in the sense of introducing dutiable merchandise without paying and with the intent to avoid paying the duty on it. The proper administration of the custom laws requires that it be given a wider scope. It is important, in order to enforce the collection of duties, to establish many regulations relating to the introduction of merchandise into the country, other than the ultimate one of requiring the payment of duties. These are auxiliary regulations and can only be enforced by the imposition of penalties and punishment for their infraction. It is necessary not only to establish them, but to make disobedience of them criminal. This Congress accomplished through the enactment of section 3082, the effect of which, as we construe it, is to punish criminally and by forfeiture the bringing into the United States of any merchandise, whether dutiable or nondutiable, contrary to law, and the receiving and buying of it knowing it to have been brought in contrary to law. 'Contrary to law' we construe to mean to be in violation of any regulation, relating to its introduction, established by law (other than section 3082 itself) and made punishable when disobeyed [citing cases]."

We think that, where goods forbidden of importation are physically brought into the country as such prohibited articles, they are in fact imported within the meaning of the act just as truly as there may be an importation of lawful goods which may be imported contrary to law by failure to comply with the customs statute.

In *United States v. One Ford Automobile* (C. C. A.) 262 Fed. 374, an automobile used for importing distilled spirits, which were brought in contrary to law, was seized. We held that the automobile could not be lawfully seized from its owner, which was used in importing liquors which are by law prohibited from importation. There we said:

"We find that, upon examination of the act of August 10, 1917, there is made a new offense to import distilled liquors as the defendants named in the indictment did import them, and prescribed a punishment by fine or imprisonment, or both. Thus the statute is complete, and it makes no reference to any other statute which would give rise to a right of action for forfeiture of the vehicle of transportation, and we cannot add to the punishment already inflicted upon Tourville the forfeiture of his automobile."

Nowhere is the phrase "contrary to law" defined in the statute. We must therefore look to other statutes to ascertain this. We think that, although section 3082 is not complete, it can be and is completed in this instance by the provision of paragraph 347 of the Tariff Act which makes such importation absolutely prohibitive after the date of probation. The feathers in question, which were imported, were therefore imported contrary to law, as that phrase is used in section 3082. We think the Tariff Act permitted this seizure.

Decree affirmed.

FINK, Collector, v. NORTHWESTERN MUT. LIFE INS. CO.

(Circuit Court of Appeals, Seventh Circuit. June 24, 1920.)

No. 2675.

1. Internal revenue § 9—Dividends to policy holders not "income" for year.

A mutual life insurance company's so-called "dividends," applied at the option of policy holders to purchase paid-up additions and annuities, and also applied in partial payment of renewal premiums, are not income for the year in which so applied, within the meaning of Excise Tax Law, § 38, as "income * * * received * * * during such year"; such "dividends" having been once taxed as part of the income of the year when received.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

2. Internal revenue § 9—Mutual life insurance company's uncollected premiums not taxable as "income."

Mutual life insurance company's premiums due and deferred, and interest due and accrued, but not actually collected in cash, are not "income," within Excise Tax Law.

3. Internal revenue § 9—Interest on policy loans, due and unpaid, not taxable as "income."

Mutual life insurance company's interest on policy loans, which by the terms of the contract was added to the principal of the loan when it became due and remained unpaid by the policy holders, held not "income," within Excise Tax Law.

4. Internal revenue § 9—Amortization of premiums on bonds not deductible from taxable income as "depreciation."

Under Excise Tax Law, § 38, providing for deduction from taxable income of "all losses * * * sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any," mutual life insurance company's decrease in value of assets because of amortization of premiums on bonds are not deductible as "depreciation."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Depreciate.]

5. Internal revenue § 38—Question of deductibility from corporate income of amortization of premiums on bonds held within issues.

Since, in view of Rev. St. § 989 (Comp. St. § 1635), a suit to recover corporation tax paid is for all purposes a contest between the government and the taxpayer, so that the collector may, on recovery by plaintiff, retain what plaintiff should have paid, and the question in each case is, What tax should plaintiff have paid? in such a suit plaintiff's claim that the question whether decrease in the value of its assets because of amortization of premiums on bonds was deductible from its income was not within the issues could not be supported, where it alleged, in assignments of reasons why the tax was excessive and illegally assessed, that "no greater amount of taxes should have been collected" than a named sum.

6. Internal revenue § 9—Amortization of bond premiums by insurance departments held not to affect deductibility of amortization from income.

Under Excise Tax Law, the question of the deductibility from taxable income of a mutual life insurance company of its amortization of premiums on bonds is not affected by the fact that such amortization is in accordance with the requirements of the insurance departments of the different states; it not being an "addition required by law to be made * * * to reserve funds."

7. Internal revenue —9—Addition to reserve funds because of liability on contracts held not deductible from income.

Under Excise Tax Law, mutual life insurance company's so-called addition to reserve funds, because of liability on supplementary contracts not involving life contingencies and canceled policies on which a cash surrender value might be demanded, *held*, in view of St. Wis. 1919, §§ 1946x, 1950, 1952, not deductible from income, being a mere bookkeeping reservation of reserve funds already built up.

In Error to the District Court of the United States for the Eastern District of Wisconsin.

Action by the Northwestern Mutual Life Insurance Company against Henry Fink, Collector of Internal Revenue. Judgment for plaintiff (248 Fed. 568), and defendant brings error. Modified.

H. A. Sawyer, of Milwaukee, Wis., for plaintiff in error.

Sam T. Swansen, of Milwaukee, Wis., for defendant in error.

Before BAKER, EVANS, and PAGE, Circuit Judges.

PAGE, Circuit Judge. This case comes here on a writ of error to reverse the judgment for plaintiff in the District Court, entered by Judge Geiger. See 248 Fed. 568, where the facts are fully stated. The insurance company, the defendant in error, will herein be known as plaintiff, and the collector of internal revenue, plaintiff in error, will herein be known as defendant.

The Commissioner of Internal Revenue amended plaintiff's returns of income for the years 1909 and 1910, filed under the Excise Tax Law of August 5, 1909, and thereby greatly increased the tax. This suit was brought to recover that increase, paid under protest. Defendant states the following as the questions involved, and they will be determined as written:

I.

[1] 1. Whether dividends applied at the option of the policy holders to purchase paid-up additions and annuities were not income for the year in which so applied, within the meaning of the act.

2. Whether dividends applied at the option of the policy holders in partial payment of renewal premiums were not income for the year in which so applied, within the meaning of the act.

The Excise Tax Act of August 5, 1909 (36 Stats. at Large, c. 6, pp. 11, 112, § 38), provides:

" * * * Every insurance company * * * organized under the laws * * * of any state * * * shall be subject to pay annually a special excise tax * * * equivalent to one per centum upon the entire net income over and above \$5,000 received by it from all sources during such year, exclusive," etc. " * * * Such net income shall be ascertained by deducting from the gross amount of the income of such * * * insurance company, received within the year from all sources, * * * (second) * * * and in the case of insurance companies the sum other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds."

Disregarding the deductions, the basis for the tax is "income * * * received * * * during such year." Plaintiff is a mutual

insurance company, organized under the laws of Wisconsin, and annually collects level premiums which are sufficiently large to pay the insurance cost, including reserves, and all of the expenses of the business. Usually there is something left over for a surplus, which surplus is required by the laws of the state of Wisconsin to be divided among the policy holders. The dividend of surplus is in no sense a dividend of profits. By dividing such a surplus by means of the so-called "dividend," the company simply says to its policy holders:

"There is available to you, from funds heretofore paid by you to this company, a sum of money that may be used by you for the payment of premiums, paid-up additions, annuities, or for whatever use you may choose to make of it."

The Excise Law did not take effect until January 1, 1909, and, inasmuch as the surplus converted into dividends in 1909 was received by the company before the law went into effect, that surplus, converted into dividends, was not income for 1909. The surplus from premiums, out of which the dividends for 1910 were declared, were a part of the income for 1909, and formed a basis for taxation, under the Excise Law, for that year, and could not, as dividends, form a basis for further taxation. In other words, the fair interpretation of the statute is that income forms a basis for taxation only for the year in which it was received. *Herold v. Mutual Benefit Life Ins. Co.*, 201 Fed. 918, 120 C. C. A. 256; *Maryland Casualty Co. v. United States*, 251 U. S. 352, 40 Sup. Ct. 155, 64 L. Ed. —, decided by the Supreme Court of the United States January 12, 1920; *Hays v. Gauley Mt. Coal Co.*, 247 U. S. 192, 38 Sup. Ct. 470, 62 L. Ed. 1061. There is nothing in *Maryland Casualty Co. v. United States*, *supra*, out of harmony with this interpretation. It was said that funds of an insurance company, which had escaped taxation in the year in which they were received, because they had been set aside as a reserve, in that year, and therefore had formed no basis for taxation, might, if they were released from that reserve to the general uses of the company, be treated as income for the year in which they were so released.

II.

[2] 3. Whether premiums due and deferred, and interest due and accrued, but not actually collected in cash, were not income within the meaning of the act.

In *Hays v. Gauley Mt. Coal Co.*, *supra*, this question was answered contrary to the contention of the government in the following language:

"The expression 'income received during such year,' employed in the act of 1909, looks to the time of realization, rather than to the period of accrument, except as the taking effect of the act on a specified date (January 1, 1909), excludes income that accrued before that date."

See, also, *Maryland Casualty Co. v. United States*, *supra*.

III.

[3] 4. Whether interest on policy loans, which by the terms of the contract was added to the principal of the loan when it became due and remained unpaid by the policyholders, was not income, within the meaning of the act.

This question is answered contrary to the government's contention by Board of Assessors, etc., v. New York Life Ins. Co., 216 U. S. 517, 30 Sup. Ct. 385, 54 L. Ed. 597.

IV.

[4] 5. Whether increases in the value of assets because of accrual of discounts were not income, and decreases in value of assets because of amortization of premiums on bonds were a deduction from income under the act.

In the reassessment the commissioner added to income for the two years a total, as "Accrual of discount," of \$67,268.96, and deducted for "Depreciation" (amortization of bonds) for the two years \$231,654.86. In his findings of fact, Judge Geiger said:

"Plaintiff waived objection in each amended return made by the Commissioner of Internal Revenue to the item 'Accrual of discount' and to the item 'Depreciation.'"

Thereupon the court disposed of those items by deducting the "Accrual of discount" from the "Depreciation," giving plaintiff a net deduction of \$164,385.90. Inasmuch as plaintiff waived objection to items "Accrual of discount," the propriety of such a charge will not be discussed here. If deduction by reason of amortization of premiums on bonds was proper, it must have been so under the following provision of the statute, viz.:

"All losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any."

There was no sale. The item arose from mere book adjustments. In our opinion, amortization of bonds does not come within any definition of "depreciation" under this or similar acts. In considering the excise statute, the Supreme Court has said:

"What was here meant by 'depreciation of property'? We think Congress used the expression in its ordinary and usual sense as understood by business men. It is common knowledge that business concerns usually keep a depreciation account, in which is charged off the annual losses for wear and tear, and obsolescence of structures, machinery, and personalty in use in the business."

The court then said that it did not consider the statute covered a depreciation of a mine by exhaustion of the ores. *Van Baumbach v. Sargent Land Co.*, 242 U. S. 524, 37 Sup. Ct. 201, 61 L. Ed. 460. See also *Lumber Mut. Fire Ins. Co. v. Malley* (D. C.) 256 Fed. 383; *Baldwin L. Works v. McCoach*, 221 Fed. 59, 136 C. C. A. 660; *Van Dyke v. Milwaukee*, 159 Wis. 467, 146 N. W. 812, 150 N. W. 509.

[5] Plaintiff's claim that this question is not within the issues in this case is clearly overborne by its second and eleventh assignments of reasons why the tax is excessive and illegally assessed, viz.:

"2. No greater amount of taxes should have been * * * collected * * * for the year 1909 than the sum of \$43,729.78," etc.

No. 11 is similar. It seems clear that a suit of this character is for all purposes a contest between the government and the taxpayer; the question being, how much tax should the plaintiff have paid? In

Crocker v. Malley, 249 U. S. 223, 39 Sup. Ct. 270, 63 L. Ed. 573, 2 A. L. R. 1601, the court found that the tax actually assessed against the plaintiffs as a joint-stock association was improperly assessed and collected, because the plaintiffs were not a joint-stock association, but simply trustees. At page 235 of 249 U. S., at page 272 of 39 Sup. Ct. (63 L. Ed. 573, 2 A. L. R. 1601), the court said:

"The District Court, while it found for the plaintiffs, ruled that the defendant was entitled to retain * * * the amount of the tax that they should have paid as trustees. * * * The Commissioner of Internal Revenue rejected the plaintiffs' claim, and the statute does not leave the matter clear. The recovery therefore will be from the United States. Rev. Stats. § 989. The plaintiffs, as they themselves alleged in their claim, were the persons taxed, whether they were called an association or trustees. They were taxed too much. If the United States retains from the amount received by it the amount that it should have received, it cannot recover that sum in a subsequent suit."

See, also, *Missouri River, F. S. & G. R. Co. v. United States* (C. C.) 19 Fed. 67.

[6] Plaintiff cites the *Eaton Cases* (D. C.) 218 Fed. 188. The reason given by the court, in the first case, for allowing items "Bonds for accrual of discount" and "Bonds for amortization of premiums" is:

"Because the testimony shows that the method of annually scaling down the book values of bonds purchased at a premium, and making additions to the book value of bonds purchased below par * * * is in accordance with the law and the requirements of the insurance departments of the different states."

The record here shows no such practice by plaintiff. What law that action was in accordance with the decision does not say, but it certainly was not in accordance with the Excise Tax Act. Whether it was in accordance with the requirements of the insurance departments of the different states makes no difference. The only clause, if any, under the Excise Law, which would permit the Commissioner to exercise any influence upon deductions is the following, relating to deductions:

"The net addition, if any, required by law to be made within the year to reserve funds."

Under authority of *Maryland Casualty Co. v. United States*, supra, the requirement of the insurance commissioner as to reserves would be a thing "required by law."

We are of opinion that decreases in value of assets because of amortization of premiums on bonds were not a proper deduction, and that there should be deducted from the judgment of the court below the sum of \$1,643.86, with interest thereon at the rate of 6 per cent. from January 22, 1912, to the date of the entry of the original judgment on November 16, 1917.

V.

[7] 6. Whether an addition to the reserve funds because of liability on supplementary contracts not involving life contingencies and canceled policies upon which a cash surrender value may be demanded was deductible from gross income under the act.

The Excise Law permits insurance companies to deduct "the net ad-

dition, if any, required by law to be made within the year to reserve funds." Section 1952 of the Wisconsin state law provides:

"In determining the amount of the surplus to be distributed there shall be reserved an amount not less than the aggregate net value of all the outstanding policies."

Under this section and section 1950, the insurance commissioner of Wisconsin, as of December 31, in the years 1908, 1909, and 1910, certified his computation of reserves, and did not include reserves as against the contracts in question. All the actuary would say about what was required by the insurance commissioner with reference to the reserve in question was that the blank that the company was compelled to fill in contained an item "Reserve liabilities," but that no such item was included in "Net reserve funds."

Section 1946x defines "'reserve' at any time within the policy year" and "terminal reserve." The latter is defined to be:

"The sum sufficient, with the net premiums coming due, to provide for the future mortality charges, and mature the policy according to its terms, all computed upon the table of mortality adopted and the rate of interest assumed."

The end to be reached in life insurance is to mature the policy by building up a reserve. The basis of arriving at that desired end is the table of mortality and the rate of interest assumed, and by the use of them the net premium is fixed and the reserve is built up from net premiums. Repeating the process of making the terminal reserve from year to year until the time when the payment of premiums ceases matures the policy. The net premium coming due is the foundation of the reserve. Actuary Evans states it thus:

"The reserve is the balance of cash that the company must have on hand in order to pay out the contract, assuming that the future premiums under the policy are paid to the company; or, in other words, the increase in the reserve on the policy would be, specifically, the amount of the premium for that year paid in, interest on the entire sum, and the cost of the insurance deducted."

Assistant secretary Anderson explained that—

"When the policy becomes a claim, it is charged off in the death loss account as a disbursement * * * for the full amount of the * * * policy."

When asked what, if anything, is deducted from the general reserve fund when death occurs, he answered:

"A corresponding amount to the death loss which was taken out of disbursements—the reserve—is held on that policy. I mean that one part of reserve account is wiped out and another created."

Just here is the misconception as to what is a life insurance reserve. The reserve meant in the law is that fund which is built up to mature the policy. Of course, at the time when the money is taken out of the reserve account and is not used for immediate payment, it must be held somehow. In other words, it is reserved for the purpose of future payment. The full amount is there at the beginning, and there is nothing that has to be built up or matured. Nothing more can be reserved on that account.

We are of opinion that the decrease in the net value of assets because of amortization of premiums on bonds was not proper, and that the decrease in the net value of assets because of liability on supplementary contracts not involving life contingencies and canceled policies upon which a cash surrender value may be demanded was not proper, and that there should be deducted from the judgment of the court below on account of the first item the sum of \$1,643.86, and on account of the latter item the sum of \$9,969.08, an aggregate of \$11,612.94, as of January 22, 1912, and that judgment should be entered for the sum of \$131,755.84, being the principal of the original judgment, less said sum of \$11,612.94, with interest thereon at 6 per cent. from January 22, 1912, with costs in the District Court, which said interest amounts, to the date of the entry of the judgment in the District Court on December 16, 1917, to \$46,641.57.

It is adjudged that each party pay its own costs of the proceedings in this court.

TEN EYCK v. DIRECTOR GENERAL OF RAILROADS et al.

(Circuit Court of Appeals, Second Circuit. June 2, 1920.)

No. 243.

1. **Towage** ⇨3—Contract by which tow assumes risk of tug's negligence valid.

A contract between tug and tow, by which the tow assumes all risks of the towing, *held* not invalid as against public policy, and to cover the risk from the tug's negligence.

2. **Towage** ⇨4—Tug, in relation to tow, not common carrier.

A tug is not, in relation to its tow, a common carrier.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by Kittle Ten Eyck against the Director General of Railroads, with the Hartman-Blanchard Company impleaded. Decree for libellant against the Hartman-Blanchard Company, which appeals. Affirmed.

Certiorari denied 254 U. S. —, 41 Sup. Ct. 14, 65 L. Ed. —.

Macklin, Brown, Purdy & Van Wyck, of New York City (Pierre M. Brown, of New York City, of counsel), for appellant.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for appellee Ten Eyck.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark, of New York City, of counsel), for appellee Director General.

Alexander & Ash, of New York City, *amicus curiæ* (Mark Ash, of New York City, of counsel), for New York Tow Boat Exchange.

Hornblower, Miller, Garrison & Potter, of New York City, *amicus curiæ* (George S. Hornblower, of New York City, of counsel), for New York Trap Rock Corporation.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. Kittie Ten Eyck owned the canal boat Florence Trembley. It was chartered on the 17th of September, 1918, to the appellant, Hartman-Blanchard Company. The Pennsylvania Railroad Company, among other things, was engaged in towing and owned the tug P. R. R. No. 7. It was sent to tow the Trembley, and picked her up in the slip at Ninety-Sixth street shortly after midnight on September 18, 1918. This towing contract was made under these circumstances. On September 2, 1918, the Director General of Railroads, then in control of the Pennsylvania Railroad, sent Hartman-Blanchard Company, by registered mail, the following notice:

"United States Railroad Administration,
"W. G. McAdoo, Director General of Railroads,
"Pennsylvania Railroads—Eastern Lines.
"Office: Foot of Cortland Street,

"New York, N. Y., September 2, 1918.

"Gentlemen: We beg to inform you that it has become necessary for us to cease being responsible for vessels while in tow of our tug. On and after September 11, 1918, the following conditions will apply to all work accepted and performed by tugs owned, employed or chartered by the Pennsylvania Railroad Company: All towing is done at the risk of the tow. Neither we, nor the tugs employed in the service, nor the owners shall be responsible for any damage done to the tow through negligence, and the masters and crews of tugs, in the performance of the towage service, shall become the servants of and identified with the vessel or the craft towed, whether singly or with other vessels owned by you and in possession of charterers, and to the shifting of vessels in and around piers and in slips.

"Very truly yours,

D. C. Chase, Supt. Steam Towing."

On the afternoon of September 17, 1918, the Hartman-Blanchard Company contracted for the towage by the tug by telephone, calling the office of the superintendent of steam towing of the Pennsylvania Railroad, and asked to tow the canal boat Florence Trembley from Ninety-Sixth street, East River, Manhattan, to South Amboy, N. J. The record of the railroad company shows that a clerk in the office of the superintendent of steam towing answered the telephone and made entry of this order for towing in the book kept for that purpose, and later gave the necessary instructions for towing the Florence Trembley. When the towing commenced, the tide was ebb, the wind easterly, and the weather misty, and about 12:20 a. m. of the same day, the No. 7, with two boats made fast on her port side, and three on her starboard side, the Florence Trembley being the outside boat on the starboard side, attempted to pick up the boat the Florence O'Boyle, which was lying in the same slip, and when making fast to the O'Boyle the barges drifted out of the slip, and the strong ebb tide caught the head of the tow, carrying it downstream, and the Florence Trembley came in contact with a bathhouse at the end of the pier, damaging her. She was without motive power of her own, and was therefore in control of the charterer and the tug. The libelant and her husband lived on the boat, the latter acting as the captain.

The receipt of the notice of September 2, 1918, is conceded. After the libel was filed against the Director General of Railroads, under the fifty-ninth rule of admiralty (29 Sup. Ct. xlv), the Hartman-Blanch-

ard Company was brought in. The District Judge relieved the Director General of Railroads from liability because of the written notice served September 2, 1918, and its acceptance as a condition of the contract.

[1] We are urged upon this appeal to rule that public policy forbids the enforcement of a condition of the contract relieving the tugs employed in the service from responsibility for any damage done to the tow through negligence of the master or crew of the tug while engaged in the performance of towage service, or to contract so as to make the servants of the tug the servants of the craft or vessel which is being towed. This court had this question presented in *The Oceanica*, 170 Fed. 893, 96 C. C. A. 69. There we approved a contract for towage of a barge which provided that—

"The tow assumed no risks, and releases the tug from liability for her own negligence resulting in damage to the tow."

We said there:

"A tug is not, in relation to its tow, a common carrier, being only bound to the exercise of ordinary care. *The Margaret*, 94 U. S. 495, 24 L. Ed. 146. It follows that a contract against liability for negligence cannot be construed in the case of a tug as it may be in the case of a common carrier. The tug [owner] being liable for negligence if the tow agrees to assume all risks, no risk can be meant except those for which the tug is liable, viz. the consequences of her own negligence. There is no other class of risks upon which the cause can operate as in the case of common carriers, viz. those rising from liability as insurer. Unless construed to cover the tug's negligence, stipulation is meaningless; i. e., an agreement by the tow to assume risks to which she is subject without any stipulation and for which there is no liability at all on the part of the tug."

Later, in *Monk v. Steamboat Co.*, 198 Fed. 472, 117 C. C. A. 232, this court approved the previous ruling in *The Oceanica Case*, and said:

"When the boat towed assumes all the risks of towing, it assumes the risk of the tug's negligence, as we have held in *The Oceanica*, 170 Fed. 893, 96 C. C. A. 69, because, the tug not being an insurer or common carrier want of ordinary care and prudence is all the tug and owners are responsible for. There is nothing else for the contract assuming all risks to operate on."

In *B. & O. R. R. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, the court held that an express messenger in an express car by contract could exonerate the railroad company from liability to him, and that such a contract did not contravene public policy. This was held because it was said that the railroad company did not assume toward him the obligations of a common carrier as it would to a passenger because he was not a passenger, that as to him it assumed the obligations of a private carrier, and that, a private carrier is free to contract as to the conditions of the carriage, and no reason of public policy forbids such carrier from stipulating against its own negligence and making it a part of the contract. To the same effect are the cases of *Robinson v. B. & O. R. R. Co.*, 237 U. S. 84, 35 Sup. Ct. 491, 59 L. Ed. 849, and *Santa Fé R. R. Co. v. Grant Bros. Co.*, 228 U. S. 177, 33 Sup. Ct. 474, 57 L. Ed. 787.

[2] A tug is not, in the relation to its tow, a common carrier. The *Margaret*, 94 U. S. 494, 24 L. Ed. 146. In *McCormick v. Shippy*, 124 Fed. 48, 59 C. C. A. 568, a case in this court, where a suit was brought by the owner of a yacht against the charterer to recover for loss of the yacht, and which charter contained a provision that "the charterer shall assume no responsibility for loss or damage to the yacht," it was said:

"There is no question of public policy involved in this charter party, as in the case of a common carrier. It is well settled that the parties in such a case have the right to provide by apt language against liability for negligence. *Hartford Fire Ins. Co. v. Chicago, etc., Ry. Co.*, 175 U. S. 91, 98, 20 Sup. Ct. 33, 44 L. Ed. 84."

This rule prevails in the British courts. See *United Service*, 8 Prob. 56, affirmed in Court of Appeals, 9 Prob. 3; *Luna v. Kingston*, 36 Times Law Reports, 112 (Dec., 1919).

Notice imposing the conditions under which the tug would be accepted having been received, the railroad company was justified in accepting the towage contract, fully understanding that the libellant agreed to these terms. The terms stated in the notice, therefore, became part of the oral contract entered into for the service. On this record, we affirm the decree below.

Decree affirmed.

In re SCHAFFNER.

Petition of STRAUSS.

(Circuit Court of Appeals, Second Circuit. June 9, 1920.)

No. 89.

1. Bankruptcy ☞336—Claim may be amended after one year.

An amendment of a claim, to make it more specific, may be allowed after expiration of the year for filing claims.

2. Bankruptcy ☞331—One of two executors may file claim for estate.

One of two executors may sign and verify a claim on behalf of the estate.

3. Bankruptcy ☞439—Order expunging claim reviewable by petition to revise.

An order expunging a claim filed on behalf of an estate, because not signed by both of the two executors, *held* properly reviewable by petition to revise.

4. Bankruptcy ☞439—Appellate court may revise interlocutory order.

The appellate court may revise an interlocutory order in bankruptcy, where it will speed the proceedings.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of Herbert E. Schaffner, trading as Schaffner & Rubstadt, bankrupt. On petition by Louis C. Strauss to revise order of District Court. Reversed.

Rosenberg & Ball and Lewis M. Scheuer, all of New York City (D. W. Kahn, of New York City, of counsel), for claimant.

H. & J. J. Lesser, of New York City, and Leo Oppenheimer, of Cleveland, Ohio (J. J. Lesser, of New York City, of counsel), for trustee and Karp.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. June 21, 1917, an involuntary petition in bankruptcy was filed against Herbert E. Schaffner, trading as Schaffner & Rubstadt. July 17 an order of adjudication was made, and Melville Boyd appointed receiver. July 31 a special meeting of creditors was held to vote on offers to purchase the assets of the estate, at which the offer of one Karp was accepted, viz. to pay all prior claims proved and allowed in full, 56 per cent. of all unsecured claims proved and allowed, and disbursements and expenses of administration. August 1 the referee confirmed the sale and made Karp a party to this proceeding. November 13 Boyd, the receiver, was elected trustee.

In April, 1918, Louis C. Strauss, one of the executors of Emanuel Schaffner, deceased, father of the bankrupt, verified and filed a proof of claim, the material portions of which are as follows:

"At Cincinnati, in the state of Ohio, on the date hereinafter set forth, came Louis C. Strauss, one of the executors of the estate of Emanuel Schaffner, deceased, and says: That the above-named bankrupt was at and before the filing of the petition in bankruptcy herein, and still is, justly and truly indebted to said estate of Emanuel Schaffner, deceased, in the sum of sixty-six thousand five hundred fifty (\$66,550) dollars. That the consideration of said debt is moneys and securities loaned to the said bankrupt by Emanuel Schaffner, deceased, of the agreed value or amount of \$66,550, on or prior to the 8th day of November, 1915, no part of which has been paid, and the whole whereof is justly due and owing by the said bankrupt to the said estate. That there are no offsets or counterclaims thereto."

April 22 Boyd, the trustee, and Karp, the purchaser, objected to the claim:

"Sir: Please take notice that Melville Boyd, the trustee herein, and Hyman Karp, the purchaser of all of the assets of the above-named bankrupt, hereby object to the claim filed by Louis C. Strauss, the executor of the estate of Emanuel Schaffner, in the sum of sixty-six thousand five hundred fifty (\$66,550) dollars, for the reason that the said claim is not a debt provable against this estate and should not be allowed, and for the further reason that the said bankrupt is not indebted to the estate of Emanuel Schaffner in any sum whatsoever.

"Dated, New York, April 22, 1918."

December 23 a hearing on the objections was had, at which objection was made that the proof of claim was invalid, because signed and filed by one executor only. February 11 the executor Strauss applied for leave to file an amended claim, which was granted by the referee. The amended claim differs from the original only in adding to the first paragraph:

"That he, together with Herbert E. Schaffner, are the sole qualified and acting executors of the estate of Emanuel Schaffner, deceased"

—and changing the amount claimed from \$66,550 to \$65,150, and adding:

"Schedule A.

December, 1914. Cash	\$22,800
March 31, 1915. Securities.....	42,350

Total	\$65,150"
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The referee, relying upon *Whitney v. Dresser*, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584, directed the objectors to go forward. Thereupon Karp and the trustee filed a petition for review by the District Court, on the ground that the referee erred in allowing the amended proof of claim to be filed more than a year after adjudication, and in not holding it to be insufficient, because signed by one executor only, and in imposing the duty of going forward upon the objectors.

[1] The District Judge made no reference to the objection that the amended proof of claim was allowed to be filed more than a year after adjudication, but we think it without merit. In *re Kessler*, 184 Fed. 51, 107 C. C. A. 13. He did, however, hold that, though one executor may verify, both executors must sign and file the proof of claim. For that reason he reversed the order of the referee, directed the amended proof of claim to be expunged, and that if within 15 days an amended proof of claim, signed by both executors, were filed, the referee, upon petition of the trustee for a re-examination of the claim under General Order 21 (89 Fed. ix, 32 C. C. A. xxiii), should take the examination of each of the executors, with the discretion of suspending the proceedings to determine the validity of the claim until each had been examined.

[2] We do not agree with the District Judge that the proof of claim must be signed by both executors. We think that one may sign and verify a claim on behalf of the estate. The whole bankruptcy proceeding constitutes one suit, and a proof of claim is not an action at law or in equity, but is a demand against a fund in possession of the court for distribution, just like a proceeding to limit the liability of a vessel owner or to wind up a corporation in equity. Strict rules of pleading are not necessary or applicable. We can see no objection to one executor signing and filing a proof of claim upon behalf of the estate, just as section 1 of the General Order permits one partner to do for the firm; both having the right to collect or release a debt or dispose of assets of the estate or the firm. *Geyer v. Snyder*, 140 N. Y. 394, 35 N. E. 784. In such exceptional cases as this great mischief might ensue, if the view of the District Judge were enforced. One executor, by refusing to sign, might prevent a proof of claim ever being filed, and important controversies ever determined. It is suggested that by proceedings in the probate court the letters of such an executor might be revoked; but this would be a long proceeding, which might subject the bankruptcy court to the control of the probate court, as, for example, if that court refused to discharge the executor.

[3, 4] Both an appeal and a petition to revise have been taken; but, as this is a proceeding in bankruptcy, the petition is the proper remedy. We might refuse to revise the order, as it is interlocutory (*In re Horowitz*, 250 Fed. 106, 162 C. C. A. 278); but, questions of law going to

the jurisdiction being involved, it will speed distribution to dispose of it now.

The order is reversed, the proof of claim reinstated, and, if the trustee apply for a re-examination under General Order 21, the referee to determine upon whom the duty of going forward lies, and to take the examination of the claimant and of any competent witness called by either party.

CUTLER HAMMER CO. v. PAWLING & HARNISCHFEGER CO. et al.

(Circuit Court of Appeals, Second Circuit. June 9, 1920.)

No. 242.

Patents ~~328~~—1,096,485, for electric switch, valid and infringed.

The Barnum patent, No. 1,096,485, for an electric switch, *held* not anticipated, valid, and infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Cutler Hammer Company against Pawling & Harnischfeger Company and Isaac G. Johnson & Co., Incorporated, for infringement of patent No. 1,096,485. Decree for complainant, and defendants appeal. Affirmed.

Leverett C. Wheeler, of Milwaukee, Wis., and C. C. Billings, of New York City, for appellants.

Edwin B. H. Tower, Jr., of Milwaukee, Wis., and Wylie C. Margeson, of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. Appellee sued on patent No. 1,096,485, granted May 12, 1914, for an improvement in an electric switch. The appellee was the assignee of T. E. Barnum. The appellant Pawling & Harnischfeger Company is the manufacturer, and Isaac G. Johnson & Co. (a corporation), is the user, of the switch in question. Claims 1, 2, and 3 of the patent are in suit, and provide as follows:

1. In an electric switch, in combination a support, a contact finger, having at one end an open pivotal bearing on said support, and having at its other end a contact, a pin mounted on said support, and extending through said contact finger intermediate its ends, and a coil spring surrounding said pin and bearing upon said contact finger, to hold the latter in engagement with said support and permit movement of said contact.

2. In an electric switch, in combination, a support, a contact finger having at one end an open pivotal bearing on said support, and having at its other end a contact, a pin mounted on said support, and extending through said contact finger intermediate its ends, and a coil spring surrounding said pin and bearing upon said contact finger to hold the latter in engagement with said support and permit movement of said contact, said support having an extension to limit the movement of said contact finger in one direction.

3. In an electric switch, in combination, a support, a contact finger having at one end an open pivotal bearing on said support, and having at its other end a contact piece, a pin mounted on said support and extending through said contact finger intermediate its ends, a coil spring surrounding said pin, and pressing upon said contact finger, to hold the latter in engagement with said support, and adjustable means on said contact finger to limit the movement of the same in one direction.

The District Judge found the patent valid as to claims 1 to 4, and held claims 1, 2, and 3 infringed.

The patented switch, as applied to drum controllers, was placed on the market in 1910, and the appellant Pawling & Harnischfeger Company purchased and used the appellee's drum controller. The invention is said by the inventor to be particularly applicable to drum controllers. Although applicable for other purposes, the patented switch may be applied to a drum controller, as illustrated in the drawings of the patent. The drum controller comprises a rotatable drum and stationary contacts arranged alongside the same and mounted upon a base. The contact segments have different lengths, and may be arranged in various ways around the drum, so as to engage the stationary contacts according to the sequence required. The contact segments are carried by radial arms, which dispose them cylindrically. The contact comprises a support and a pivoted finger. An open pivotal bearing is provided, so that the contact, as a whole, may have minimum width and a finger readily removable therefrom. The contact is pressed inwardly by a coiled spring, arranged upon the outside of the finger, and carried upon a pin which is mounted upon the support. The finger's normal inward position is determined by the stop, and this position may be adjusted by means of a screw. There is a flexible conducting lead, which carries the current from the support to the finger. The finger has a tip, which is engaged by the segment. This tip has the same curvature on both sides.

The advantages obtained by this combination of elements have brought the patented contact into extensive commercial use. With the spring, the lead, and the finger exposed outside, they are readily accessible. The open pivotal bearing enables the finger to be withdrawn, and applied after the lead and spring are disconnected, without difficult manipulation, and without withdrawing the pivot pin laterally. The result is that the contact has a minimum width, so that more may be placed in a given space than pivotal contacts which have bearings arranged alongside the finger or have a pivot pin which has to be moved sideways. It results that many more contacts can be arranged in half the space required by a contact which has a closed pivotal bearing and requires the pivot pin to be removed or inserted laterally. The finger is rigid, so that it will not bend. The spring does not carry current, so it does not become heated and lose its resiliency; it is not necessary that the spring have conductivity, and other materials may be used for resiliency. It guards against a short circuit, if the spring breaks, because the pin and pivot keep it in position, so that it does not become displaced, and therefore come in contact with other electrical parts.

The contacts may be arranged close together, as the open pivotal bearings allow it to be readily removed and applied; the lead and spring are outside and accessible.

The appellants' controller, in which its fingers are employed, is substantially the same as appellee's drum controller. The appellants' contacts are substantially the same as the appellee's contacts, comprising a support and a pivotal finger; the spring and lead are both outside the finger and are readily accessible. An open pivotal bearing is provided, so that the finger may be removed and applied readily when the lead and spring are disconnected. The spring and pivot do not carry current. The tip has substantially the same inclination on both sides. The pivotal bearing and tip face are arranged substantially in a line tangential to the point at which the tip face engages the drum segment. The appellants' open pivotal bearing is formed by a triangular projection on which the finger rests. The finger is kept from moving sideways by the retaining pin, which projects through a hole in the finger; such pin being arranged alongside the triangular projection from the semispherical projection.

Appellants' claim is that the triangular projection has the bearing faces thereof formed to provide a point contact, so that the finger may tilt crosswise to allow the tip face to adjust itself to the contact segment. The appellee's finger may likewise tilt crosswise, and enable the tip face to adjust itself to the contact segment. Infringement is not avoided under the claim of pivotal bearing, as the appellants' is an open pivotal bearing and performs the same function as the appellee's open pivotal bearing. They are the same in substance. The appellee's projection shown in the patent is mounted upon the finger, instead of the support, as in appellants' contact, and the groove provided to prevent lateral movement, instead of a pin. The appellants' contact has substantially the same elements, which co-operate in substantially the same way, and produce substantially the same result. We do not think that this is avoided on account of a pin pivotal bearing. The open pivotal bearing, as that term is used, must be considered according to the function of the bearings and the use made thereof.

Nor do we think that anything disclosed by the prior art anticipated the appellee's invention. The patent to Gale, No. 771,239, October 4, 1914, and the publication of Die Hebezeuge, are the chief reliance of the appellants as the prior art. The patent and publication do not disclose a pivoted switch contact. They do not embody the same structure, nor attain the same end, as a pivotal contact. The Gale patent is not a pivoted contact, nor a controller contact. The clips do not pivot, but are kept parallel, so as to engage the sides of the switch blades. The spring enables the clips to adjust themselves against the switch blades. The structure could not be modified, so as to adapt it to a controller. The clips may be readily removable. The springs are not accessible, as they are located beneath the finger, and cannot be readily reached through space between contacts. The spring carries current, which tends to heat the same and make it lose its resiliency. If the spring breaks, the spring and finger may be displaced, and cause a short circuit.

Other patents of the prior art were received in evidence, but an examination of each does not reveal a combination of elements, such as the appellee has gotten together to produce, and which has accomplished new and useful results in the art.

Decree affirmed.

ELLIOTT MACH. CO. v. P. B. APPELDOORN'S SONS CO.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1920. On Petition for Rehearing, November 5, 1920.)

No. 3367.

1. Patents \S 168(2)—Inventor, acquiescing in rejection of claim, estopped from thereafter asserting it.

Where the patent office rejects a claim covering a device on its merits, and the rejection is acquiesced in, and the patent issued, the applicant cannot afterwards be permitted a construction of the claims allowed wide enough to embrace the claim which was rejected.

2. Patents \S 174—In crowded art, inventor is entitled only to his own device.

A patentee of a new machine acquires a monopoly as against all formal variations; but if the advance is gradual, so no one can claim the complete machine, each inventor is entitled only to his own specific form of device.

3. Patents \S 328—799,549, for a button-setting device, not infringed.

Patent No. 799,549, claim 4, for a button-feeding mechanism for a button-setting device operated by foot or other power, *held*, in view of the prior state of the art and the patentee's acquiescence in the rejection of the original claim, which, as shown by the file wrapper, was not allowed until a combination was described, limited to the particular construction, and, as limited, not infringed.

Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Suit by the Elliott Machine Company against the P. B. Appeldoorn's Sons Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Fred L. Chappell, of Kalamazoo, Mich. (Edgar H. Johnson, of Grand Rapids, Mich., on the brief), for appellant.

Chas. W. Owen, of Toledo, Ohio (Owen, Owen & Crampton, of Toledo, Ohio, on the brief), for appellee.

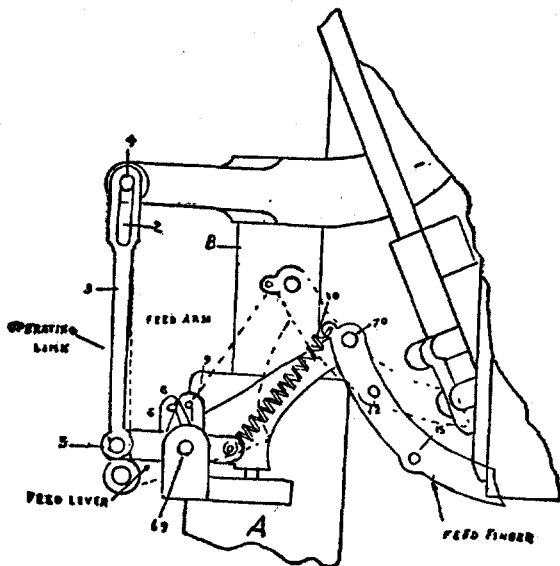
Before DONAHUE, Circuit Judge, and COCHRAN and WESTENHAVER, District Judges.

WESTENHAVER, District Judge. This is a suit for infringement of United States letters patent No. 799,549, issued to William E. Elliott, September 12, 1905. The defenses are invalidity and noninfringement. The court below, being of opinion that claim 4, the only one in issue, should be limited to the specific construction therein described and claimed, held that it was not infringed and dismissed the bill. From this decree, plaintiff appeals.

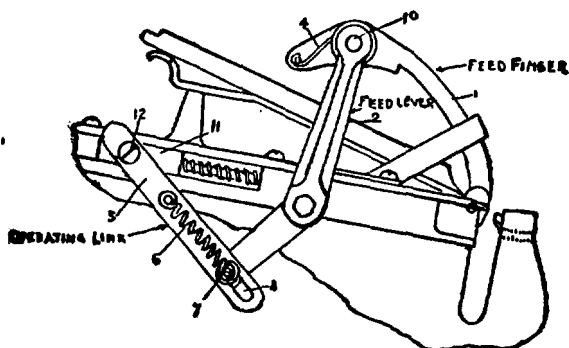
Elliott's patent is for certain improvements in a class of button-setting machines which are operated by foot or other power, and in which the buttons are fed from a hopper or chute to the clinching anvil or die. This machine is particularly adapted to attach buttons to shoes by means of wire staples, which are automatically formed in the machine from a spool or coil of wire. The buttons are delivered from a hopper into a chute, down which they slide in a single-file column to the wire-receiving position. The button-feeding mechanism is adapted to take the first button from the column, push it into a wire-receiving position, and hold it there while the wire is being threaded through the eye and until the staple driver has come into position to drive the staple through the fabric. While the staple is thus being driven and clinched, the feed finger of the button-feeding mechanism is returned into position ready to repeat the operation. These operations are performed by means of an operating plunger, to which the power is applied by a foot treadle or other suitable device.

Claim 4 relates solely to this button-feeding mechanism. It is desirable, if not necessary, that different sized buttons should be placed and held in position, and the feeding mechanism is provided with a compensating or lost motion feature, so that, after the button is fed into its position, the actuating mechanism may complete its normal operation of driving and clinching the staple. The controversy here turns on the special means of compensation employed in the plaintiff's and defendant's respective constructions. Plaintiff's and defendant's button-feeding mechanisms are best shown by the accompanying illustrations:

PLAINTIFF'S STRUCTURE



DEFENDANT'S STRUCTURE



Claim 4, covering plaintiff's construction as above illustrated, contains four elements: (1) A button feed finger, 12; (2) a feed arm 7; (3) a feed lever 6; (4) a spring connection, 10, between the feed lever and the feed finger, adapted to allow the feed lever to complete its normal stroke after the feed finger is arrested by the stoppage of the button. The feed finger is connected to the feed arm by a pivot, 70. The feed lever and feed arm are fulcrumed on a common pivot, 69. They have a pin and shoulder connection, 8 and 9, whereby they have a pivotal movement together in one direction and a relative pivotal movement in the opposite direction, so that, while operating in one direction, they are in effect an integral lever, and, while operating in the opposite direction, a split lever. A spring, 10, connects the two together, and is adapted to permit the feed lever, 6, to complete its normal movement after the movement of the feed finger is arrested by the stoppage of the button. The operating link, 3, is pivoted rigidly at its lower end to the feed lever, 6, and has a pin and slot connection at its upper end with the operating plunger. This mechanism is operated by the up and down movement of the plunger and co-operates in the manner briefly set forth above, with the staple forming and clinching mechanism of the machine.

Thus it will be seen that the compensating or lost motion device inheres primarily in the split lever construction of the feed lever and feed arm, and the spring connection between the feed lever and feed finger, whereby the operating link and the feed lever are permitted to complete their normal stroke in order to drive and clinch the staple after the feed finger and the feed arm are stopped by the button. As will appear later on examination of the file wrapper history of the patent application, the patentable novelty of this construction was found to inhere in these features, and claim 4 was allowed only because of the introduction of a feed arm as a fourth element of the combination, and the spring connection adapted to function in this specific manner.

Defendant's structure, as above illustrated, has a feed finger, 1, connected by a pivot, 10, to a feed lever, 2. This feed lever is fulcrumed on the pivot, 3, attached to the frame of the machine. Its lower end has a pin and slot connection with the operating link, 5, the upper end of which is rigidly pivoted to the plunger. A spring, 4, holds the feed finger in yielding engagement with the top of a button while being fed. A tension spring, 6, connects the pin at the lower end of the feed lever with the operating link. In actual operation, when the button feed finger and the feed lever have brought the button into staple-receiving position, and are positively stopped, the operating link and plunger are allowed to complete their normal stroke by reason of the spring, 6, yielding and thereby permitting the operating link, 5, to move relatively to the lower end of the feed lever.

This is the reverse of the mode of operation of plaintiff's construction. The feed lever, also, is not made up of a lever and a feed arm having pivotal movement together in one direction and a relatively pivotal movement in an opposite direction, as in plaintiff's construction, but is an integral, and not a split, lever. Plaintiff contends, however, that defendant's operating link, 5, is the equivalent of its feed lever, 6; that defendant's feed lever, 6, is the equivalent of its feed arm, 7, and that the pin, 8, operating in the slot, 7, is the equivalent of the abutting surfaces on its feed arm and feed lever, whereby pivotal movement together in one direction and relative pivotal movement in an opposite direction are obtained, and, further, that defendant's spring 4, connecting the feed finger and feed lever, and the spring 6, are the equivalent of its spring 10. The charge of infringement rests primarily upon these contentions.

[1-3] In passing on this charge of infringement, a brief review of the file wrapper history of plaintiff's patent and of the prior art will be helpful. Elliott's original application described and claimed a combination of a feed finger, a pivoted lever attached to said feed finger, and a spring connection, substantially as described. This claim was rejected on two earlier patents issued to him, being Nos. 526,012 and 552,869. Later he amended the claim, describing a combination of a button feed finger and a feed lever, together with a spring connection between the two, to allow the feed lever to complete its normal stroke after the feed finger is arrested by the stoppage of the button, substantially as is described. In support of this amended claim and in order to avoid the references cited, he said:

"In all the references cited against the feed fingers, the fingers are provided with a slot, and have a longitudinal movement in order to adjust the fingers to buttons of different sizes. In the present invention, applicant has obviated the necessity of using a slot, and pivots the feed finger to the lever, and the movement of the finger upon its pivotal attachment forms a sufficient adjustment to adapt the same to buttons of all sizes."

The amended claim, despite this argument, was again rejected on patent No. 552,869. The applicant acquiesced in these rejections, and substituted an amended claim in the language of present claim 4, which was finally allowed. In submitting it, he said:

"This claim as now presented is thought to be patentably distinguished from the state of the art, as the elements therein recited are not disclosed."

Thus it appears that the patent examiner rejected the original and amended claims because of the prior art, and required the substitution of a narrower claim, which calls for the feed arm as an element, and of a spring connection between the feed finger and the feed lever, functioning in the manner described, in order to avoid conflict with that prior art. The applicant acquiesced in these rejections and in the examiner's construction of the claims and of the prior art. It is settled law that he is bound thereby, and is now estopped to assert a different or a broader construction. In *Frey v. Marvel Auto Supply Co.* (6 C. C. A.) 236 Fed. 916, 921, 150 C. C. A. 178, 183, Judge Knappen says:

"It is the broad, general rule that, where the Patent Office rejects a claim covering a device on its merits, and the rejection is acquiesced in and the patent issues, the applicant cannot afterwards be permitted a construction of the claims allowed wide enough to embrace the claim which was rejected" (citing cases).

To the same effect are *Garland v. Quinn* (6 C. C. A.) 242 Fed. 267, 270, 155 C. C. A. 107; *Van Manen v. Leonard* (6 C. C. A.) 248 Fed. 939, 161 C. C. A. 57; *Arnold-Creager Co. v. Barkwill Brick Co.* (6 C. C. A.) 246 Fed. 441, 158 C. C. A. 505; *Ventilated Cushion & Spring Co. v. D'Arcy* (6 C. C. A.) 229 Fed. 398, 143 C. C. A. 518; *Morgan Envelope Co. v. Albany Paper Co.*, 152 U. S. 425, 429, 14 Sup. Ct. 627, 38 L. Ed. 500.

This file wrapper history indicates, and the fact is, that Elliott's invention was made in an old and crowded art. Button-setting machines of this general type, with button-feeding mechanisms containing compensating and lost motion devices, to take care of the difference in size of buttons, had been in use for many years. Elliott himself seems to have been a prolific inventor of button-feeding machines. In addition to the two patents issued to him, as cited by the patent examiner, he had obtained patent No. 408,700, August 13, 1889, and No. 799,550, issued September 12, 1905, on an application dated two years earlier than the application for the patent now in controversy. In addition thereto, we have United States letters patent No. 265,532, issued October 3, 1882, to J. H. Morley, and No. 386,856, issued July 31, 1888, to J. F. Thayer, both for button-attaching machines.

An extended review thereof is not necessary. It is sufficient to examine briefly the two cited by the patent examiner. The button-feeding mechanism of the machines therein described and claimed contained three elements only—a feed finger, a feed lever, and the spring connection between the two. In patent No. 526,012, the means of compensation was a pin and slot connection between the feed finger and the feed lever, with a spring connecting the two together. This construction is also present in No. 408,700. Elliott in his testimony says that the objection to this form of construction was the difficulty of keeping the feed finger in alignment, and that guide plates were applied on both sides to hold it in line. Patent No. 799,550 was applied for and obtained by him on this construction, which he says did not overcome the difficulty to his entire satisfaction. The patented

construction was invented and designed to remedy this difficulty. In so doing, he departs from the pre-existing compensating devices, in which there is a relative sliding movement between two members, the feed finger and feed lever connected by a spring, and resorts to the relative rotation of two members about a common pin or pivot as a means of compensation.

In *Railway v. Sayles*, 97 U. S. 554, 24 L. Ed. 1053, it was held:

"A party who invents a new machine never used before, and procures letters patent therefore, acquires a monopoly as against all merely formal variations thereof; but if the advance towards the thing desired is gradual, and proceeds step by step, so that no one can claim the complete thing, each inventor is entitled only to his own specific form of device."

See, to the same effect, *Ross-Moyer Mfg. Co. v. Randall* (6 C. C. A.) 104 Fed. 355, 43 C. C. A. 578; *Rich v. Baldwin, Tuthill & Bolton* (6 C. C. A.) 133 Fed. 920, 66 C. C. A. 464; *Russell Grader Mfg. Co. v. Zeig Mfg. Co.* (6 C. C. A.) 259 Fed. 575, 577.

The foregoing principle is applicable here. Elliott made an improvement to an existing feed mechanism in a button-setting machine. He made an improvement only in the means of compensating for the lost motion necessary in feeding different sized buttons. He is entitled to claim only his specific form of device, and every other inventor is entitled to design and use any new form of device not embodying his.

Applying these principles to the present case, we are of opinion that defendant's construction does not infringe. The feed arm as an element is wholly lacking. There is no spring connection between the feed lever and the feed finger of the kind described and claimed, operating in the same manner and performing the same function. The feed lever is integral, and not a split lever, having pivotal movement together in one direction and a relative pivotal movement in the opposite direction. Nor does defendant's construction function in the same manner as plaintiff's. The feed lever is not permitted to complete its normal stroke after the movement of the feed finger is arrested by the stoppage of the button; on the contrary, when the button is in position, the movement of the feed finger and feed lever is positively stopped, and it is the operating link and plunger which complete their normal stroke.

In our opinion plaintiff's several contentions that defendant's feed lever is the mechanical equivalent of its feed arm; that defendant's operating link is the mechanical equivalent of its feed lever; that defendant's pin and slot connection between the operating link and the feed lever, with the connecting spring, are the mechanical equivalents of plaintiff's feed lever and spring connection between the lever and feed finger—are not sound and cannot be sustained. Defendant's operating link is not a lever in any proper sense of the word. Defendant's spring 4 performs no function except to hold the feed finger firmly in contact with the button, and is not adapted to permit the feed lever to complete its normal stroke. Defendant's construction has really the three elements only of the prior art, such as were embodied in the original and amended claims rejected by the patent examiner, and is, as respects the means of compensation, more akin to the rel-

ative sliding connection between the feed lever and feed finger of the prior art than to plaintiff's present construction. Defendant has, in fact, adopted the longitudinal movement emphasized by Elliott in distinguishing in the Patent Office his present invention from the prior art, made some changes, if not improvements, in the several parts, and transferred the slot, pin, and spring to another position in the machine.

Being of the opinion that the charge of infringement is not sustained, it becomes unnecessary to express any opinion as to the validity of claim 4.

The judgment of the lower court should be and is, affirmed.

On Petition for Rehearing.

PER CURIAM. Appellant, in his petition for rehearing, criticizes the expression in the opinion at page 986: "This is the reverse of the mode of operation of plaintiff's construction." This expression, if applied to the entire mode of operation described in the preceding paragraphs, is too broad, and is perhaps misleading. It should be limited, as the context shows, to the specific operation of the feed arms of the two different constructions under examination. In defendant's, the feed arm is positively stopped on contact of the feed finger with the button, and the operating link *b* thereafter completes its normal stroke. In plaintiff's, the feed arm is not thus stopped, but is permitted to complete its normal stroke by means of the split lever and tension spring designed and functioning in the manner specifically described. It was in this limited sense that the criticized language was used. Due consideration has been given to the new arguments advanced in support of the application for rehearing. We are, however, content with the conclusion and opinion already announced and filed, except as herein modified.

The application is denied.

INTERSTATE LIGHTERAGE & TRANSPORTATION CO. v. NEWTOWN CREEK TOWING CO.

NEWTOWN CREEK TOWING CO. v. INTERSTATE LIGHTERAGE & TRANSPORTATION CO.

(District Court, E. D. New York. July 13, 1920.)

Salvage *§*22—Salvor liable for injury caused by negligence.

A wrecking company *held* entitled to recover for services rendered in raising a tug, which had been injured and beached, but liable for damage to the tug through negligent performance of the work.

In Admiralty. Libel by the Interstate Lighterage & Transportation Company against the Newtown Creek Towing Company, with cross-libel for damages. Decree for libellant, and also for cross-libellant.

See, also, 259 Fed. 318.

Macklin, Brown, Purdy & Van Wyck, of New York City (William F. Purdy, of New York City, of counsel), for Interstate Lighterage & Transportation Co.

Alexander & Ash, of New York City (Peter Alexander and Edward Ash, both of New York City, of counsel), for Newtown Creek Towing Co.

CHATFIELD, District Judge. The present action raises a pure question of fact, as there is a definite contradiction of testimony between the principal witnesses, with corroboration of the story of each.

The libellant first brought an action in rem. This court in *The Convoy*, 257 Fed. 843, disposed of certain legal questions presented upon that libel as drawn, but which were not dependent upon the taking of testimony. The libellant thereafter changed his action to one in personam, and sued for the sum of \$1,118, for work, labor, and services in raising, pumping out, and delivering to a dry dock the tug *Convoy*, which had received injuries, described as holes in her bow, on a trip down the Hudson river from Yonkers, and which had been beached early in the morning of December 31st, at the head of the slip between the Erie coal docks on the north, and a coal pier on the south, at Weehawken, N. J. A bulkhead runs along the shore at the head of this slip, with a flat sand or gravel top, extending some distance inshore. The slip has been dredged along its northerly side, furnishing a deep water channel south of the Erie coal pier. The southerly portion near the head of the slip is much shallower than the dredged portion, and has a considerable slope out from the bulkhead at the head of the slip as well as on the edge of the deep water channel. But in general the shallow southerly half of the slip is more or less uniform in depth as it approaches the coal pier on the south.

The crew of the *Convoy* late at night ran her ashore on this shelving beach rather to the southerly side of the slip, but with her stem some feet from the bulkhead at the head of the slip. As she filled with water, she rested on an even keel and was left in that condition. A number of witnesses testify that they saw the boat lying on an even keel, and there is no reason to suppose that, lying upon the bottom, the rise or fall of the tide would cause any change in her position, unless in some way at high water she was drawn out or caused to slide out into a position where she could roll over. Immediately to the north of the *Convoy* was a pile driver, with its barge or tender on the north side and lying next to a barge moored on the southerly side of the Erie coal dock. The *Convoy* was 3 or 4 feet from the southerly side of the pile driver and apparently when left was approximately parallel to the pile driver.

The libellant's derrick barge 402, which had a lifting capacity of about 40 tons, reached the *Convoy* on the night of December 31st. The various witnesses seem more or less confused as to the exact date, but in general they agree as to the sequence of transactions. The 402 did not have sufficient lifting capacity to put slings under both ends of the tug and remove her bodily, or to hold her up and tow her away. The water on the south side of the *Convoy* was unobstructed, and the 402 was able to work in at high tide, although she took the ground in so doing. She went along the port or southerly side of the *Convoy*, and, by sending down a diver, put a sling through the arch of the stern post. Upon

raising the stern of the Convoy up 2 or 3 feet, or near the level of the water, it was found that the Convoy could not be lifted high enough to pump her out, and they lowered her back for the night.

It must be remembered that the last week in December, 1917, and the first part of January, 1918, saw continuous below zero temperature, with some days running several degrees below zero. The Hudson river was full of ice, and the conditions were as bad as possible for wrecking operations. But this apparently did not cause any further injury to the Convoy; it merely resulted in some delay and interference, as the pumps froze for a short period. On the following day, when the Convoy was again raised by means of the sling through the arch, it was noticed that her stern was in such position as to bring her superstructure against the rail or wearing strip of the pile driver every time the stern of the Convoy was raised up or down, and damage resulted, as the Convoy had to be again lowered. At some time during the occurrence the Convoy's house was forced over to one side, and damages, independent of the holes in her bow, resulted, for which the claimant has filed a cross-libel, claiming damage in a sum much beyond the libellant's charge for its services.

Upon the trial proof was offered showing that the libellant's charge for services was correct and not unreasonable in amount, when the conditions prevailing and the proved inability of the Merritt & Chapman and other companies to undertake the work at that time are considered. The libellant, therefore, would be entitled to recover its claim, and the real issue is the counterclaim for damage. There are a number of direct points of dispute in the testimony.

A representative of the claimant, who was neither a navigator nor a wrecker, but a man of intelligence and apparent credibility, reached the scene of the wreck on the afternoon of December 31st. He testifies that the Convoy was lying on an even keel, and that he stepped from the pile driver to the top of the deckhouse, over a gap of 3 or 4 feet. A number of other witnesses corroborate him. The captain of the 402 and another captain working for the libellant went up to look the situation over before the boat could get there, and they testify that the stern of the Convoy was so close to the pile driver that neither the pile driver nor the coal barge could be pulled out, in order to let the 402 go in on the north side. It is undisputed that on the following day a tug tried to draw out these boats, and at that time was unable to do so. But this was after the stern of the Convoy had been raised, and she had been lowered back into what the claimant alleges was a different position. There is also direct dispute as to when a line was carried to the dock on the south side of the slip from the Convoy, and whether another line was carried from the stem of the Convoy to some point on the bulkhead, so that, as the stern of the Convoy was raised, she would not roll over or slide off. Such lines ultimately were in position, but the claimant offers testimony which tends to show that these lines were not in position when the stern was raised the first time.

The claimant's witnesses allege that, as the derrick 402 raised the stern of the Convoy, two things happened: First, the Convoy slipped back, as her narrow supporting surface at the bow cut into the mud

at the head of the slip; and, second, that the downward strain upon the starboard side of the 402 lifted her port or southerly side sufficiently, so that both the derrick and the Convoy were carried, either by some slope in the bottom or by the force of the water, toward the north and closer to the pile driver. The Convoy was ultimately raised with the aid of another derrick, which placed a sling under the bow after the coal barge and the pile driver had been drawn out. But this was not accomplished until some three or four days after the first attempts.

There is nothing in the testimony which conclusively settles these disputes of fact. The witnesses are all men of apparent credibility, and it is impossible to find that any of them were deliberately making up their story. Both sides are evidently trying to recall the events and state conditions from the standpoint of their own claims, and the court is not able to base its decision upon a direct conclusion that any of the witnesses were testifying falsely. The matter, therefore, has to be disposed of solely from a determination of the preponderance of the testimony, remembering that the burden is upon the claimant to furnish a preponderance of testimony in its favor.

The testimony is so strong that the Convoy was beached on an even keel, and that her stern was not then in contact with the pile driver, that we must start with this assumption. This being so, the change in position, so that the stern of the Convoy was under the side of the pile driver, and from which damage resulted, either as the tide went up and down, raising and lowering the pile driver, or as the Convoy was raised by the 402, must have come from some movement of the Convoy. If the Convoy was raised, so that one-half of her weight, when filled with water, was resting upon her bow in soft mud and on a sloping bank, the boat would be likely to do as the claimant's witnesses testify and slip back. Even a line to the bulkhead, unless favorably placed, might not prevent this slipping or the swinging of the boat to the north. The lifting of the port side of the 402, and the moving of both boats to the north, would also be the probable result of strain upon the stern of the Convoy, and again this could only be prevented by favorable and careful location of lines to anticipate that result.

The probabilities of the case are with the claimant. It is difficult to believe that the captain of the 402, or the other wrecking captain, who went with him to visit the scene, had anticipated the situation which they experienced, if they undertook to raise the stern of the Convoy by a sling, when it was evident that she could not thus be moved, when she was in contact with the pile driver, and when damage would certainly result, but which could be avoided by a change in conditions, through the removal of the other boats. If the Convoy had been keeled over in such a way that she was resting against the pile driver, it would seem as if some effort to roll her into an upright condition, or to remove her from contact with the pile driver, would have been undertaken, instead of an attempt to raise her up in such a manner that she would apparently be allowed to roll further over.

The fact, also, that no soundings were taken, and that the captain of the derrick accepted the situation and took his derrick into the shallow water on the south side of the Convoy, to a position where he could

undertake only the maneuver which the claimant's witnesses testify he attempted, adds to the probability that an attempt was made to lift the stern of the Convoy, with the idea that she might be pumped out at low tide, and that the operation might be rendered an easy one, if conditions were favorable. When, however, the formation of the bottom caused a slight movement of the Convoy into a position where damage resulted, then, like all matters where a chance of problematical success has failed, the situation was much worse than it had been in the beginning.

Finding, therefore, that the preponderance of the weight of testimony is in favor of the claimant, we must consider whether the action of the captain of the 402, in undertaking what he did, was negligence sufficient to allow recovery on the part of the claimant. All matters of judgment may turn out contrary to what is expected, and yet the judgment may have been either the best one possible at the time, or may have been reasonable under the circumstances. In the present case the extremely cold weather, the difficulty of getting another boat, the near approach of night, the apparent ease with which the derrick was drawn in on the south side of the Convoy, all lead the court to conclude that the judgment of the captain of the 402 was made up from insufficient data, and that he should not have attempted the maneuver without making soundings and more carefully knowing what he was doing.

It is probable that, when he and the other captain visited the scene at noon, the condition of the tide was different, the depth of water on the south side of the Convoy was not known, and that, when the 402 arrived, she was put in at the south side of the Convoy and in the shallow water, owing to lack of information on the part of the captain, which he should have obtained in order to make a correct determination as to his course of action.

For these reasons it must be held that the libelant was negligent in the manner in which it conducted the raising operation of the Convoy, and that the claimant should recover on its cross-libel.

Decree for libelant for amount claimed, with decree for cross-libelant for damages sued for.

RANDOLPH et al. v. CRAIG, Internal Revenue Collector.

(District Court, M. D. Tennessee, Nashville Division. February 23, 1920.)

No. 1261.

1. Courts ⚡347—General demurrer insufficient under state law insufficient in action at law in federal court.

Under the federal conformity statute (Rev. St. § 914 [Comp. St. § 1537]), general grounds of demurrer, insufficient under Shannon's Code Tenn. § 4655, are insufficient in action at law in federal court.

2. Internal revenue ⚡8—Inheritance tax is tax, not upon property, but upon succession.

The estate tax imposed by Act Sept. 8, 1916, § 200 et seq. (Comp. St. § 6336½a, et seq.), is not a tax on the decedent's property, but is on transfer or transmission by will or descent from the decedent, being in effect a tax on the succession from the decedent.

⚡ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. Courts \Rightarrow 363, 365—State statutes and decisions controlling as to taxability under federal Inheritance Tax Law.

In determining taxability of widow's interest in her husband's estate under Inheritance Tax Law, § 200 et seq. (Comp. St. § 6336½a, et seq.), the statutes and rules of decision in the states where the decedent's property is located control.

4. Internal revenue \Rightarrow 8—Widow's dower, homestead, and year's support not taxable; "charges against estate."

Since, in Tennessee and Arkansas, a widow does not receive either her homestead, dower, or year's support in succession to her deceased husband, or by transfer from him, but rather under the statutory provisions vesting these rights in her independently of her husband and adversely to his estate, the property assigned to her in those states as dower, homestead, and year's support, not being transferred to her from him, is not a part of his estate on which the tax is imposed by the Federal Estate Tax Law, § 200 et seq. (Comp. St. § 6336½a, et seq.), and, in any event, if her dower, homestead, and year's support should be deemed part of the decedent's gross estate, within the meaning of the estate tax, they would be deductible from the value of the gross estate, under section 203, cl. a(1), being Comp. St. § 6336½d, as "charges against the estate * * * allowed by the law of the jurisdiction * * * under which the estate is being administered."

5. Internal revenue \Rightarrow 8—Widow's support deductible; "charge against estate."

Where, by the law of the state under which an estate is being administered, the widow's right to a year's support is not conditioned upon actual dependency, such support is deductible as a "charge against the estate," under Federal Estate Tax Law, § 203, cl. a (1), being Comp. St. § 6336½d, without showing actual dependency.

At Law. Action by George Randolph and others against E. B. Craig, Collector of Internal Revenue. On demurrer to declaration. Demurrer overruled.

Action by the executors and trustees under the will of Wm. M. Randolph, deceased, at the time of his death a citizen and resident of Tennessee, and by his widow, against the Collector of Internal Revenue for the District of Tennessee, to recover a portion of the tax assessed upon the estate of the decedent under the Act of September 8, 1916, c. 463, 39 Stat. 756, which had been paid the Collector under protest; namely, that portion of the tax based upon the value of the gross estate of the decedent without deduction for the value of the widow's homestead in Tennessee, her dower interest in lands in Tennessee and Arkansas, and her year's support out of Tennessee personalty. On demurrer to the declaration. Demurrer overruled.

Randolph & Randolph, of Memphis, Tenn., for plaintiffs.

Lee Douglas, U. S. Atty., and B. H. Littleton, Asst. U. S. Atty., both of Nashville, Tenn., for defendant.

SANFORD, District Judge. After careful consideration, my conclusions, briefly stated, are:

[1] 1. The first, second and third grounds of demurrer, being general, are, under section 2934 of the Tennessee Code (Shan. 4655), and the Federal Conformity Statute, R. S. 914 (Comp. St. § 1537), insufficient in law. *Brown v. Telephone Co.* (C. C.) 181 Fed. 246, 247. They must hence be overruled.

2. The fourth, fifth and sixth grounds of demurrer are special. Neither of them challenges the widow's right in law to the setting aside of dower and homestead, but the fifth specifically challenges her right to the allowance of a year's support. The fourth ground specifically raises the defense that the widow's dower and homestead interest is to be included in determining the estate of the decedent which is subject to the estate tax; and the sixth ground raises this defense, in another form, both as to the dower and homestead and as to the year's support.

3. Under the Federal Tax Law, Act Sept. 8, 1916, c. 463, sec. 200 et seq., 39 Stat. 777 et seq., U. S. Comp. Stat. sec. 6336 $\frac{1}{2}$ a et seq., an estate tax is "imposed upon the transfer of the net estate of every decedent" (sec. 201). The pertinent provisions are:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * * wherever situated: (a) To the extent of any interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expense of its administration and is subject to distribution as part of his estate" (sec. 202); and "That for the purpose of the tax value of the net estate shall be determined—(a) In the case of a resident, by deducting from the value of the gross estate—(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, * * * support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction * * * under which the estate is being administered" (Sec. 203).

[2, 3] 4. The estate tax thus imposed is clearly not a tax on the property of the decedent, but upon its transfer or transmission by will or descent from the decedent, being in effect a tax on the succession from the decedent. See *United States v. Perkins*, 163 U. S. 625, 629, 16 Sup. Ct. 1073, 41 L. Ed. 287; *Magoun v. Illinois Co.*, 170 U. S. 283, 288, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Knowlton v. Moore*, 178 U. S. 41, 54, 20 Sup. Ct. 747, 44 L. Ed. 969; *Crenshaw v. Moore*, 124 Tenn. 528, 531, 137 S. W. 924, 34 L. R. A. (N. S.) 1161, Ann. Cas. 1913A, 165. That is, as said in *Lederer v. Northern Trust Co.* (C. C. A. 3d Circ.) 262 Fed. 52, 54, affirming *Northern Trust Co. v. Lederer* (D. C.) 257 Fed. 812, the tax "is imposed not upon the interest of the recent owner * * * but upon the transfer of the interest in its devolution." This is made clear by the express provisions of the act that the tax is imposed "upon the *transfer* of the net estate of every decedent" (sec. 201) and that the value of the gross estate is to be determined by "the extent of the interest therein of the decedent * * * which * * * is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate" (sec. 202). In other words, the underlying principle is that in the first instance the interest subject to the tax is only that which is subject to charges against the estate of the decedent and is transferred from him to others at his death by will or descent. The crucial question then is whether upon the husband's death the widow is entitled to homestead, dower and a year's support by transfer from her husband's estate and in succession to him, or whether her right to

these interests is vested in her by operation of law independently of her husband and not transmitted to her through him. On this question the statutes and rules of decision in Tennessee and Arkansas where the decedent's property is located are controlling. *De Vaughn v. Hutchinson*, 165 U. S. 566, 570, 17 Sup. Ct. 461, 41 L. Ed. 827.

It is settled in Tennessee that a widow's right to dower is not a succession to the title of her husband upon his death; that she does not succeed in her dower to her husband's title, but derives it by the marriage and her right as wife, to be consummated in severalty to her upon her husband's death; and that she takes it adversely to the inheritance from the husband. *Crenshaw v. Moore*, 124 Tenn., supra, at page 534, 535, 137 S. W. 924, 34 L. R. A. (N. S.) 1161, Ann. Cas. 1913A, 165, supra; *Kitts v. Kitts*, 136 Tenn. 314, 319, 189 S. W. 375. This is likewise the law in Arkansas. *McDaniel v. Byrnett*, 120 Ark. 295, 299, 179 S. W. 491, citing and approving *Crenshaw v. Moore*, supra. A fortiori this is true as to the widow's homestead in Tennessee, which is likewise not a purchase from her husband, but an incumbrance upon the title of the heir at law originating with the marriage and consummated by the husband's death. *Kitts v. Kitts*, 136 Tenn., supra. And so in Tennessee the widow does not succeed to her husband's title to the property set apart as a year's support, but acquires it adversely to his administrator by virtue of the statute conferring the right. *Crenshaw v. Moore*, 124 Tenn. at page 531; 137 S. W. 924, 34 L. R. A. (N. S.) 1161, Ann. Cas. 1913A, 165, supra. It results that as the widow does not receive either her homestead, dower or year's support in succession to her husband or by transfer from him, but takes them under the statutory provisions vesting these rights in her independently of her husband and adversely to his estate, the property assigned to her as dower, homestead and year's support, not being transferred to her from her husband, is not a part of his estate upon which the tax is imposed by the Federal Estate Tax.

Furthermore, if her dower, homestead and year's support should be deemed part of the decedent's gross estate, within the meaning of the estate tax, it seems that they would be in any event charges against the estate allowed by the laws of the jurisdictions under which the estate is being administered, and hence in any event to be deducted from the value of the gross estate under the express provisions of clause a (1) of section 203 of the Act.

[5] As to the question raised by the fifth ground of the demurrer, whether on the face of the declaration the widow is entitled to a year's support, it is doubtful, in the first instance, whether the recitals as to her other property in the testator's will are conclusive upon her. But even if this were so, the result would be the same. While it would apparently be true that in so far as the Federal Estate Tax itself is concerned, she would not be entitled to support during the administration of the estate—whatever the period—unless dependent upon the decedent, under the terms of clause a (1) of section 203, nevertheless her claim for a year's support should in any event be deducted as a charge against the estate allowed by the laws of Tennessee; there being nothing in the Tennessee statutes or decisions in reference to a year's support which

limits the widow's right to a year's support to cases of actual dependency upon the decedent. The fourth, fifth and sixth grounds of the demurrer are hence not well taken, and must likewise be overruled.

5. An order will accordingly be entered overruling the entire demurrer.

Ex parte HARVELL.

(District Court, E. D. North Carolina. September 30, 1920.)

1. War ⚡4—Existence does not suspend restrictions on arrests without warrant for offenses not connected therewith.

The continued existence of the state of war with Germany does not suspend the constitutional rights of citizens, so as to justify an arrest without warrant for an offense not connected with the prosecution of the war, which would not be justified in times of peace.

2. Arrests ⚡58—Federal officers can arrest only for federal offenses.

Federal officers have no power to arrest a citizen, unless he is charged with an act violating the federal statute.

3. Arrest ⚡63 (3)—Federal officers may arrest without warrant for misdemeanor in their presence.

Federal officers may arrest without warrant persons who commit in their presence acts declared by the Penal Code to be misdemeanors.

4. Arrest ⚡70—Prisoner, arrested without warrant, must be taken forthwith before a magistrate.

Under Rev. St. § 1014 (Comp. St. § 1674), making proceedings for holding a person to answer a criminal charge similar to those under the laws of the state in which the proceeding takes place, and Comp. St. § 1678, requiring an officer arresting a citizen to take him before the nearest judicial officer for hearing and commitment or bail, a federal officer making arrest without warrant, whether for an act committed in his presence or for a felony of which he has information, cannot confine defendant in jail without first having preferred charges against him before a magistrate and given him an opportunity to be heard.

5. Habeas corpus ⚡30 (3)—Mittimus for federal prisoner in county jail held insufficient.

A mittimus, issued by a federal agent to a county jailer, which simply stated that defendant was remanded to the jailer's custody, without stating the charge, the duration of the imprisonment, or any time for hearing, is insufficient, and a prisoner held thereunder will be discharged on habeas corpus.

Habeas Corpus. Petition by T. H. Harvell to procure the discharge of C. W. Harvell from custody in a county jail. Petitioner discharged.

McClammy & Burgwyn, of Wilmington, N. C., for petitioner.

E. F. Aydlett, Dist. Atty., and C. E. Thompson, Asst. Dist. Atty., both of Elizabeth City, N. C., for respondent.

CONNOR, District Judge. On September 16, 1920, T. H. Harvell, in behalf of C. W. Harvell, presented his petition, duly verified, alleging that C. W. Harvell was imprisoned in the county jail of New Hanover county and restrained of his liberty—

“by a government agent from the Department of Justice; * * * that the cause of such imprisonment or restraint, according to the knowledge and

belief of the petitioner, is under the Mann Act [Comp. St. §§ 8812-8819], but no warrant or order of arrest, or other process, as this petitioner believes and alleges, has ever been issued; that no warrant has been read to petitioner, no charge has ever been made against him, and no process ever served upon him, other than the said C. W. Harvell was taken into custody by an agent of the government and incarcerated in the common jail of New Hanover county, without being permitted to give bond; that the legality of his imprisonment has not been inquired into."

Petitioner prayed that a writ of habeas corpus issue, etc. The writ was directed to the jailer of New Hanover county, and pursuant thereto, R. L. Harber, deputy sheriff and jailer, produced the body of C. W. Harvell before me at the Federal Court Building in the city of Wilmington, and in his return to the writ produced a mittimus in the following words and figures:

"Remand.

Form 41.

"United States Department of Justice E. District.

"September 16, 1920.

"To the Keeper of New Hanover County Jail:

"C. W. Harvell, a United States prisoner, is hereby remanded to your custody.

~~"Deputy~~ S. S. Nelms, Agt. Dept. J.,

"Pr. A. B. West.

F. C. Hamby, ~~U. S. Marshal~~

"Dept. Justice."

The district attorney not being in Wilmington, the hearing of the petition was continued until Tuesday, September 21, 1920, at Laurinburg, N. C. Petitioner was admitted to bail in the sum of \$500 for his appearance at that time and place.

A copy of the petition, writ, return, and order were transmitted to E. F. Aydlott, Esq., district attorney, at Elizabeth City, N. C. The petition, writ, and return thereon were heard at Laurinburg, N. C., September 21, 1920; the petitioner being present and represented by his attorney, K. O. Burgwyn, Esq., and the government by C. E. Thompson, Esq., assistant district attorney. No answer was filed to the petition or return of the jailer.

S. S. Nelms made an oral statement from which it appeared that petitioner was, on September 16, 1920, in the city of Wilmington, his home being about six miles distant, in an adjoining county; that Nelms, as an assistant agent of the Department of Justice, received information, which he regarded reliable, that petitioner had violated the Mann Act. He also received information which caused him to believe that, unless apprehended, petitioner would attempt to make his escape. He was, at that time, under bond for his appearance before the state court upon a charge based upon the same facts of which Nelms had received information. He declined to give the name of the person who informed him that petitioner would attempt to escape, or in what such information consisted. The United States commissioner at Wilmington, N. C., was, on September 16, 1920, away from the city. Resident commissioners were at Jacksonville and Whiteville, in adjacent counties. Nelms wired such information as he had to F. C. Hamby, Esq., Agent Department of Justice, at Raleigh. He received an answer, but the telegram was not produced on the hearing. Nelms says that he had not received an answer to his telegram to Hamby at the time he

arrested petitioner. A warrant was issued by W. P. Batchelor, Esq., United States commissioner at Raleigh, N. C., upon the complaint and affidavit of Hamby, based upon the telegram from Nelms. It reached Wilmington, N. C., on the night of September 16th. Nelms says:

"I arrested Harvell and turned him over to West, deputy marshal. Petitioner's home is six miles from Wilmington."

No testimony was offered, or heard, touching the question of petitioner's guilt, or of his alleged purpose to escape. The only question considered was directed to the authority of either the agent of the Department of Justice or the deputy marshal to arrest and imprison petitioner without a warrant, or other authority than that shown upon the hearing.

Passing the question respecting the extent of the authority vested in an agent of an executive department to arrest and commit a citizen to imprisonment, without the intervention of an officer empowered to hear and determine whether probable cause for such arrest had been shown, and conceding to such agent the authority of a marshal, or his deputy, the very important question is presented whether he is, or can be without violating the constitutional and statutory rights of the citizen, authorized to pursue the course disclosed by the record in this proceeding.

[1] I am not inadvertent to the fact that the United States is legally at war with the Imperial Government of Germany. The offense with which petitioner is charged had no relation to a state of war, nor is it suggested that such offense was committed within five miles of any army camp. It may not be inappropriate to call the attention of officers in the civil service of the government to the declaration of the Supreme Court that—

"The Constitution of the United States is a law for rulers and people equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of men than that any of its provisions can be suspended during any of the exigencies of government." *Ex parte Milligan*, 4 Wall. 120.

[2] The inquiry therefore comes: When, and under what circumstances, may an officer, authorized to arrest a citizen charged with violation of the Penal Code of the United States (35 Stat. 1088), do so without a warrant, and what may he do with the person arrested? It must always be kept in mind that federal officers and courts have no power or jurisdiction to arrest, try, or punish a citizen, unless the act with which he is charged violates a federal statute. In that respect their power is subject to limitations not imposed upon state officers and courts having jurisdiction to arrest, to try, and to punish for what are known as "common-law offenses."

[3] It is not questioned that federal officers may arrest, without a warrant, persons who commit, *in their presence*, acts declared by the Penal Code to be misdemeanors. It may be that they may, within certain limitations, arrest without a warrant persons charged with acts declared to be felonies by the Penal Code, not committed in their presence. The only statute which I find conferring such authority is sec-

tion 1676, U. S. Comp. Statutes Annotated 1916, vol. 3, p. 3484 (2d Ed.), which provides that when a marshal, or his deputy, "shall find any person or persons in the act of operating an illicit distillery, it shall be lawful for such marshal or deputy marshal to arrest such person or persons, and take him or them forthwith before some judicial officer."

[4] While my attention is not directed to any other statute conferring such authority, it has been held that, under the provisions of section 1674, Comp. Stat. (R. S. § 1014) vol. 3, p. 3447:

"All proceedings for holding an accused person to answer to a criminal charge are assimilated to those under the laws of the state in which the proceedings take place." See note 13, p. 3451, Comp. Stat. 2d Ed. (West Publishing Co. Edition).

It is also held that, in the absence of any constitutional or statutory provisions, the common law furnishes the rule as to the mode of procedure in criminal cases in the federal courts. *U. S. v. Kilpatrick* (D. C.) 16 Fed. 765; 4 Blk. Com. (Jones) § 328, p. 2512, and notes. Section 1674, Comp. Stat., after naming the officers who may issue warrants for the arrest of persons charged with violation of the federal Penal Code, among whom are commissioners, mayors of cities, and justices of the peace, prescribes that the procedure shall be "agreeably to the usual mode of process against offenders in such state." Section 1678, Comp. Statutes, vol. 3, p. 3484, prescribes, in unmistakable terms, the duty of an officer arresting a citizen charged with violating a federal statute, "to take the defendant before the nearest * * * judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail."

This is in accord with the provisions carefully guarding the right of the citizen, found in the North Carolina Statutes. Chapter 80, Pell's Rev. 1908. Conceding the power to arrest petitioner, the offense charged being a felony, although no proof is offered to sustain the suggestion that he would escape before a warrant could be procured, and of the fact that he was under bond for his appearance before the state court upon a charge of which that court held that it had jurisdiction, based upon the same alleged facts, no authority is suggested by the district attorney for the incarceration in jail by the officers upon the so-called "mittimus" issued by either one or all of them. It is not clear who, in fact, did sign the "mittimus." Mr. Hamby, who purports to have done so, was in Raleigh at the time. Each of the names appears to have been written by the same person.

When an officer is exercising, under statutory limitations, powers affecting the personal liberty of the citizen, he should exercise a high degree of care in complying strictly with the forms which essentially affect the substance of the procedure. They may not, for any reason, be violated or neglected. It is the right of the citizen to demand, at every stage of a proceeding, involving and, as here, resulting in his incarceration in jail, that the law, in form and substance, be complied with, to the end that he may be informed of the cause of his arrest and present the record, made by the officer, upon an application for a writ of habeas corpus.

[5] The record made by the agents, or officers, who arrested, issued the "mittimus," and caused the imprisonment of the petitioner, fails to comply with any, and violates every, statute enacted for their guidance and the protection of the rights of petitioner. It fails to set out the cause of the arrest and imprisonment, how and when he could have a hearing and be confronted by his accusers and their witnesses, or make his defense, or the manner, if at all, in which he could be released from imprisonment. It states that petitioner, "a United States prisoner, is hereby remanded to the custody" of the jailer. When, how, or by what judicial procedure petitioner became "a United States prisoner," and by what authority he is "remanded" to the custody of the jailer, is left to conjecture, without any suggestion enabling the "prisoner" to have a hearing to give bail or be otherwise released. So far as the "mittimus" informs the petitioner or the jailer, he was to be held in custody perpetually. Nothing short of a writ of habeas corpus could secure an examination of the cause of his imprisonment or his release. The only possible explanation of the conduct of the agents or officers who promulgated this so-called "mittimus" is that they used a blank form of a "mittimus" committing a defendant to jail, in execution of a final judgment rendered after trial and conviction and directed to a United States marshal. Such disregard of essential provisions of criminal procedure, resulting in imprisonment of a citizen, without being informed of the cause of his imprisonment or an opportunity to be heard in his defense, indicates a degree of ignorance or disregard of law difficult to account for and without justification or excuse. A great and wise judge in the early days of the republic, referring to arrests without a warrant, said:

"No proceeding, under the color of law, can be more susceptible of being wrought into an engine of oppressive power, than that of depriving an individual of his liberty, and of consigning him to imprisonment upon an 'ex parte hearing.' Every freeman has a right to be confronted with the witness against him, *in all stages of his accusation*; the privilege is inherent and the right to demand the opportunity for proving his innocence *simultaneous with the first step of the prosecution*. Before, therefore, any commitment can be lawfully made, the accused is entitled to an opportunity of showing, either that the act he is charged with is no crime in the eye of the law—that if any wrong has been done he is not the perpetrator of it, or that however strong the evidence may be against him, the offense alleged is of a class justifying the discharge of his person upon the production of such bail as may be legally required of him." Hanson, Judge, in *United States v. Almeida*, 2 Wheeler, Cr. Cas. N. Y. 576.

In *State v. Parker*, 75 N. C. 249, 22 Am. Rep. 669, Mr. Justice Bynum, holding that a constable, who arrested, imprisoned, and discharged, without a warrant, a man found intoxicated on the streets of a town, was guilty of an assault, said:

"Men may not be arrested, imprisoned and released upon the judgment or at the discretion of a constable or any one else. If the alleged offense be criminal in its character and committed in the presence of the officer, he may arrest and take the offender before a magistrate for trial."

After setting forth the course pursued by the constable the learned justice said:

"The constable thus constituted himself the judge, jury and executioner. *This is the best description of despotism.*"

In *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, Justice Bradley, in an opinion of great learning and ability, quoted Lord Camden's language in his celebrated opinion regarding unwarranted searches and seizures:

"Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown, where the law forceth evidence out of the owner's custody by process. * * * But our law has provided no paper search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say."

Justice Bradley says:

"The principles laid down in this opinion affect the very essence of constitutional liberty and security."

The pertinency of this language is found in the fact that the same amendment (article 4) secures "the right of the people to be secure in their persons," as "in their * * * houses, papers, and effects, against unreasonable searches and seizures," and provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In *Boyd's Case* it was held that the "language of Lord Camden was relied on [by the authors of the amendment] as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and 'unreasonable' character of such seizures." The statutes, therefore, enacted by Congress, unless in violation of the Constitution, prescribing the manner in which the persons of citizens may be seized, arrested, and imprisoned, are the sole standard of what, in that respect, is "reasonable." Any other method of doing so is "unreasonable," and therefore unlawful. They constitute the standard by which the right of the citizen is measured and the power of the officer is limited. Referring to the suggestion made in defense of the procedure adopted in *Boyd's Case*, supra, and held to violate the Constitution, Justice Bradley says:

"Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficiency, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

In view of the unusual powers recently conferred upon administrative officers, the frequent disregard of the legal rights of the citizen in

the enforcement of "war statutes," essential to the safety of the country while in a state of war, the increasing extension of federal control of the conduct of the citizen under recently adopted amendments to the Constitution, requiring the employment of agents, inspectors, and many others whose titles and whose powers are uncertain, indefinite, and unknown to the people, and for the due enforcement of such statutes and execution of such powers in accordance with law, thus bringing those charged with violating the law to trial by lawful methods of procedure, insuring respect for law by both officers and citizens, I have given the case careful examination and consideration, and set out at more than usual length the law as enacted by Congress and expounded by the courts. The authority given officers for the detection of crime and arrest of alleged criminals is ample for the enforcement of federal statutes. If this were not so, the remedy must be found by appeals to the legislative department of the government, and not by the exercise of doubtful authority, or resort to doubtful methods by executive or administrative officers or strained construction by the courts.

The imprisonment in jail of a citizen without warrant, without opportunity for a hearing or to give bail, is a serious matter, and while, in case of necessity, recognized by law, for the protection of the safety of the state and the due administration of its laws, an arrest may be made without warrant, the duty in every case is imperative upon the officer "*to forthwith carry the person arrested before the nearest judicial officer having jurisdiction to hear and determine the legality of such arrest,*" to issue a warrant upon affidavit setting forth the substance of the offense charged and the substantial and material features thereof. Ex parte Van Hoven, Fed. Cas. No. 16,858. "The citizen is entitled, at all times, to be apprised of the crime of which he is accused and of the acts charged constituting the crime." U. S. v. Ruroede (D. C.) 220 Fed. 210. Save in cases of pressing necessity and within clearly defined legal exceptions, a warrant should be procured *before the arrest is made*. This is due process of law. I have heard no evidence regarding the charge, or evidence of petitioner's guilt.

The question may come to me through lawful procedure, when petitioner will be entitled to be heard by a court and jury, which has not "formed and expressed an opinion" concerning his guilt. The marshal informs me that a new warrant against petitioner has been issued by a United States commissioner and placed in his hands. It is clear that the petitioner is unlawfully restrained of his liberty and is entitled to be discharged. The marshal will be notified of this order, to the end that the government's officers may proceed to deal with the case in accordance with "the statutes in such cases made and provided" and the "law of the land."

It is so ordered.

EDWARDS v. BODKIN.

(District Court, S. D. California, S. D. April 9, 1919. On Motion for Rehearing, July 24, 1919.)

No. C-55.

1. Ejectment ⚡1—Nature of action of "ejectment."

An action in "ejectment" is merely to recover possession of land based on legal title.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ejectment.]

2. Judgment ⚡663—During pendency of appeal, judgment in ejectment not conclusive.

That defendant recovered judgment against plaintiff in a prior action of ejectment in the state court involving the land in suit, which plaintiff claimed under a homestead entry, is not a conclusive adjudication against plaintiff's right to recover, where the action was removed to the Supreme Court of the State by notice of appeal and the giving of a bond, for in such case the action, which involved merely the right to possession, was still pending.

3. Judgment ⚡656—After order sustaining demurrer not conclusive against plaintiff's right to recover in another action.

A judgment dismissing the previous action brought by plaintiff in the California state court, based on an order sustaining a demurrer to the complaint with leave to amend, was not a conclusive adjudication against plaintiff's right to recover in a subsequent suit in the federal court, for Code Civ. Proc. Cal. § 1911, declares that only is deemed to have been adjudged in a former judgment which appears on its face to have been so adjudged, or which was actually and necessarily included, while the complaint was attacked on the grounds that it did not state a cause of action, and court was without jurisdiction, and the order sustaining the demurrer did not specify on which ground it was based, nor did the final judgment in any wise show a disposition on the merits, but might well have been based on plaintiff's failure to amend.

On Motion for Rehearing.

4. Public lands ⚡103 (1)—Affidavit insufficient to start contest, where affiant had no knowledge of facts.

A notice of contest supported by an affidavit absolute in form is insufficient to commence a contest, where it appeared that the contestant had no actual knowledge of the facts, for in such case he should be deemed guilty of false swearing.

5. Judgment ⚡18 (1)—Pleadings necessary to give jurisdiction.

In a court of justice it is necessary to file a declaration, etc., or other document sufficient to give court jurisdiction, and if a document is not filed which is sufficient to initiate the proceeding subsequent acts of court are futile, and no rights are adjudicated.

6. Public lands ⚡103 (3)—Where there is no contest, defendant acquires no preference right of entry.

Where there was no contest against an entryman on public lands, which for a time were withdrawn under Reclamation Act June 17, 1902 (Comp. St. §§ 4700-4708), but were later released, the one attempting contest could have no preference right of entry.

7. Public lands ⚡40—Failure of entryman to reside on arid lands not an abandonment.

In view of Reclamation Act June 17, 1902, § 3 (Comp. St. § 4702), held that Act June 27, 1906, § 5 (Comp. St. § 4724), is applicable to a home-

stead entry, and the failure of an entryman on arid lands withdrawn under the Reclamation Act to continuously reside or cultivate the same cannot, the lands being later released, be deemed an abandonment.

8. Appeal and error ⚡1195(1)—**Decision on former appeal, construing statute, is law of the case.**

A decision of the appellate court on former appeal, construing statute, is conclusive thereafter.

9. Public lands ⚡103(3)—**Institution of contest necessary to give land office jurisdiction.**

Where it did not appear that a contest was duly instituted, so as to give the land office jurisdiction to determine rights to the land, there being no question of fraud on the government, the decision of the land office as to rights to arid lands withdrawn after entry under Reclamation Act June 17, 1902 (Comp. St. §§ 4700-4708), but later released, is not binding.

In Equity. Suit by William B. Edwards against Patrick H. Bodkin. Decree for plaintiff, and motion for rehearing denied.

Affirmed in (C. C. A.) 265 Fed. 621.

Henry M. Willis, of Los Angeles, Cal., for plaintiff.

Dan V. Noland and Duke Stone, both of Los Angeles, Cal., for defendant.

TRIPPET, District Judge. A complaint in this suit was passed upon by the Circuit Court of Appeals and reported in 249 Fed. 562, 161 C. C. A. 488. The complaint has been amended, but not in any material respect as compared with the complaint passed upon by the said court. The facts, as stated in the opinion in that report, were proven at the trial. The plaintiff offered no proof regarding the misconduct of any of the officers in the land office. It follows, therefore, that the plaintiff is entitled to a decree as prayed for in the complaint, unless the pleas in bar pleaded by the defendant defeat that right.

[1, 2] The first plea sets up a judgment obtained in the superior court of Riverside county, in an action wherein the defendant here, Patrick Henry Bodkin, was plaintiff, and the plaintiff here, William B. Edwards, was defendant. The facts concerning that suit are these: Suit was filed June 3, 1912. It was an action in ejectment to recover possession of the land in controversy in this suit. The defendant answered the complaint, and a trial was had on October 18, 1912. Judgment was entered in the cause on November 12, 1913, wherein it was adjudged that the plaintiff (Bodkin) recover of the defendant therein the possession of the land described in the complaint and \$50 damages for rents and profits. On February 4, 1914, the defendant in the said cause filed a notice of appeal to the Supreme Court of California, and on the same day filed an undertaking on appeal. This notice of appeal and bond in pursuance thereof removed the case to the Supreme Court. The court is of the opinion that the plea in bar, as above stated, does not defeat the right of plaintiff's recovery. The action in ejectment was merely to recover possession of the land, based upon the legal title; and, since the appeal has not been determined, the action is still pending.

[3] The defendant also pleads in bar a judgment in a suit in the superior court of the state of California, in and for the county of River-

side, entitled William B. Edwards v. Patrick H. Bodkin, being the same parties here in litigation. The facts concerning that suit, in so far as material here, are as follows:

A demurrer was filed to the first amended complaint on April 5, 1916. This demurrer was upon the following grounds: First, that the court had no jurisdiction of the subject-matter of said action; and, second, that said first amended complaint did not state facts sufficient to constitute a cause of action. On June 8, 1916, the court made an order in words and figures following:

"Demurrer to amended complaint sustained, 10 days."

On June 30, 1916, the court entered the following:

"* * * An order having been entered in this action on the 8th day of June, 1916, sustaining the demurrer to the amended complaint herein and granting plaintiff 10 days within which to amend, and plaintiff having failed to further amend his complaint, it is hereby ordered and adjudged that the amended complaint herein be and the same hereby is dismissed, and that the defendant have and recover its costs of the said plaintiff taxed at fifty and ⁴⁰/₁₀₀ dollars. Dated June 30, 1916. Hugh H. Craig, Judge."

Other proceedings were had in said cause, with a view of having said judgment set aside. A motion to vacate the judgment was made. This motion to vacate the judgment has never been disposed of by the superior court of Riverside. The rule of res adjudicata is stated by section 1911, C. C. P., as follows:

"That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

It will be seen that there are two grounds specified in the demurrer: One, that the court did not have jurisdiction; and the other, that the complaint did not state facts sufficient to constitute a cause of action. The judgment sustaining the demurrer does not specify upon what ground the court sustained it. If the demurrer was sustained on the ground that the court had no jurisdiction, there would be no judgment upon the merits. Since it cannot be determined by an examination of the record upon what ground the court sustained the demurrer, it must follow that the judgment is not a bar. Besides, the proceedings show that the plaintiff was given leave to amend the complaint when the court made an order sustaining the demurrer. The plaintiff, however, never amended. It cannot be determined from the judgment entered in that case whether or not the court dismissed the complaint by reason of the failure of plaintiff to amend or by reason of the fact that the demurrer had been sustained to the amended complaint. It may well be that the court on June 30, 1916, finding that the record showed that the plaintiff had been given leave to amend and had not amended, thought the case ought to be dismissed for want of prosecution by the plaintiff. The judgment shows that the complaint was dismissed, but why it was dismissed, whether by reason of the fact that the demurrer had previously been sustained, or by reason of the fact that the plaintiff had not amended, is not set forth. There is no judgment that the prayer of the plaintiff's complaint be denied, nor is there a formal de-

cree of dismissal. It is plain that it does not appear upon the face of this judgment that the controversy was decided, or actually and necessarily included therein, or was necessary thereto.

For the reasons above stated, I am of the opinion that the last-mentioned suit is not a bar to the plaintiff's right of recovery in this suit. Civil Code of Procedure, § 1911; Civil Code of Procedure, § 581; Goldtree v. Spreckles, 135 Cal. 666, 67 Pac. 1091; Kirsch v. Kirsch, 113 Cal. 56, 45 Pac. 164; Bissell v. Spring Valley Township, 124 U. S. 225, 8 Sup. Ct. 495, 31 L. Ed. 411; Smith v. McNeal, 109 U. S. 426, 3 Sup. Ct. 319, 27 L. Ed. 986; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Wiggins Ferry Co. v. O. & M. Railway, 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055.

The plaintiff will prepare a decree as provided by the rules of the court.

On Motion for Rehearing.

This is an application for rehearing. Upon the trial of the case great stress was laid upon the judgments introduced in the case, and very little was said concerning the proofs relative to the allegations in the complaint. On the application for rehearing it was contended that the proof does not support the allegations in the complaint in several particulars. Great controversy arose during the argument, concerning the meaning and importance of the following quotation from the opinion rendered by the Circuit Court of Appeals (249 Fed. 562, 161 C. C. A. 488), to wit:

"On May 5, 1908, the defendant served a notice of contest upon the plaintiff, in which it was charged that the plaintiff had never established a residence upon the land, had made no improvements thereon, and that he had abandoned the same for more than six months. The defendant, in support of this contest, made oath that he did not know and had no means of knowing the facts. This was insufficient to initiate a contest. Schofield v. Cole, 1 Land Dec. 140."

This is a correct statement of what the allegations of the complaint are, and the syllabus No. 5 in the opinion is as follows:

"A notice of contest against an entryman on public lands, in support of which the contestant made oath that he did not know and had no means of knowing the facts, is insufficient to initiate a contest."

[4] This syllabus correctly interprets the decision on this subject. The proof adduced at the trial of the case supports the allegations in the complaint in this regard. There is no ambiguity in this statement of the court. It certainly states that no contest was initiated. The attorney for the defendant argues that the court did not mean to decide that, if the affidavit of contest filed by the defendant was verified positively by him, that would not initiate a contest, and he argues that it would initiate a contest, even though it subsequently developed that the contestant did not know anything about the facts, and only testified on information and belief. He argues that if the affidavit of contest be made positively, it does not matter whether contestant knows the truth of it or not, it would initiate a contest. He points out that the authority cited by the Circuit Court of Appeals is a decision of the land office, based

upon an affidavit in support of a contest that was sworn to by the witness only upon information and belief, and the office held that such a supporting affidavit was not sufficient. In other words, the defendant argues that, if the contestant swears positively to the facts, it makes no difference whether he knows them to be true or not, it is sufficient to initiate a contest. This argument leads to this absurdity:

If a man who stands in awe of the law and in fear of God makes an affidavit on information and belief to initiate a contest, it will be rejected; but if a reckless man, who cares naught for the law or divinity, swears positively to the affidavit of contest, it will suffice to initiate a contest, although he does not know anything except upon information given him by others, and that this would be true, even though affiant knew the rules required him to swear positively. If such be the law, then the law sets a premium upon the reckless, and condemns the man who has a conscience. It may well be that the Circuit Court of Appeals took this into consideration, and had in mind that it might properly be regarded as false swearing for a man to swear positively he knew a thing, when he only knew it on information and belief, although it might not constitute perjury. If, however, a man is conscious, when giving his testimony, that he does not know anything about the matter to which he is testifying, he ought to be regarded as swearing falsely. *People v. Von Tiedeman*, 120 Cal. 128, 136, 52 Pac. 155. It is also probable that the Circuit Court of Appeals considered that, since the department required a man to swear to a thing positively, if he swore to it positively when he only knew it upon information derived from others, then he would be perpetrating a fraud, because he would have misled the department.

[5] The attorney for the defendant also argues that it made no difference whether the affidavit of contest was sufficient, because the contestee appeared and the land office decided the matter. Land office decisions were cited to the effect that the land office had a right to proceed to hear a contest, notwithstanding the affidavit of contest was insufficient, and notwithstanding the contestant may have abandoned the matter; that upon the serving of the notice of contest the land office acquired jurisdiction, and the department had a right to decide the case. In a court of justice it is necessary to file a declaration, complaint, or other document sufficient to give the court jurisdiction, and if a document is not filed which is sufficient to initiate the proceedings, all subsequent acts of the court are futile and nugatory, and no rights whatever are adjudicated. The question arises: Did the Circuit Court of Appeals have in mind this principle of law when it made the statement above quoted? The statement in the opinion would have no useful purpose, unless the court was of the opinion that there was no contest and the acts of the Land Department were without jurisdiction. Otherwise, the court should have ignored this allegation in the complaint, or should have simply stated that it made no difference—that the land office had decided it anyhow. This would have been in line with the argument of the defendant. In this connection it must be borne in mind that the complaint stated that the Land Department

decided the question against the plaintiff, although this fact is not referred to in the decision of the Circuit Court of Appeals.

[6] The attorney for the defendant asserts that, notwithstanding there was no contest, it could not make any difference. But it does make a difference. If there was no contest, the defendant never acquired any preference right of entry, and that fact has an important bearing throughout this case. It also has a bearing on the interpretation to be given to the decision of the land department. The Circuit Court of Appeals points out (249 Fed. page 569, 161 C. C. A. 488) that, even though there was a contest, the defendant Bodkin could not have obtained any preference right. This is set out very clearly in paragraph 9 of the syllabus, which is as follows:

"Any right under regulation 7 of June 6, 1905, issued by the Secretary of the Interior under Reclamation Act June 17, 1902, § 10, which a successful contestant of a homestead entry on land withdrawn as susceptible of irrigation might have had, was lost by the promulgation of regulation 6 of January 19, 1909, declaring that, where a contest has been allowed prior to a first form withdrawal, the withdrawal, if made before the termination of the contest or entry of the successful contestant, will terminate all rights acquired by such contest, where the land, before termination of the contest or entry by contestant, was withdrawn under the first form for irrigation works, and the contestant had only a preference."

We will therefore proceed to consider the case without regard to the rights of Bodkin, for under the decision of the Circuit Court of Appeals he had no rights to be considered.

[7, 8] Counsel for the defendant states that section 5 of the act of June 27, 1906 (Comp. St. § 4724), does not apply to homestead entries, and that the decision of the Circuit Court of Appeals, wherein the court decided that it was not necessary for the plaintiff to make improvements upon the land, was erroneous. It is true that that section does not refer to homestead entries, but section 3 of the act of June 17, 1902 (Comp. St. § 4702), does refer to homestead entries made after withdrawal of the land, and expressly allows a homestead entry after withdrawal. It is provided by section 3:

"That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act," etc.

Section 3 of the act of June 17, 1902, and section 5 of the act of June 27, 1906, construed together, work out the proposition stated by the court. In any event, the Circuit Court of Appeals has settled the law of this case, and this court must follow the decision upon that subject.

[9] The opinion of the Land Department shows that the plaintiff was residing upon the land and making improvements thereon at the time the alleged contest was heard in the land office. In this respect the Circuit Court of Appeals said:

"We assume that the act of June 27, 1906, was overlooked, or its meaning misunderstood, when the officers of the Land Department held that the plaintiff had abandoned his homestead entry while he was in fact residing upon the land and holding it, pending a final determination of the Secretary of the Interior as to whether or not the land would be required for irrigation

works under the first form of withdrawal. This was clearly a mistake of law, and authorizes a review of the proceedings in a court of equity."

The attorney of the defendant claims that the decision of the Land Department, notwithstanding there was no contest, is binding, for the Land Department had jurisdiction and could decide the matters it did decide. In the case of *Lee v. Johnson*, 116 U. S. 48, 52, 6 Sup. Ct. 249, 251 (29 L. Ed. 570), it is said:

"If in any case it appears from the evidence that the claim of the complaining or moving party is against public policy or the law, so that in no event could he recover a final judgment or decision, whatever be the nature or extent of the testimony upon the point at issue, the tribunal should not hesitate to dismiss the suit or the proceeding."

The point at issue in that case to which the Supreme Court was addressing its remarks was the decision of the Land Department to the effect that the party there was not acting in good faith, within the meaning of section 2262 of the Revised Statutes, in that he was seeking to acquire a homestead for some one else, instead of himself. The statute provides that a homesteader must make oath:

"That he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use," etc.

There is no evidence at all in this case that the plaintiff was seeking this property for another person than himself. The court takes it that where a tribunal has jurisdiction to investigate a matter, and reaches the conclusion that the party is seeking to practice a fraud upon the government, such determination of the department is binding. It certainly is required, however, that the tribunal making the investigation must have some jurisdiction to do so. It would be against public policy to practice a fraud upon the government. In the case of *Lee v. Johnson*, above referred to, it is said (116 U. S. on page 52, 6 Sup. Ct. on page 250 [29 L. Ed. 570]):

"While there are no formal pleadings in such cases, it is undoubtedly true, as a general rule, that in contested matters before the Land Department, as in those before the courts, the decision should be confined to the questions raised by the allegations of the respective parties; but this rule has its exceptions."

And the exceptions to which the court refers are stated in the previous quotation. Of course, no court will enforce a contract or an alleged right of a party, where the party is seeking to perpetrate a fraud upon the government. The Land Department undoubtedly has a right to cancel an entry, where upon a contest, even though prosecuted only on behalf of the government, it appears that the entryman has violated the law.

Then we must consider: What did the Land Department decide? It must be borne in mind that the Circuit Court of Appeals in this case has decided that the plaintiff did not have to make improvements upon the land. If the land office meant, by stating that the plaintiff did not act in good faith, in that he did not make improvements and reclaim the land as required by law, then the opinion of the Circuit Court of Appeals is to the effect that he did not have to comply with the

homestead law in this regard during the time of withdrawal. The Secretary of the Interior in his decision says of the plaintiff:

"From his own testimony, it clearly appears that he failed to comply with the law in the matter of residence. Indeed, his actual home was in another county, where he qualified as a voter by swearing that he resided there. He states that he visited the land about every six months, staying only a few days at a time. He had no house to live in. In fact, he had no house completed at date of hearing, more than six years after entry. He evidently did considerable work on the land, in cultivating, digging brush, etc.; but this work was after he had personal knowledge that the contest had been filed. He seems to think it a great wrong and injustice that another may reap the benefit of his labors. The department, under the plain facts in the case, especially the facts as shown from claimant's own frank testimony, is powerless to give relief."

What the Secretary of the Interior stated would not constitute a fraud. The land was withdrawn under the Reclamation Act; the plaintiff did not have to cultivate or improve the same during the time of withdrawal. There is no finding of the exact time when he was away from the land. The statement of the Secretary of the Interior shows that the plaintiff was acting in good faith, in that he made his disclosures, believing, undoubtedly, that he had a right to do what he did do. The Secretary says:

"His testimony is quite frank, and bears the stamp of truth."

The next question is: Did the plaintiff comply with the law? The allegations of the complaint, as stated by the Circuit Court of Appeals, are to the effect that the plaintiff complied with all the requirements of the homestead and reclamation laws, made final proof of such compliance before the United States land office for that land district, provided such compliance by two creditable witnesses, who made oath to all the items required by law to be made, paid all the fees required by law to be paid prior to receiving a patent for the land, published in due form notice to all persons having or claiming to have a better right to such land than the plaintiff, and required such persons to appear and exhibit such claim of right. No person appeared at the time and place, and offered evidence of a better or of any right adverse to plaintiff; nor was notice ever given to plaintiff by the land office that the proof submitted was defective in any way, as to the special or any of the conditions under which the entry was made. But the Land Department, without regard to the premises, refused to consider such proof and to issue a patent for the land described.

The final proof submitted to the Land Department sustains this allegation of the complaint, and therefore shows the finding of the Secretary of the Interior, that the plaintiff did not comply with the law, to be an incorrect decision on the undisputed facts. The conclusions must be drawn: That there was no contest; that the defendant never acquired any rights in the property; that the plaintiff submitted final proof, showing his compliance with the homestead and reclamation laws, which the department did not consider. The decision of the Circuit Court of Appeals is to the effect that the Land Department should have considered it, and, if considered, necessarily the patent would have gone to the plaintiff.

The motion for rehearing will be denied.

In re ENGLANDER'S, Inc.

(District Court, E. D. Pennsylvania. July 30, 1920.)

No. 6218.

Bankruptcy § 385—Failure to prove claim within year does not exclude from composition.

Bankruptcy Act, § 57n (Comp. St. § 9641), denying to claims not proved within one year the right to share in the bankrupt estate, does not deny to any creditor the right to share in a fund offered by the bankrupt to his creditors in composition and distributed under section 12 (Comp. St. § 9596).

In Bankruptcy. In the matter of Englander's, Incorporated, bankrupt. On review of order of referee. Reversed.

Joseph Blank, of Philadelphia, Pa., for creditors.

Julius C. Levi, of Philadelphia, Pa., for bankrupt.

Alfred Aarons, of Philadelphia, Pa., for trustee.

Findings and Conclusions.

DICKINSON, District Judge. The legal principles involved in this cause, with the findings on which they rest and the conclusions to which they lead, are as follows:

1. No one can, by a legal judgment, be deprived of his property, unless he is fairly subject to some provision of the law which visits the loss upon him.

2. A law which denies to a creditor a share in one fund, because of his failure to claim such share within a required time, does not forbid him to share in another fund, unless the time limit applies to the second claim as well as the first.

3. Section 57n of the Bankruptcy Law (Comp. St. § 9641) shuts out a creditor, who has failed to prove his claim within the year, from all "claim against the bankruptcy estate," consisting of the assets and property which vested in the trustee.

4. A composition proceeding is a part of the bankruptcy proceedings, in the sense that the former arises out of the latter, and each has the like result in respect to the extinguishment of the obligation of debt. The composition fund is the same as the bankruptcy estate fund, in the respect that one is substituted for the other; but the identity feature of the fund rests in the fact, and one is a substitute for the other only in the sense, that one is by operation of law exchanged for the other for a special purpose, and the proceedings are alike only in the respect that they affect alike the obligation of debt. In source, in the manner in which raised, in amount or value, and in respect to the basis of the claim of the creditor to a right to share therein, they are wholly different. Because of these differences, and consequent absence of identity in the two funds, it does not follow that, inasmuch as certain creditors only are permitted to share in one, they alone can share in the other.

5. A law which denies to a creditor the assertion of his right to share in a bankruptcy estate fund, which may be so small that the defaulted

share is less than the expense of proving the claim, does not of itself imply a like denial of his share in a composition fund voluntarily given by his debtor, his share in which may be considerable.

6. Section 57n of the Bankruptcy Act, denying to unproven claims participation in the distribution of a bankruptcy estate fund, does not deny to any creditor the right to participate in a composition fund being distributed under section 12 (Comp. St. § 9596).

7. The petition for review is allowed, and the order made by the referee vacated. Inasmuch, however, as other considerations than that of the effect of section 57n may enter into the decree of distribution to be made, no distribution is now ordered, but the cause is remanded to the referee, with instructions to proceed to a final determination of the cause after vacating the order made; the effect of this review being limited to the proposition that the rights of creditors, after confirmation of a composition and its being carried into effect, are not lost through the operation of 57n.

BENEDICT v. HALL et al.

(District Court, N. D. Iowa, Cedar Rapids Division. October 5, 1920.)

No. 42.

Removal of causes ☞118—Court may require reformation of pleadings.

Where the pleadings in a suit removed to a federal court do not conform to the equity rules of that court and raise issues not within its jurisdiction, the parties may properly be required to reform such pleadings before determining their sufficiency.

In Equity. Suit by James Z. Benedict against J. S. Hall and the Hall Manufacturing Company. On motions to strike parts of answer and to dismiss counts of petition. Order to reform pleadings.

Crissman & Linville and Geo. C. Claassen, all of Cedar Rapids, Iowa, for plaintiff.

E. E. Reed, of Monticello, Iowa, for defendants.

REED, District Judge. Submitted on motion of the plaintiff to strike parts of defendants' answer, and defendants' motion to dismiss counts 1 and 2 of the petition, upon the grounds that neither count states a cause of action arising under the patent laws of the United States, and not within the jurisdiction of this court.

The bill, or petition, was filed September 11, 1919, is apparently drawn under the equity rules prior to those adopted in 1912, which became effective February 1, 1913, is in two counts, and embraces what may be called both equitable and legal causes of action. Count 1 is lengthy, embraces several divisions and paragraphs, to which the defendants have filed motions for more specific statements as to some of the divisions, and to dismiss others upon the ground that they state no grounds for equitable relief; and to count 2 upon the further

ground that the matters affirmatively show that the cause of action, if any therein alleged, is not within the jurisdiction of this court, is wholly between citizens of the state of Iowa, and alleges no grounds within the jurisdiction of this court; and further states that the causes of action, if any alleged in the petition, are barred by the statute of limitations, and prays that the petition be dismissed at plaintiff's cost. Defendants also allege payment of certain items claimed by the plaintiff from the defendants.

In general, this is a brief statement of the causes of action alleged in the petition and of the motions and answer of the defendants thereto; and the statements of the petition as alleged need not be more specifically stated. The defendants in their answer also deny generally the allegations of the petition, and that they have paid many of the claims alleged by the plaintiff, for which he seeks to recover from the defendants.

In March, 1915, an action was commenced in the district court of Iowa in and for Jones county against the Hall Manufacturing Company, a corporation of Iowa, and some of its members, in four counts, each of which seeks to recover from the defendants damages in behalf of one James Z. Benedict for a breach of a written contract alleged to have been made between said Benedict and the defendant Hall, whereby Hall agreed to pay Benedict certain royalties upon the manufacture and sale of certain patented articles and devices covered by patent or patents of the United States to said Benedict. The petition alleges that Benedict had assigned one of his patents at least to said Hall as a licensee, to enable him to manufacture and sell the patented device or devices for the royalties Hall was to pay him thereon.

It is alleged, among other things, that defendant Hall formed a corporation, under the name of Hall Manufacturing Company, under the laws of Iowa, to manufacture and sell the patented devices; that the corporation was doing so, but that all defendants had failed to pay the royalties to which Benedict claimed to be entitled; and numerous interrogatories were attached to the petition, which it was asked that the Halls be required to answer. In neither count is there any claim for the infringement of any patent, or the statement of any cause of action within the jurisdiction of this court, and this is specifically so alleged in a petition for removal subsequently filed by the defendants for the removal of the cause to this court, but no diversity of citizenship is alleged in the petition for removal.

On September 18, 1915, which was a day in the May, 1915, term of court in Jones county, Benedict filed an amendment to his petition, not to any particular count or division thereof, but generally to all of them, in which for the first time there is a claim for an infringement of a patent; which plaintiff alleges in the original petition that he had assigned to the defendant Hall as a licensee. In the course of the proceedings in the state court, one of the Halls filed an amendment for an infringement of some patent issued to Benedict, in which Benedict claimed damages for an infringement of a trade-mark, and claimed to recover of Hall royalties upon articles manufactured and sold by the defendants, which are different from those authorized by the Benedict

patent, which are questions solely cognizable in the District Court of the United States, and that the district court of Jones county had no jurisdiction over such questions, and no power to try and determine the same. Paragraph 7 of this amendment to the petition is the only one, so far as can be discovered, in which it is claimed a cause of action is alleged for the infringement of a patent, and that paragraph is as follows:

"Plaintiff further represents and shows: That the defendants, instead of proceeding to manufacture the various improvements and articles referred to in the contract and in the letters patent, failed and neglected to make the wire stretchers and horse blocks in strict accord with said patent, but for the purpose of defrauding the plaintiff herein made slight changes, in order to prevent payments of royalties, which changes were injurious to said patented articles, thereby injuring the sale thereof to a large extent, and generally damaging the plaintiff herein. That defendant fraudulently and deceitfully, in order to mislead the public and to cover up the rights of the plaintiff to receive royalties, advertised plaintiff's improvement, and after the same had been well established in the market, and the defendants had received orders for them, defendants were substituting for the articles that were made properly under the patent improvements the articles they had made changes in."

Various other questions arose in that proceeding in the state court, and on October 5, 1915, the state court entered an order removing the cause to this court, and a transcript of the record was filed herein. Suffice it to say that this court, upon the removal of that cause hereto, entered an order remanding the same to the state court, upon the ground that it involved no question of which this court had jurisdiction, and the cause was thereupon remanded to the state court. A memorandum opinion and order of this court, remanding the cause to the state court, was filed in this court on March 7, 1917, and is now on file herein, to which reference is made for the facts as therein stated.

Instead of disposing of this case upon the motions of the respective parties filed by them, it is deemed advisable by the court to require the parties to reform their respective pleadings by amending the same; the plaintiff to amend his petition to conform to the requirements of the new equity rules Nos. 19 to 26, inclusive (198 Fed. xxiii, 115 C. C. A. xxiii, 201 Fed. v, 118 C. C. A. v; (see especially equity rule No. 20), and the defendants their answer to conform to the requirements of equity rules Nos. 29 and 30, the sufficiency of which as an answer or defense to the petition as so amended may be tested as provided in equity rule No. 33, if the plaintiff shall be advised to so do. The plaintiff may amend his petition within 30 days after the filing of this order, and the defendants their answer within 20 days thereafter; the parties may then proceed with their proofs in accordance with such rules.

The plaintiff attempts to join in his present petition causes of action against the defendants for royalties upon a contract for the assignment of the patent, and another for infringement of an alleged trade-mark, and for unfair competition in trade, of which it seems quite clear this court has no jurisdiction. See Hopkins, New Equity Rules, pp. 169-171, and cases cited; Chaffee v. Boston Belting Co., 22 How. 217, 223, 16 L. Ed. 240; Wright v. Barnard et al. (D. C.) 233 Fed. 329; Bloomer v. Millinger, 1 Wall. 340, 350, 17 L. Ed. 581; Shrauger &

Johnson v. Bernard (D. C.) 247 Fed. 548; Geneva Furniture Co. v. Karpen, 238 U. S. 254, 35 Sup. Ct. 788, 59 L. Ed. 1295, and cases cited. In the last cited case the Supreme Court said:

"It hardly needs statement that the jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which the court is without jurisdiction with one of which it has jurisdiction. Upon this point the rule otherwise prevailing respecting the joinder of causes of action in suits in equity must of course yield to the jurisdictional statute."

Section 274b of the Judicial Code, 38 Stat. c. 90, p. 956 (Comp. St. § 1251b), provides:

"That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject-matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

See New Equity Rules Nos. 22 and 23; Union Pacific Co. v. Syas, 246 Fed. 561, 158 C. C. A. 531; Curtiss Aeroplane & M. Corp. v. United Aircraft E. Corp (C. C. A.) 266 Fed. 71, 77.

An order may be entered, requiring the parties to amend their pleadings as above indicated; and it is accordingly so ordered.

In re DIX.

Ex parte GLENS FALLS TRUST CO.

(District Court, N. D. New York. May 5, 1920.)

1. Bankruptcy § 303 (3)—Undisputed insolvency held prima facie proof of insolvency a month before.

Where the undisputed facts established that the bankrupt was insolvent to a large extent at the time of bankruptcy, even disregarding his contingent obligations, there is prima facie proof that he was insolvent at the time of making transfers a month before, where there was no going business which substantially affected the situation in so short a time.

2. Bankruptcy § 303 (3)—Evidence held to show preferential payments.

Evidence in bankruptcy proceedings that the bankrupt, in a transaction with a bank shortly before his bankruptcy, had transferred to the bank, as security for his notes held by the bank, corporate stock largely exceeding in value the amount of cash received by him and the value of other stock released, held sufficient to show that the transfers were preferential.

3. Bankruptcy § 303 (3)—Evidence held to sustain finding that preferences were not security for claims in controversy.

In bankruptcy proceedings, evidence, consisting of letters and circumstances surrounding the parties, held to sustain the referee's findings that the stock transferred by the bankrupt to the claimant was to secure notes held by the claimant, which had since been subsequently paid, but not to secure the claims in controversy.

4. Bankruptcy §311(7)—Preference on claims subsequently paid bars proof of prior existing claim.

A creditor, who has received a preferential payment on a claim on a debt subsequently paid in full, cannot, under Bankruptcy Act, § 60b (Comp. St. § 9644), prove, without surrendering his preference, another claim against the bankrupt which arose between the time of the preferential transfer and the full discharge of the preferred debt, though without surrender of his preference he could have proved a claim which arose after the full payment of the preferred claim.

5. Bankruptcy §311(7)—Creditors, having two debts, must surrender preference as to one before proving the other.

Generally a creditor holding two debts at the same time, on one of which he has received a preference, may not prove on the other in bankruptcy proceedings without surrendering his preference on the first.

In Bankruptcy. In the matter of John A. Dix, bankrupt. Order of the referee, allowing the claim of the Glens Falls Trust Company, reversed, and claim expunged.

Edward M. Angell, of Glens Falls, N. Y., for claimant Glens Falls Trust Co.

B. Jermain Savage, of Albany, N. Y., for trustee.

LEARNED HAND, District Judge. In this case the referee has found that the transaction of June 1 and 2, 1915, was intended to give new security for Dix's obligations, within the meaning of the Bankruptcy Act (Comp. St. § 9585 et seq.). He has found, also, that the Iroquois shares were Dix's, of which there is no doubt. He has not expressly found that the bank knew that the shares were Dix's, but he seems to imply as much. His allowance of the claim rests upon two findings: First, that there was no proof of insolvency; second, that there was no proof that the shares were intended to secure any notes but those given on June 1 and 2, 1915.

[1] The proof of insolvency was sufficient. The schedules were admitted without objection, and the debts speak as of the date of petition filed, which was in July, 1915. They show \$412,148.81 of Dix's own debts, secured and unsecured, and \$500,238.64 of debts on which he was an indorser. Of these over \$200,000 were debts of the Moose River Lumber Company, which the records of this court, of which I may always take notice, show to have gone into bankruptcy at the same time as Dix. Just what was the eventual liability of Dix on these notes, some of which were secured, does not appear. His assets amounted to little besides stocks and bonds, Schedule B-3, and of these \$255,500 consisted of shares, preferred and common, of the Moose River Lumber Company, which, because of its bankruptcy, were presumptively valueless. The footing of Schedule B-3 is \$887,100, but the items given in fact only foot to \$391,100. Taking out the Moose River Lumber Company stock, these assets were \$135,600. Dix was therefore insolvent by over \$270,000 in July, 1915, without counting his liability upon over \$200,000 of Moose River Lumber Company indorsements. In view of the fact that no dispute as to his insolvency appears in the testimony or in the briefs, this is sufficient

prima facie proof of insolvency on June 1 and 2, 1915; there being no going business, as far as appears, substantially to affect the situation in so short a time.

[2] In clearing the transaction of June 1 and 2, 1915, Dix was credited with \$4,000 upon the note of \$6,250, and its interest, together with the principal and interest of the note of \$2,791.25 were paid. Dix received \$911.75 in cash and paid petty expenses of \$17.05, and the bank released 15 shares of Greenwich stock, a present consideration. As no one can contend that the payment of say \$930 in cash and the release of these shares was equal to the value of the Iroquois shares and of \$3,500, the bank necessarily received preferential payments and security upon the \$6,250 note and the \$2,791.25 note. These preferences, as I shall show, were enough to defeat the proofs of claim on the \$5,000 Moose River Lumber Company note and the \$500 Dix Foundry note.

[3] For this reason it really makes no difference whether or not the Iroquois shares were pledged to the claims now in suit, though on that question I agree with the referee. This appears from Colvin's letter to Becker in June, 1915, and from the bank's subsequent conduct. The letter showed that Colvin took the security only on Dix's personal obligation, not on the Moose River Lumber Company. He expressly says so, relying for the \$5,000 note, and perhaps others, upon what Becker had told him of the condition of the Moose River Lumber Company's prospects. That letter shows the intent of the transaction, and in the face of Dix's vague "impressions" is controlling evidence.

Finally, the bank's releases, in June, 1916, of the Iroquois shares, and of the Iroquois bond in January, 1916, are nearly proof positive that they had understood from the outset that they held these securities against only the \$1,250 note of Dix and the \$5,400 note of Coffin (substituted in November, 1915, for the two originals of June 1 and 2, 1915). It is scarcely credible that they should have released security taken as a preference, because they feared that they might not be able to maintain the preference later. The referee was therefore quite right in holding that inter partes the \$5,000 and the \$500 notes now in question were not secured. Even though the trustee be right, that in general a bank has a lien upon all security for all debts, the same result follows, because, in the case at bar, the agreement limited the lien, and the agreement would prevail. I do not, therefore, disturb the referee's finding in this respect.

[4] Yet, as I have said, all this makes no difference in the result, because the bank got a voidable preference under section 60b (Comp. St. § 9644), upon the notes for \$6,250 and for \$2,791.25, which were eventually paid in full. The rule, as established by two decisions of the Circuit Court of Appeals for the Second Circuit (In re Abraham Steers Lumber Co. [D. C.] 110 Fed. 738, affirmed 112 Fed. 406, 50 C. C. A. 310, and In re Lyon, 121 Fed. 723, 58 C. C. A. 143), is this: If a bankrupt gives a voidable preference of the single debt which he owes to a creditor, and actually extinguishes it, he need not surrender the preference as a condition of proving a debt subsequently arising;

but if the preference leave the old debt in part surviving, so that upon incurring the new debt he is still indebted upon the old, he must surrender his preference upon the old in order to prove upon the new. In short, it is only when the debt on which he seeks to prove came into existence after the extinction of the debt on which the bankrupt has made a preferential payment that he may prove without surrendering his preference on the other debt.

[5] In the case at bar the debts now sought to be proved were all in existence when the preferences were made. It is in general the rule that a creditor holding two debts at the same time, on one of which he has received a preference, may not prove upon the other without surrendering the preference on the one. *Swarts v. Siegel*, 117 Fed. 13, 19, 54 C. C. A. 399 (C. C. A. 8th); *Livingston v. Heineman*, 120 Fed. 786, 57 C. C. A. 154 (C. C. A. 6th); *In re Leslow*, 104 Fed. 229 (D. C. Minn.); *In re Meyer*, 115 Fed. 997 (D. C. Tex.).

As, therefore, there were clearly preferential transfers in payment of the notes for \$6,250, and \$2,791.25, the bank may not prove on any other debts until these preferences are paid. In view of the small dividend to be paid, I assume that it is unnecessary to give the bank the option of surrender, and the order will simply be reversed, and the claims expunged.

In re PRENTICE.

(District Court, D. Massachusetts. August 31, 1920.)

No. 26954.

1. Bankruptcy ⚡228—Findings of referee, valid on face, final, in absence of evidence.

The findings of the referee, which do not appear to be clearly wrong on the face of the certificate, must be accepted as final and conclusive, when the evidence is not reported.

2. Bankruptcy ⚡207—Attachment lien preserved only by affirmative action.

Under Bankruptcy Act, § 67f (Comp. St. § 9651), dissolving an attachment levied within four months before bankruptcy, unless the court shall on due notice order it preserved for the benefit of the estate, the mere adjudication and appointment of a trustee do not preserve the attachment, but there must be affirmative action of the court to that effect.

3. Judgment ⚡707—Default of mortgagee summoned as trustee in state court held not to affect rights as against mortgagor or other creditors.

Whether or not a mortgagee lost his right to insist on his mortgage as against an attaching creditor in the state court, by reason of his default when summoned as a trustee in that court, the default did not invalidate his mortgage generally, nor affect it as between himself and the mortgagor or other creditors in bankruptcy proceedings.

In Bankruptcy. In the matter of Herbert H. Prentice, bankrupt. Order of referee on the claim of Jonathan A. Brackin vacated, and case recommitted.

Frank H. Cande, of Pittsfield, Mass., for trustee.

M. B. Warner, of Pittsfield, Mass., for mortgagee.

MORTON, District Judge. [1] At the time of the adjudication the property in question was under attachment on mesne process in the action brought by Brett against the bankrupt in the state court. Except as they may be affected by the proceedings in that action, the mortgages are found by the learned referee to be valid. The findings on this point do not appear to be clearly wrong on the face of the certificate, and as the evidence is not reported they must be accepted as final and conclusive.

[2] The lien which the trustee is now asserting against the mortgagee rests on the attachment. It was less than four months old at the date of the adjudication, and was thereby dissolved—

“unless the court shall on due notice, order that the right under such * * * attachment * * * shall be preserved for the benefit of the estate.” Bankruptcy Act, § 87f (Comp. St. § 9651).

The mere adjudication and appointment of a trustee do not of themselves operate to preserve an attachment; there must be affirmative action to effect that result. *Davis v. Crompton*, 158 Fed. 735, 743, 85 C. C. A. 633; *In re Walsh Brothers* (D. C.) 195 Fed. 576; *In re Jules & Frederic Co.*, 36 Am. Bankr. Rep. 233. It follows that the lien of the attachment has not passed to the trustee and cannot now be asserted by him against the mortgagee.

[3] Whether, as between the attaching creditor and the mortgagee, the latter lost his right to insist on his mortgage by reason of his default in the state court when summoned as trustee, it is unnecessary to determine. His petition to remove the default is still pending there and it would seem probable that he would have had the right to present the merits of his position to the bankruptcy court, if proceedings had been instituted to preserve the attachment for the purpose of defeating his mortgage. The statute explicitly provides that “due notice” shall be given of proceedings to preserve attachments, presumably for the purpose, *inter alia*, of enabling the court to deal with such matters on an equitable basis. Whatever the effect of the mortgagee’s default may have been as between him and the attaching creditor, it certainly did not invalidate the mortgages generally, nor affect them as between the mortgagee, and the mortgagor or other creditors of the mortgagor.

As to the after-acquired property the referee was clearly right; it was, on the facts found, not subject to the mortgages, and belongs to the trustee. It should perhaps be observed that the procedure followed was not entirely regular; but the merits have been fully presented, and neither party has made any objections on purely formal grounds.

The order of the referee must be vacated, and the case recommitted to him for further proceedings in accordance with this opinion.

UNITED STATES v. ONE CHEVROLET AUTOMOBILE.

(District Court, M. D. Tennessee, Nashville Division. April 10, 1920.)

No. 1295.

Internal revenue 46—Court can release on bond property libeled for forfeiture.

Though Rev. St. § 931 (Comp. St. § 1557), authorizing delivery on bond of attached property, relates only to property seized in certain postal suits, the District Court can, under section 934 (section 1560), prohibiting replevy of property seized by United States revenue officers and making such property subject to the order of the United States courts, and their inherent power, release property seized for being used to transport liquor on which the tax had not been paid, on condition that the claimant give bond similar to that required by the practice in admiralty libels in rem.

Libel of information by the United States for condemnation and forfeiture of an automobile alleged to have been used, while driven by one Green, in the removal and concealment of spirituous liquors, on which the tax had not been paid, in violation of R. S. § 3450 (Comp. St. § 6352). The automobile having been seized by the marshal under a warrant of arrest, T. O. Tune, claiming to be its owner, filed a petition for its release and delivery to him upon executing proper bond. Petition granted.

Lee Douglas, U. S. Atty., and B. H. Littleton, Asst. U. S. Atty., both of Nashville, Tenn.

A. M. Tillman and J. C. R. McCall, both of Nashville, Tenn., for claimant.

SANFORD, District Judge. While section 934 of the Revised Statutes (Comp. St. § 1560) provides that property taken or detained by an officer under authority of a revenue law shall be irrepleviable in his hands, it specifically declares that such property shall be subject to the orders and decrees of the Federal courts. On the other hand, section 931 of the Revised Statutes (Comp. St. § 1557) merely relates to the release on bond of property attached in certain postal suits. It is, however, one of the inherent powers of the court, established upon motives of public convenience, to allow a claimant of seized property to substitute an equivalent security in place of the res. *Place v. City of Norwich*, 1 Ben. 89, 19 Fed. Cas. 792, 796. In this case Benedict, District Judge, said:

"This power is daily exercised in actions in rem, because 'a ship is made to plow the sea, and not to rot by the wharf'—because serious damage to her owners is caused by her detention without benefit, and expenses are thereby increased—all which may be obviated without injury to the rights of creditors by a delivery on bail. Ben. Adm. p. 246."

Specific provision for the exercise of this inherent power is made in Admiralty Rule 11 (29 Sup. Ct. xl); and its existence in admiralty causes and cases of seizure (in which jurisdiction depends upon a prior seizure of the property) is recognized in section 940 of the Revised

Statutes (Comp. St. § 1566). And see Rev. Stat. § 941 (Comp. St. § 1567). I am of opinion that this power likewise exists in the court under other libels in rem for the condemnation and forfeiture of property. This practice is recognized in Pagin's Federal Precedents, Form No. 741, p. 493. It is a useful and just practice; avoiding not only unnecessary injury to the owner of the property but also unnecessary expense in the custody of the property while the litigation is pending. I am of opinion that it should be followed in the instant case.

As it appears that the value of this automobile has been appraised at \$600.00, an order will be entered directing the delivery of the automobile by the Marshal to the claimant T. O. Tune, upon his giving a claimant's delivery bond in that sum, in manner and form as set forth in Pagin's Federal Precedents, sup., with surety to be approved by the clerk of the court.

MEMORANDUM DECISIONS.

ANDREWS, Inspector of Immigration, et al. v. JACKSON. (Circuit Court of Appeals, Ninth Circuit. October 20, 1920.) No. 3553. Appeal from the District Court of the United States for the District of Montana. For opinion below, see 263 Fed. 110. Edward C. Day, U. S. Atty., and W. W. Patterson, Asst. U. S. Atty., both of Helena, Mont., for appellants. Louis P. Donovan and Timothy Nolan, both of Butte, Mont., for appellee.

PER CURIAM. Pursuant to stipulation of counsel for the respective parties, appeal dismissed.

Ex parte ARDJEN SINGH, on Habeas Corpus. ARDJEN SINGH v. WHITE, Commissioner of Immigration for Port of San Francisco. (Circuit Court of Appeals, Ninth Circuit. November 1, 1920.) No. 3592. Appeal from the District Court of the United States for the First Division of the Northern District of California. Frank M. Silva, U. S. Atty., and Ben. F. Gels, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

PER CURIAM. Appeal dismissed for noncompliance by appellant with provisions of subdivision 1 of rule 16 of the Rules of Practice (208 Fed. ix, 124 C. C. A. ix).

SECOND NAT. BANK OF PARKERSBURG et al. v. UNITED STATES FIDELITY & GUARANTY CO. (Circuit Court of Appeals, Fourth Circuit. April 30, 1920, and June 7, 1920.) No. 1781. Appeal from the District Court of the United States for the Northern District of West Virginia, at Parkersburg. V. B. Archer and W. H. Wolfe, both of Parkersburg, W. Va., for appellants. B. M. Ambler, of Parkersburg, W. Va., for appellee.

PER CURIAM. Decree of District Court affirmed April 30, 1920, 266 Fed. 489. Order allowing appeal to Supreme Court filed June 7, 1920.

SERVEL v. JAMIESON et al. (Circuit Court of Appeals, Ninth Circuit. October 18, 1920.) No. 3534. In Error to the District Court of the United States for the District of Montana. Reynolds & Shea, of Billings, Mont., for

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plaintiff in error. Norris, Hurd & Rhodes, of Great Falls, Mont., and Edwin L. Norris, of Dillon, Mont., for defendants in error.

PER CURIAM. Writ of error dismissed for noncompliance by plaintiff in error with provisions of rules 23 and 24 of Rules of Practice (231 Fed. v, vi, 144 C. C. A. v, vi).

TEXAS CO. v. HOGARTH SHIPPING CO., Limited, et al. THE BARON OGILVY. (Circuit Court of Appeals, Second Circuit. June 18, 1920.) No. 229. Appeal from the District Court of the United States for the Southern District of New York. Suit in admiralty by the Texas Company against the Hogarth Shipping Company, Limited, owner of the steamship Baron Ogilvy, and Hugh Hogarth & Sons. Decree for respondents (265 Fed. 375), and libellant appeals. Affirmed. Certiorari granted 254 U. S. 625, 41 Sup. Ct. 15, 65 L. Ed. 445. Haight, Sandford, Smith & Griffin, of New York City (John W. Griffin, of New York City, of counsel), for libellant appellant. Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (John M. Woolsey and Harrison Lillibridge, both of New York City, of counsel), for appellees. Frederick R. Coudert and Howard Thayer Kingsbury, both of New York City, amici curiæ for British Embassy. Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

WHITESIDE et al. v. TITUS. (Circuit Court of Appeals, Ninth Circuit. October 4, 1920.) No. 3581. Appeal from the District Court of the United States for the Second Division of the Northern District of California. Charles A. Shurtleff and J. G. De Forest, both of San Francisco, Cal., for appellee.

PER CURIAM. Appeal dismissed for noncompliance by appellants with provisions of subdivision 1 of rule 16 of Rules of Practice (208 Fed. ix, 124 C. C. A. ix).

END OF CASES IN VOL. 267